FLORIDA PRISON LEGAL

Perspectives

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Florida Supreme Court Revisits *Schmidt v. Crusoe*

by Melvin Pérez

On December 4, 2008, the Florida Supreme Court revisit its prior ruling in *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003). The case came before the Court on a certified question of great public importance from the First DCA's ruling in *Cox v. Crosby*, 31 Fla. L. Weekly D310 (Fla. 1st DCA; Jan. 26, 2006)(Hawkes, J., dissenting).

The First DCA in *Cox, supra,* held that, "if appellant's claim is successful the result would be that his time in prison would be 'directly affected,' i.e., significantly reduced. We are, therefore, constrained to conclude that this proceeding is a 'collateral criminal' one as defined by our supreme court in *Schmidt.*"

The question before the Court as rephrased was, "Does the holding in *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003), extend to all gain time actions, regardless of their nature, in which, if successful, the complaining party's claim would directly affect his or her time in prison, so to preclude imposition of a lien on the inmate's trust account to recover applicable filing fees?"

Cox who was convicted of second degree murder on April 16, 1995, and was sentenced to twenty years imprisonment, filed a petition for writ of habeas corpus to the Florida Supreme Court challenging the constitutionality of the Safe Streets Initiative of 1994 (hereinafter "The Act").

The Act amended section 944.275, Florida Statutes (1993), to restrict the awarding of basic gain time to only those prisoners who were sentenced for crimes committed prior to January 1, 1994. See: Ch. 93-406, § 26 at 2958-60, Laws of Florida.

Cox argued that the Act violated the single-subject provision of article III, section 6, Florida Constitution, and that he had been unlawfully deprived of more than five years of basic gain time under the Act.

The Florida Supreme Court transferred the petition to the circuit court for Leon County, Second Judicial Circuit, which treated the filing as a petition seeking both declaratory relief (with respect to the single-subject claim) and mandamus relief (with respect to the gain time claim).

The Second Judicial Circuit Court found Cox to be indigent and applied the prepayment lien requirements of the prisoner indigence statute, section 57.085, Florida Statutes (2005). Thereafter, the lower court denied Cox's petition.

Cox then filed a notice of appeal and a motion to proceed as indigent. The trial court certified Cox as indigent for appellate purposes and again determined that the prisoner indigence statute was applicable.

Cox filed in the First DCA a "Motion for Review," wherein he argued that, under Schmidt, supra (Schmidt I), his proceedings in both the circuit and district court; were "collateral criminal proceedings" and not subject to the prisoner indigence statute or prepayment lien provisions of same.

ON THE INSIDE

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The district court withheld ruling on the merits of the underlying claim, granted relief on the indigence issue, and certified the above question of great importance. DOC then sought review and made a ridiculous argument.

DOC's Argument

DOC argued that the Court should answer the certified question in the negative, quash the First DCA's decision, and adopt the reasoning of the dissent opinion. Further, DOC asserted that Cox's case differed from Schmidt I in several ways. These were that:

(a) The prisoner in Schmidt I challenged the decision of the Dept. to revoke his gain time, while Cox challenged the constitutionality of a legislative act;
(b) The prisoner in Schmidt I was seeking to recover gain time that had already been awarded, while Cox sought to obtain gain time that had never been awarded;
(c) Schmidt was required to act within rigid time frames, while Cox was not required to do so; and,
(d) Schmidt's claim was based on unique facts peculiar to his case, while Cox's claim involved general facts that applied to other prisoners as well.

Moreover, DOC contended that the test used by the DCA in applying the prisoner indigence statute was an incorrect standard and will open the floodgates to prisoners' statutory validity claims.

Last, the Dept. claimed that to allow prisoners to file such actions free of cost, while requiring private citizens to pay filing fees and court costs for similar actions, was fundamentally unfair.

Court's Holding

The Court in answering the certified question as rephrased in the affirmative and approving the DCA's ruling stated, "We conclude that each of the Department's arguments misses the mark...." The Court further held that:

- The procedural posture of the prisoners in *Schmidt I* and Cox were sufficiently similar for section 57.085 purposes.
- It was irrelevant under *Schmidt I* whether the claims involved "revoked" gain time versus "withheld" gain time, or whether the prisoners acted within rigid time frames versus general time frames or whether the cases involved unique facts versus general facts.
- The analysis in *Schmidt I* was clear-cut: the prisoner indigence statute was intended "to discourage the filing of frivolous civil lawsuits" with respect to prison conditions, not "to prevent the filing of claims contesting the computation of criminal sentences."
- The standard used by the DCA was not incorrect, nor will it open the floodgates to prisoners' statutory validity claims with respect to gain time.

• All indigent persons—whether eligible prisoners or private citizens—are treated equally: all are entitled to proceed in court without prepayment of costs.

"We hold that *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003), is applicable to all claims that, if successful, will directly affect 'the length of time the inmate will actually spend in prison.' Id. at 366. Such claims constitute 'collateral criminal proceedings' for purposes of section 57.085, Florida Statutes (2005) as explained in *Bush v. State*, 945 So.2d 1207, 1213 (Fla. 2006)," concluded the Court.

Certainly, DOC is not happy with this ruling. Since the Dept. has made every wishful argument in its effort to discourage filing against DOC without a lien on the prisoner's account, not to mention the 15¢ copy fee prisoners are being charged when submitting a petition for writ of mandamus for copies seeking review from a DR resulting in the loss of gain-time, also a "collateral criminal proceedings" under *Schmidt*.

For a full review of the Court's ruling see: *McNeil v. Cox, etc.*, 33 Fla. L. Wkly (s) 935 (Fla. Dec. 4, 2008). Cox was represented by Stephen H. Grimes and Matthew H. Mears of Holland and Knight.

[Editor's Note: As briefly mentioned above, the FDOC has been and continues to try to obstruct prisoners from challenging DRs involving loss of gaintime by charging them photocopy fees for documents needed to litigate such actions. In fact, in September 2007 emails were sent to all institutional librarians informing them that FDOC's General Counsel and the state Attorney General's office were interpreting such actions to be "civil actions" and therefore prisoners must pay copy costs for documents to pursue such actions. Obviously, such copy fee charges are illegal and improper. Such cases, as the Fla. Supreme Court has now repeatedly stated, are "collateral criminal proceedings" not "civil actions" and therefore no photocopy fees are authorized to be charged. See: Rule 33-501.302(5), F.A.C. (no copy fees shall be charged for documents filed in criminal proceedings). It is time a challenge was brought to stop such illegal, unauthorized copy fee charges. Small claim court actions would be proper to recover such fees already deducted or to have liens removed from inmate accounts for same - bp] ■

First DCA Reverses Circuit Court in "Constructive Possession" DR Case

In an opinion filed January 21, 2009, Florida's First District Court of Appeals overturned a Second Judicial Circuit Court summary denial of a prisoner's Petition for Writ of Mandamus challenging what was, essentially, a disciplinary report for "constructive possession" of contraband.

In his mandamus petition state prisoner Terry Bujno challenged a prison DR team's findings that he was guilty of introduction of contraband after a pornographic magazine was found hidden in a work squad cart in which he, another prisoner, and two prison staff members were riding. Bujno asserted in his administrative appeals of the DR and in his mandamus petition to the circuit court that: 1) he was not in personal possession of the contraband at the time of its discovery, 2) that there was no evidence that he had hidden the contraband or was aware of its existence, and 3) that the evidence was otherwise insufficient to establish constructive possession because the cart ws kept in an unsecured area and was readily accessible to a large number of other prisoners and staff members.

The circuit court denied Bujno any relief on his petition without even requiring a response from the FDOC by issuing a simple, and usually automatic, show cause order, reasoning speciously that the FDOC';s responses to Bujno's administrative appeals "were adequate." Bujno correctly sought review of the circuit court's denial by filing a Petition for Writ of Certiorari in the appeals court.

The DCA determined in its review that the record supported the conclusion that the DR hearing team found Bujno guilty based on the theory that he "constructively possessed or controlled" the contraband at issue. Case law, the DCA noted, recognizes that evidence of constructive possession is sufficient in a prison disciplinary proceeding when contraband "is found in an area where only a limited number of inmates have ready access." *See, e.g., Hamilton v. O'Leary*, 976 F.2d 341 (7th Cir. 1992) (evidence that weapons were found in vent of cell shared by four inmates was sufficient to establish constructive possession).

However, the DCA also noted, even under the minimal evidentiary standard associated with prison disciplinary proceedings, the inference of constructive possession may be too weak where the charged prisoner was just one of many who shared access to the area where the contraband was found and there was no other reliable evidence tying the contraband to the charged prisoner. *See, e.g., Broussard v. Johnson*, 252 F.3d 874 (5th Cir. 2001) (evidence that contraband was found in kitchen area accessible to approximately 100 other inmates not sufficient); *Cordenas v. Wigen*, 921 F.Supp. 286 (in common area shared by 12 inmates insufficient).

The DCA opined that the administrative appeal (grievance) responses on which the circuit court relied to deny Bujno relief "*did not directly address [his] claim that the evidence was insufficient to establish constructive possession, and because the circuit court did not order a response from the Department, it undertook to determine the merits of [Bujno's] claim without the benefit of an*

adequate record of the disciplinary proceeding and the evidence considered by the disciplinary team. Without such a record, the DCA stated, the circuit court could not properly discharge its duty to determine whether there was some factual support for the finding of guilty, citing *O'Neill v. McNeil*, 979 So.2d 1209 (Fla. 1st DCA 2008).

Under those circumstances, the DCA held, that the circuit court's failure to issue an order to show cause amounted to a departure form the essential requirements of law. *See: Duncan v. Florida Parole Com'n*, 939 So.2d 176 (Fla 1st DCA 2006).

Therefore, the DCA granted the certiorari petition, quashed the order denying Bujno's mandamus petition, and remanded the case back to the circuit court for further proceedings.

Bujno v. Department of Corrections, _____So.2d____, 34 Fla. L. Weekly D204 (Fla. 1st DCA 1/21/09).

[Editor's Note: The above case is significant in that it appears to be the first published court decision in Florida state courts, or federal courts with jurisdiction over Florida, to offer any clarity to the principle of "constructive possession" of contraband in the prison discipline context. Which is likely why the DCA relied on federal cases from other jurisdictions in its discussion on this case. However, the fact is that every year hundreds of Florida prisoners are written DRs for what amounts to constructive possession of contraband. DRs that, as the above case illustrates, can be in many instances successfully overturned if properly and zealously litigated. Although not an issue in Bujno's case, as the work cart was likely entering the prison from an outside maintenance shed when the contraband was found, the DR charge of "introduction of contraband" is also worth commenting on.

In recent years, many legally-ignorant FDOC staff seeking to inflict maximum punishment on prisoners caught with contraband will write the DRs for "introduction" rather than simple "possession." The difference is the first is a major DR while the second is minor DR and the first carries much harsher penalties upon a finding of guilt.

However, the fact is, "introduction of contraband" may only be properly charged upon introducing (or bringing) specified contraband into a prison from the outside. *See*: § 944.47 Fla. Statutes, and *Parrish v. State*, 423 So.2d 617 (Fla. 2d DCA 1982), *State v. Becton*, 665 So.2d 359 (Fla. 5th DCA 1995). Contraband that is already inside a prison, or items inside a prison that become contraband for whatever reason, and found in a prisoner's possession can legally only earn a "possession of contraband" (minor) charge. For example, it is not "introduction of contraband" to get caught taking prohibited tobacco products into a confinement unit from the compound, since nothing was being "introduced" into the prison from the outside.

Such improper upgrading of DR charges should be vigorously challenged by prisoners to discourage this practice and to obtain relief from such bogus charges-bp] ■

Correction

In *FPLP* Vol. 14, Issue 5, article entitled "Obtaining Records From Counsel," page 8, in the last paragraph, right column states, "Moreover, this rule provides that in criminal cases." It should read, "Moreover, this rule provides that *except* in criminal cases."

From the editor...

Welcome to this latest issue of *FPLP*. This issue marks the beginning of the 15th year that *FPLP* has been published. For 15 years Florida Prisoners' Legal Aid Organization (FPLAO) and *FPLP* have steadily advocated for Florida prisoners and their families and friends and consistently brought them news and information that is of real use in surviving and dealing with being in prison or having an incarcerated loved one. For 15 years FPLAO and *FPLP* staff and members have been on the forefront in the struggle between rational correctional policies and policies that often seem to be initiated by nothing more than whims, abuse of authority (because they can), a lack of concern for the safety and health of prisoner or long-term public safety, greed, personal vindictiveness, and/or ignorance. Of course, in a bureaucracy as large as the Florida prison system, a certain amount of such undermining policies can be expected. But, for some reason, it seems the Florida system has had more than a reasonable share. That is why it has been important that FPLAO and *FPLP* exists, to provide check and balance and to shine a light into what can otherwise be a dark, abusive and secretive world behind Florida's increasingly numerous razor wire fences.

To many, that FPLAO and *FPLP* have survived so long is nothing short of amazing. I lost count long ago of the number of fellow prisoners who've expressed to me that the FDOC would never tolerate FPLAO or *FPLP* or allow them to continue to "buck the system." Both still exist and will continue with the faith and support of members.

Those members of the organization who have been with it awhile know that FPLAO does much more than just publish *FPLP*. Since the beginning FPLAO has taken on projects to improve conditions for Florida prisoners and their families. While all those projects weren't successful, many of the most important ones were. In the 1990's when the FDOC made several moves to restrict family visitation, FPLAO was there and fought the changes tooth and nail to where today the FDOC has safe and reasonable visitation policies. FPLAO has also successfully fought efforts over the years to restrict and limit prisoners' and their families' mail.

For several years FPLAO fought against the exorbitant, gouging telephone rates that prisoners' families were being charged to stay in touch with their loved ones. That fight was finally won, with rates being reduced to $1.80 per 15 minute call inside or outside the state just a couple of years ago, saving prisoners' families and friends millions of dollars every year.

FPLAO was also recently involved in having the prison canteen prices reduced and made more reasonable, although Keefe, the private vender for the canteens, is trying to inch the prices back up and bears watching.

Those are just some of the more visible efforts of FPLAO that were successful. One project that is very important but that has not been successful yet, is the parole project started in 2003. Unfortunately, insufficient financial support to continue that project has stymied it, but we haven't given up. With sufficient support the parole system in Florida can be reformed so that it works as it should. Maybe one day parole-eligible prisoners will realize that FPLAO must have financial support to make that reform a reality. (More about that in the next issue of *FPLP*.)

Anyway, what it all comes down to is that both FPLAO and *FPLP* are still alive and kicking 15 years later. And the reason for that is the dedicated staff and members who have realized just how important and beneficial such an organization and news journal are.

I'd like to remind everyone of a few things here. None of the staff of FPLAO or *FPLP* gets paid, all membership dues and donations go towards expenses, projects and to publish and mail *FPLP*. All staff volunteer their time and efforts to keep everything going.

FPLAO currently has about 4,000 members, 2/3 of whom are prisoners and the other 1/3 made up of family members, friends, advocates and other concerned citizens. The organization depends on its members to recruit new members, the more there are, the more that can be done. To receive *FPLP* it is necessary to join FPLAO as a member. (See Membership Form in this issue.) There are some exceptions to that, complimentary copies of FPLP are mailed to the FDOC secretary and other top FDOC and government officials, including state legislators. We want them to know that the problems aren't all one-sided or going to be kept secret. We know many of those people are there to do the right thing.

Additionally, when writing to FPLAO or *FPLP* to become a member, re-up membership, change your address or any other such business, please state that at the beginning of your correspondence to help the staff in processing the mail. If you are aware of an attorney or other service provider who provides good representation or service and who may be interested in advertising in *FPLP*, send them the info on how to contact *FPLP*. As costs go up for printing, supplies and postage, advertising helps us to keep membership dues reasonable and provides useful resource info.

And finally, the staff wishes to thank all those who have made donations to the organization recently. We know all members can't make donations, but many can, both large and small, and donations in any amount are certainly needed and appreciated. Everything you do nowadays costs something, so if you can, make a donation, even if it's a few extra stamps. Thanks.

Until my next letter from the editor, I wish everyone reading this the best. Together we'll continue to make changes for the better and bring useful info to those who need it. Sincerely, Bob Posey

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Each and every person accused of a crime is entitled to certain constitutional rights. One such right is the trial by jury. *See Sixth Amendment of the United States Constitution; and, Article 1, §22, Florida Constitution.* Inherent in said right is the right to plead not guilty and the right to make the State prove the charges. A criminal defendant can never be forced to plead guilty to the charges against him. And, although an attorney has the right to make tactical decisions regarding trial strategy, the determination to plead guilty or not guilty in a criminal matter should be a matter which is left completely to the defendant. In Florida it used to be that an attorney's concession of guilt without the client's consent amounted to an involuntary guilty plea and there was a presumption of the denial of the constitutional right to effective assistance of counsel in such situations. See *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000). However, subsequent cases have done away with the requirement of a defendant's consent to a concession of guilt and instead look to the reasonableness of the attorney's actions in conceding guilt. This article will address the issue of ineffective assistance of counsel where an attorney concedes a defendant's guilt to the jury without the consent of the client.

The two pronged test for ineffectiveness of counsel, as enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to allegations of counsel's concession of the client's guilt during trial without the consent of the client. *See, Florida v. Nixon*, 543 U.S. 175 (2004). As such, it must be shown both that the decision to concede guilt fell below an objective standard of reasonableness on the part of the attorney and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* at 694. When a defense attorney concedes a defendant's guilt to the jury (with or without the consent of the client) the question becomes whether the concession of guilt was a reasonable trial strategy under the circumstances presented. *Sage v. State* 905 So.2d 1039, 1041 (Fla. 2nd DCA 2005). Moreover, in determining whether this trial strategy was reasonable, the postconviction court needs to explore whether counsel failed to reasonably investigate the case in order to develop a more promising defense. Id.

The trial court should not just be able to affix the label *strategy* to each and every decision to concede guilt and thus avoid findings of ineffectiveness of counsel. Instead, the trial court should evaluate, among other things, how the defense was presented, whether the attorney had reasonable alternatives to conceding guilt, the relative strength of the alternative defenses, the attorney's investigation into the case, and whether the defendant consented to the concession of guilt. Strategic or tactical decisions by counsel made after a thorough investigation are "virtually unchallengeable." Cabrera v. State, 766 So.2d 1131 (Fla. 2nd DCA 2000). Nevertheless, "patently unreasonable" decisions, although characterized as tactical, are not immune from attack. Id. at 1133. "Certain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." U.S. v. Tucker, 716 F.2d 576 (C.A. Cal. 1983); *see also* Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000) (decisions must be "reasonable under the norms of professional conduct.")

Therefore, when an attorney concedes the defendant's guilt without the consent of the

defendant, it does not automatically amount to ineffective assistance of counsel sufficient to justify vacating a judgment and sentence. Instead, it must be argued that the decision of the attorney to concede guilt was an unreasonable decision and that, in the absence of the concession of guilt, the outcome of the trial would have been different. If both prongs of the *Strickland* Test can be demonstrated then the court should vacate the conviction and remand the case for a new trial. .The issue of unreasonable concession of guilt should be raised in a timely Florida Rule of Criminal Procedure 3.850 Motion for Postconviction Relief. Said motion should present argument, based upon Sage and the other above-cited authorities, that trial counsel conceded the accused's guilt and that said concession was an unreasonable tactical decision which likely contributed to the jury's guilty verdict. If both prongs of the *Strickland* Test can be demonstrated, the judgment and sentence should be vacated and a new trial should be held.

Loren Rhoton is a member in good standing with the Florida Bar and a member of the Florida Bar Appellate Practice Section. Mr. Rhoton practices almost exclusively in the postconviction/appellate area of the law, both at the State and Federal Level. Mr. Rhoton has also been appointed by the Florida Supreme Court to serve on the Postconviction Rules Committee of the Criminal Rules Steering Committee. He has assisted hundreds of incarcerated persons with their cases and has received numerous written appellate opinions. ■

NEWS IN BRIEF

AL - A former Covington County probate judge, Sherrie Phillips, was sentenced to three years in prison on November 12, 2008 for misuse of funds. Authorities say Phillips borrowed $517,000 from a $1.8 million estate her office was handling and returned all but $917. Phillips must also serve seven years on probation after her prison release.

AR - On December 23, 2008 the Board of Corrections approved $27 million in prison projects. As part of the project, $11 million will be used to expand the McPherson Unit for woman. Officials said a mental-health unit will be added.

CA - On November 3, 2008, San Bernardino County agreed to pay $45,000 to settle a lawsuit filed by Jameelah Medina. The lawsuit was filed after Medina was forced to remove her headscarf during her 12 hour jail stay. Medina argued that jail officials violated her religious freedoms by forcing her to remove the headscarf. As part of the settlement the jail will allow Muslim women to wear headscarves.

CO - Garfield County officials said on November 3, 2008, that nearly $570,000 in attorney fees have been paid to defend a lawsuit. The suit was filed by jail inmates who argue that jail staff have wrongly shot them with tasers, placed them in restraint chairs and denied mental health care. To no surprise, Lon Vallario, Garfield County Sheriff, denies the claims as frivolous.

CO - A jail inmate at the El Paso County Jail died on November 11, 2008, after collapsing in a holding cell at the courthouse while awaiting a court appearance. Bruce Howard, 67, had been arrested on suspicion of assault, harassment and obstruction of telephone or telegraph service. Officials have not released the cause of death.

CO - On November 18, 2008, the Denver city council approved a $3 million settlement with family members of a woman who bled to death at the jail in Feb. 2006. Emily Rice, 24, was arrested on suspicion of drunken driving and had been injured in a car crash resulting in a lacerated spleen and liver. For 20 hours Rice cried for help and guards ignored her cries.

CT - DOC said on December 16, 2008, that it opposes a task force's plan to use the maximum-security Northern Correctional Institution in Somers exclusively for problem prisoners. The task force says that it will improve officer safety in prisons, while DOC claims it must also house dangerous gang members at Somers.

FL - A prison-yard fight Jan. 25 left eight prisoners seriously injured with stab wounds and at least one gunshot wound at the high security unit of Coleman Federal Correctional Complex located about 50 miles northwest of Orlando in Sumter County. Seven of the prisoners were airlifted to an Orlando hospital for emergency treatment. No staff were reportedly hurt during the brawl. Prison officials remained tightlipped about what may have sparked the fight.

GA - The Georgia Peace Officers Standards and Training Council voted on December 24, 2008, to require police officers to receive intense training on new eyewitness identification standards. The Council's vote came in response to seven prisoners being exonerated by DNA evidence in the last decade.

HI - DOC officials reported on November 30, 2008, that too many guards were calling in sick to work, causing 13 of the past 27 visitor days at the Halawa Correctional Institution to be canceled. The Public Workers Union is trying to help resolve the problem with the Dept.

IL - A former Alton police officer was sentenced to 10 years in federal prison on December 8, 2008, for stealing. Mick Dooley was convicted of eight felonies. Officials say Dooley stole from the evidence vault to fund a gambling habit. Further, Dooley once took nearly $9,500 from the vault, then lost all but $1.75 at a casino, said prosecutors.

IL - DOC evacuated 39 prisoners from a minimum security wing at Thomson Correctional on November 25, 2008 before a drywall ceiling collapsed. Nobody was hurt, said the Dept.

IL - Hours after Sarah Jo Pender's story was featured on America's Most Wanted on December 22, 2008, authorities captured her in Chicago. Pender, 29, escaped from an Indiana prison while serving a 75 year sentence for two murders. A correctional officer hid her in a prison vehicle to escape, said officials.

IN - Charges were filed on November 19, 2008, against three male and three female inmates at Green County Jail. According to court records, the inmates removed metal ceiling panels to sneak between cell blocks to have sex. The passageway was used more than a dozen times, said the court documents.

KS - The County Commission said

on December 28, 2008, that it is considering whether to pay more than $5,000 to buy cable service for facilities that only receive analog TV signals. Starting Feb. 17 jail inmates at the Shawnee County Jail and the juvenile detention center could be without television because the TVs at those facilities only receive analog signals. Analog signals won't be around after that date, said the Commission.

MA - Officials announced on November 16, 2008 that the soaring DOC population is bringing renewed calls for changes to the state's mandatory minimum sentences. Authorities say that in 2003 there were fewer than 10,000 prisoners. The estimated population could be over 12,000 in 2009, authorities added. The dept.'s capacity is less than 8,000.

MD - A lieutenant fired from the DOC was reinstated by an administrative law judge on December 11, 2008. The judge cleared him of allegations he helped brutalize prisoners. The lieutenant was among 23 officers fired as part of an investigation involving eight prisoner assaults.

MD - On December 18, 2008, it was announced that the state agreed to settle a lawsuit for $500,000 with the family of a prisoner who died at the Western Correctional Institution. Ifeanyi Iko suffocated four years ago after an altercation with guards. DOC claims that Iko had a pre-existing heart condition which caused his death.

MD - Alphonso Hill, a prisoner serving 16 years in a Towson prison for eight rapes, was sentenced on November 12, 2008, to an additional 60 years for six new rape charges. Hill also pleaded guilty to two additional rapes at the sentencing hearing.

MI - A Huron Valley Men's Facility guard suffered second-degree burns on December 4, 2008 after a prisoner tossed a mixture of petroleum jelly and water he heated in a microwave. The union who represents guards a t Michigan prisons wants DOC to end prisoners' access to microwaves. The officer's name nor the name of the prisoner were released.

MI - The state's 41 prisons went smoke-free Feb. 1. The ban on smoking inside Michigan prisons will apply equally to prisoners and staff. For the past year prisoners were offered smoking cessation classes to help them to quit smoking.

MS - In an effort to cut $6.5 million, on November 25, 2008, DOC sent the names of 2,900 non-violent prisoners to the parole board for its consideration. The plan also calls for the removal of 300 state prisoners from county jails, 154 from regional jails and 50 from private prisons. This can begin as early as January, said DOC.

NJ - In an effort to deal with prisoners having illegal cell phones, DOC said on November 16, 2008, that cell phone-sniffing dogs are being trained. DOC officials said smuggled phones are a threat because prisoners can use them to send photos of prison layouts and direct illegal activities.

NY - The DOC in an effort to save $8.7 million announced on November 7, 2008, that it plans to consolidate housing units at 14 state prisons. The plan would also merge two infirmaries, close farms at a dozen prisons and cut 134 jobs.

NY - A man pleaded not guilty on November 4, 2008, to trespassing and other charges in connection with what officials call breaking into jail. Thomas Walsh, 26, tried breaking into the Nassau County Jail after guards told him there were no visiting hours the first week of November, said officials. Walsh's brother is being held at the jail on murder charges. His lawyer told the court that Walsh was going through a lot of emotional turmoil.

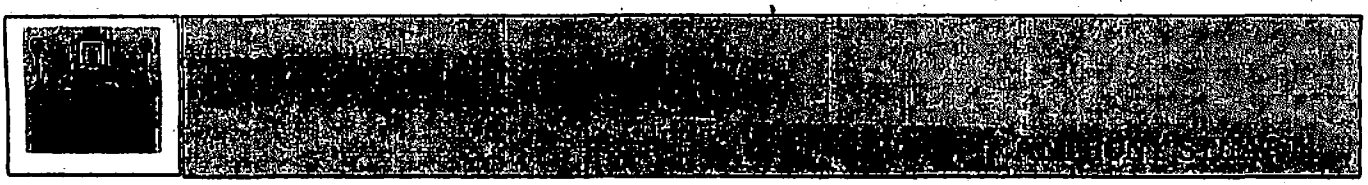
NY - Three police officers were charged with felonies on December 9, 2008, in connection with an attack on a tattoo parlor worker. The victim claims the three officers sodomized him with a baton in a subway station. DNA of the victim was found on a police baton, said Charles Hynes Brooklyn District Attorney.

OH - On November 19, 2008, Gregory Bryant-Bey, 53 was executed by lethal injection at a Lucasville prison.

OK - Mike Burgess, 54, former Custer Co. sheriff, was convicted in Jan. '09 of sexually abusing female jail prisoners and drug court defendants. A jury recommended 94 years in prison. While awaiting sentencing, county and state officials were trying to decide detention options where Burgess' safety would be an issue in a regular state prison.

WA - Doctor Marc Stern, the head doctor for DOC, resigned on December 24, 2008, to avoid an ethical conflict over the pending execution of prisoner, Darold Ray Stenson. Stern says that his resignation was the only way he could take himself out of the execution plan. Using doctors to prepare for an execution is unethical, said the former head DOC doctor.

WI - Officials said on November 30, 2008, that an old county jail in Western Wisconsin has been transformed into a homeless shelter for single adults. The Polk County Jail's old cells are now furnished bedrooms and the gun safe is now a magazine rack. The Serenity Home, as it's now called, offers homeless people a place to live for up to 18 months, said officials. ■



The following are summaries of recent state and federal cases that may be useful to or have a significant impact on Florida prisoners. Readers should always read the full opinion as published in the Florida Law Weekly (Fla. L. Weekly); Florida Law Weekly Federal (Fla. L. Weekly Federal); Southern Reporter 2d (So. 2d); Supreme Court Reporter (S. Ct.); Federal Reporter 3d (F.3d); or the Federal Supplement 2d (F.Supp. 2d), since these summaries are for general information only.

FEDERAL

US Supreme Court

Hedgpeth v. Pulido, 21 Fla. L. weekly Fed. S 559 12/2/08)

The United States Supreme Court in this case ruled that instructing a jury on multiple theories of guilt, one of which is improper, is not a "structural error," requiring that a conviction based on a general verdict be set aside on collateral review without regard to whether the flaw in the instructions prejudiced the defendant, but is subject to harmless error review. A reviewing court finding such error should ask whether the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict."

STATE

Florida Supreme Court

McNeil v. Cox, 33 Fla. L. Weekly S 935 (Fla. 12/4/08)

This was a review from the decision in *Cox v. Crosby*, 31 Fla. L. Weekly D310 (Fla. 1st DCA 12/26/06), where the appellate court certified the question: Does the holding in *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003), extend to all gain time actions, regardless of their nature, in which, if successful, the complaining party's claim would directly affect his or her time in prison, so to preclude imposition of a lien on the inmate's trust account to recover applicable filing fees? [The question was rephrased by the Supreme Court upon its review.]

The question was answered in the affirmative and the First DCA's opinion in *Cox* was approved. (See lead article in this issue of *FPLP*.)

Larimore v. State, 33 Fla. L. Weekly S948 (12/11/08)

In resolving a conflict between district courts, the Florida Supreme Court opined that an individual must be in lawful custody when the state takes steps to initiate commitment proceedings pursuant to the Jimmy Ryce Act in order for the circuit court to have jurisdiction to adjudicate the commitment petition.

Therefore, the decision in *Larimore v. State*, 917 So.2d 354 (Fla. 1st DCA 2005), was quashed and the one in *Gordon v. Regier*, 839 So.2d 715 (Fla. 2d DCA 2003), was approved.

District Court of Appeals

Green v. State, 33 Fla. L. Weekly D2410 (Fla. 2d DCA 10/15/08)

This case presented the appellate court with a motion by the state in criminal court to obtain civil restitution lien for costs of incarceration against a prisoner who had, in a separate civil action, obtained federal judgment based on state prison employees' violation of prisoner's civil rights.

The appellate court affirmed the decision to obtain the costs of incarceration.

[NOTE: Judge Altenbernd concurred with reluctance and wrote a very good explanation that should be read by prisoners seeking civil judgments against state prison employees.]

Canty v. McNeil, 33 Fla. L. Weekly D2442 (Fla. 1st DCA 10/21/08)

Edison Canty was a prisoner who had initially received concurrent 15-year sentences, one of which was a habitual felony offender sentence, and was returned to prison after conditional release. Upon his return, the Department of Corrections improperly calculated a new release date that effectively extended Canty's sentence from 15 years to over 17 years.

The appellate court opined that the problem was the DOC's misunderstanding of the opinion in *Evans v. Singletary*, 737 So.2d 505 (Fla. 1999), where the DOC says it was held that imprisonment is tolled on conditional release eligible sentences, which is incorrect. *Evans* held the conditional release *supervision* was tolled until release on the ineligible concurrent sentences. *Evans* did not speak to the length of incarceration after return to prison. *Evans* reasoned that one who is not released cannot be supervised as a conditional release, and therefore, the period of supervision is properly based on the gain time of the eligible sentence. So, it was opined on the gain time of the eligible sentence. So, it was opined that the same reasoning should apply in Canty's case: "If a prisoner is still imprisoned on a concurrent sentence, it is a bit of sophistry to say the person is not imprisoned on the release eligible sentence."

The appellate court further opined that if its reasoning in Canty's case "somehow reduces or eliminates conditional release in some cases, so be it. The court set the length of

sentence, and the Department of Corrections does not have the authority to increase it."

Therefore, it was found that the trial court in Canty's case departed from the essential requirements of law. The trial court's decision was quashed and the case was remanded for further proceedings.

Hills v. State, 33 Fla. L. Weekly D2460 (Fla. 3d DCA 10/22/08)

The appellate court in Berrard Hills' direct appeal opined that where a defendant was charged with burglary of an unoccupied structure and petit theft, the trial court errs when it submits a verdict form that does not contain an option for not guilty on the burglary charge.

Hills' case was reversed and remanded for a new trial.

Lane v. State, 33 Fla. L. Weekly D2471 (Fla. 4th DCA 10/22/08)

The appellate court reviewed John Lane's sentence for his robbery charge and opined that the twenty-five year mandatory minimum sentence he received under section 775.087 (2)(a) 3 of the 10-20-Life statute was unauthorized.

The indictment did not allege that Lane discharged the firearm he carried during the robbery or that as a result of such, death or great bodily harm was inflicted.

Consequently, Lane's robbery sentence was reversed and remanded for resentencing pursuant to section 775.087 (2)(a) 1, which was opined to be appropriate, because it appeared the allegations against Lane depicted he "carried" a firearm.

Bartlett v. State, 33 Fla. L. Weekly D2521 (Fla. 1st DCA 10/29/08)

Laurie Bartlett was charged with the second-degree murder of her live-in boyfriend and at trial she relied on the defense of self-defense based on the "battered-spouse syndrome" pursuant to Florida Rule of Criminal Procedure 3.201. The jury found her guilty of the lesser-included offense of manslaughter, and she was sentenced to ten years" incarceration, to be followed by five years' probation.

Subsequent to her conviction and sentencing, Bartlett appealed and argued that the trial court abused its discretion in allowing the primary detective in her case to testify that before he obtained a warrant for her arrest, he ruled out self-defense, and that the State had not met its burden under *State v. DiGuilion*, 491 So.2d 1129, 1139 (Fla. 1986), to show there was no reasonable possibility that the error affected the verdict.

The appellate court agreed with Bartlett's arguments opining that it was error in allowing the detective to give his lay opinion that the killing was not done in self-defense and the error was not harmless where state failed to show there was no reasonable possibility that admission of that testimony affected the verdict.

Bartlett's case was reversed and remanded for a new trial.

Gordon v. State, 33 Fla. L. Weekly D2708 (Fla. 1st DCA 11/21/08)

Willie Gordon appealed his convictions and sentences of drug crimes he was charged with due to evidence found in his home after a probationary search.

The appellate court opined that the trial court misapplied the law in refusing to suppress evidence seized and allowing that evidence to be admitted for the prosecution of new criminal charges against Gordon.

If contraband is discovered during a probationary search, such evidence cannot be used as basis for a new law violation. *See: Sora v. State*, 673 So.2d 24, 28 (Fla. 1996); and *Grubbs v. State*, 373 So.2d 905 (Fla. 1979). However, such evidence can be used to determine whether there was a violation of probation. *See: U.S. v. Knights*, 534 U.S. 112, 118-120 (2001).

Gordon's probation was found to be correctly revoked, but the new convictions and their sentences were reversed and that new case was remanded with instruction for Gordon to be discharged in that case.

Walker v. State, 33 Fla. L. Weekly D2725 (Fla. 4th DCA 11/26/08)

Terrance Walker appealed his sentence, contending that the trial court failed to give him proper credit for time served on all concurrent sentences.

It was opined that the lower court did err in only awarding credit on a single conviction. The additional credit of time served prior to sentencing should have been awarded on all the concurrent sentences. See: section 921.161 (1), Fla. Stat. (2005); *Daniels v. State*, 491 So.2d 543, 545 (Fla. 1986). "[W]hen a defendant has jail-time credit on a sentence that is to run concurrently with another sentence, the concurrent sentence must also reflect that credit." *Netherly v. State*, 873 So.2d 407, 410 (Fla. 2d DCA 2004).

The sentences were reversed and remanded for correction.

Clark v. State, 33 Fla. L. Weekly D 2756 (Fla. 2d DCA 12/3/08)

Timothy D. Clark appealed the summary denial of his motion for postconviction relief where, in pertinent part, he asserted newly discovered evidence of scientific value based on recent medical studies, reports, and articles that were not available at the time of his trial.

In that motion Clark alleged that the evidence (1) was unknown at the time of trial, (2) could not have been discovered by the exercise of due diligence, and (3) would probably produce an acquittal on retrial. The trial court denied the motion, opining the expert testimony was "not sufficient to be considered newly discovered evidence." Further, it opined that even if it was considered sufficient, the evidence would not likely result in an acquittal because the victim had testified at trial that Clark was the perpetrator of the crime charged.

First, the appellate court opined that Clark's motion filed May, 2007, clearly alleged the evidence was discovered on March 26, 2006, and was based on scientific literature not available on April 27, 1995, the time of his trial. Therefore, because the postconviction court summarily denied the claim, the appellate court opined it must accept Clark's factual allegations as true to the extent they were not refuted by the record. See: *Floyd v. State*, 808 So.2d 175, 182 (Fla. 2002). Thus, it was found that the trial court was in error to conclude the scientific evidence could not be considered newly discovered evidence.

Second, because the trial court failed to attach records of the victim's testimony or testimony concerning the scientific evidence, it was error for a summary denial.

The case was reversed and remanded for further proceedings. On remand, it must attach records conclusively refuting the claim or conduct an evidentiary hearing.

McClintock v. State, 33 Fla. L. Weekly D2779 (Fla. 5th DCA 12/5/08)

Kelly Robert McClintock appealed a trial court's order directing him to pay restitution, after he had already completed his sentence.

The appellate court opined that although the lower court reserved jurisdiction on the restitution issue and ordered that restitution be made a lien of record without indicating the amount, the lower court lacked jurisdiction to establish the restitution amount and enter a lien there on after defendant had completed his entire sentence. See similar case: *J.D. v. State*, 849 So.2d 458 (Fla. 4th DCA 2003).

Other Florida cases have also indicated that once an individual has served his or her complete sentence, the trial court loses jurisdiction to enter any further orders in the matter. *See: Maybin v. State*, 884 So.2d 1174 (Fla. 2d DCA 2004); *Daniels v. State*, 581 So.2d 970 (Fla. 5th DCA 1991).

The state tried to argue in the appellate court that under section 775.089 (3) of the Florida Statutes the trial court possessed jurisdiction to enter restitution until five years after the end of McClintock's term of imprisonment. The appellate court disagreed.

See the statute, as written, it pertains to a period of time during which the trial court *is* authorized to enforce the payment of a restitution order, not a period of time for entry of an original order of restitution.

The trial court's order for McClintock to pay restitution was vacated. ■

MEMBERSHIP/SUBSCRIPTION RENEWAL

Please check your mailing label to determine your term of membership and/or last month of subscription to FPLP. On the top line of the mailing label will be a date, such as ***Nov 09***. That date indicates the last month and year of your current membership with FPLAO or subscription to FPLP. Please take the time to complete the enclosed form to renew your membership and/or subscription before the expiration date.

Moving? Transferred? If so, please complete the enclosed address change form so that the membership rolls and mailing list can be updated. Thank you!

Florida Prison Legal Perspectives
Resource List
February 2009

FLORIDA
Government

Governor (Charlie Crist)
PL-05, The Capitol
Tallahassee, FL 32399-0001
850/ 488-4441
www.myflorida.com

Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850/ 487-1963
www.oag.state.fl.us

Department of Corrections
Secretary Walt McNeil
2601 Blair Stone Rd.
Tallahassee, FL 32399-2500
850/ 488-7480
www.dc.state.fl.us

Department of Health
2585 Merchants Row Blvd.
Tallahassee, FL 32399
850/ 245-4321
www.doh.state.fl.us

Department of Law Enforcement (FDLE)
PO Box 1489
Tallahassee, FL 32302-1489
850/ 410-7000
www.fdle.state.fl.us

Department of State
PL-02, The Capitol
Tallahassee, FL 32399-0250
850/ 245-6500
www.dos.state.fl.us

Websites contains all state agencies' rules (Florida Administrative Code) and "Florida Administrative Weekly" detailing current agency rulemaking info.

Office of Executive Clemency
(Parole Commission)
2601 Blair Stone Rd.
Bldg. C. Room 229
Tallahassee, FL 32399-2450
850/ 488-2952

Office of Vital Statistics
PO Box 210
Jacksonville, FL 32231-0042
904 /359-6900

Maintains state birth/death certificates, etc.

Parole Commission
2601 Blair Stone Rd., Bldg. C
Tallahassee, FL 32399-2450
850/ 922-0000
www.fpc.state.fl.us

Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
850/413-6055
www.floridapsc.com

Regulates in-state utilities, including telephone services.

Florida House of Representatives
402 S. Monroe Street
Tallahassee, FL 32399-1300
850/ 488-1157 (Clerk)
www.flhouse.gov

Florida Senate
404 S. Monroe Street
Tallahassee, FL 32399-1100
850/ 487-5270 (Secretary)
www.flsenate.gov

Websites contain contact info for all state legislators; a copy of all current Florida laws (statutes); and bills that have been introduced in the Legislature and their history, including in many instances "staff analyses" valuable for understanding legislative intent.

FLORIDA
Legal Aid / Advocacy Organizations

Florida Prisoners' Legal Aid Org., Inc.
PO Box 1069
Marion NC 28752
www.floridaprisons.net
fplp@aol.com

Services: Membership-based organization. Provides information advocacy to state prisoners and their families and advocates. Conducts grassroots organizing of prisoners' families and handles impact litigation concerning civil rights / administrative law affecting prisoners, their families and children. Publishes bi-monthly news journal, "Florida Prison Legal Perspectives."

Florida Justice Institute
100 S E 2nd St, #4320
Miami, FL 33131-2100
305/ 358-2081
Fax: 305/ 358-0910
www.floridajusticeinstitute.org

Services: Handles civil rights litigation concerning jail / prison conditions. Makes referrals for damage / civil-rights cases. Prison advocacy, lobbying, develops strategies for alternatives to incarceration.

Florida Institutional Legal Ser., Inc.
12921 S W 1st Rd, Ste 107 #346
Newberry, FL 32669
352/ 955-2260
Fax: 352/ 955-2189
www.criminaljusticeforum.com/Prison-Issues-Files/FILS

Services: Legal assistance o Florida state prisoners. Impact litigation: conditions of confinement, civil rights, medical, etc. Some individual services. Publishers "Florida Manuel for Incarcerated Parents," which is free to prisoners.

FLORIDA
Attorneys

Loren Rhoton, Attorney
Rhoton & Hayman, P.A.
412 E. Madison St., Ste. 1111
Tampa, FL 33602
813/ 226-3138
E-mail: rhoton167@aol.com

Specializes in Florida post conviction, direct appeals, sentence corrections, new trials, federal habeas corpus, 3.850, 3.800

David W. Collins, Attorney
PO Box 541
Monticello, FL 32345
850/ 997-8111

Specializes in all area of post conviction relief, including, appeals, 3.850, 3.800 state-federal habeas corpus, parole hearings, clemency, etc.

Daniel D. Mazar, Attorney
2153 Lee Road
Winter Park, FL 32789
1-888-645-5352 (Toll free)
407/645-5352
407/645-3224 (Fax)

Provides representation in Direct Appeals, Belated Appeals, 3.850 motions, 3.800 motions, State and Fed Habeas Corpus, Detainers, and other Post Conviction matters. Over 30 yrs. exp. In criminal law.

Michael Ufferman, Attorney
2022-1 Raymond Diehl Rd
Tallahassee, FL 32308
850/386-2345
www.uffermanlaw.com

Provides representation in State and Federal Criminal Post Conviction Motions. Payment plans available.

Cary F. Rada, Attorney
318 N Texas Ave.
Tavares, FL 32778
352/742-2778
email: info@CaryRada.com

Provides State and Federal post conviction representation. Former State Prosecutor, board certified criminal trial lawyer.

DALEY LAW OFFICE, P.A.
901 N Gadsden St
Tallahassee, FL 32303
850/224-5823
www.daleylaw-office.com

Provides Post Conviction, parole and clemency representation.

**The hiring of an attorney is an important decision that should not be based solely upon advertisements. Before you decide, ask the attorney to send you free written information about their qualifications.*

FLORIDA
Books/Publications/Journals
Legal

Continuing Legal Education Publications (CLE)

CLE publications are produced by the Florida Bar in collaboration with LexisNexis. These are excellent books covering Florida-specific legal topics, such as Administrative Law, Appellate Practice, Family Law, Legal Research Legal Writing, Trial Practice, Civil Law. Rules of Court, etc. To obtain more info and prices for available publications in the CLE series contact: LexisNexis, Attn: Order Fulfillment, 1275 Broadway, Albany, NY 12204 (Ph# 800/ 562-1197). Ask for Fla. Bar CLE Publication catalog.

"Post Conviction Relief for the Florida Prisoner"

A collection in book form of Tampa attorney Loren Rhoten's Postconviction Corner articles based on professional experience, to relevant rules of procedure. Price $20. To order send money order, cashier's or inmate bank check to Loren Rhoten, Attorney (address listed in "Florida Attorneys" section above) or order online at www.rhotonpostconviction.com

"2007 Government-in-the-Sunshine Manual"

Manual covering Florida Sunshine Laws (open public meetings and records laws) published by The First Amendment Foundation. Price $15.95 check or money order to: First Amendment Foundation, 336 E. College Ave., Ste 101, Tallahassee, FL 32301. Credit card orders call 850/224-4555 or order online at www.floridafaf.org Add 7.5% state sales tax to $15.95 payment.

FLORIDA
Other Groups / Organizations

Citizens United for Alternatives to the Death Penalty
177 N. US Hwy 1, Ste. B-297
Tequesta, FL 33469

Services: Grassroots organizing of people opposed to death penalty.

Aleph Institute
9540 Collins Ave.
Surfside, FL 33154
305/ 864-5553
www.aleph-institute.org
admin@aleph-institute.org

Services: Provides Jewish religious education, counseling, emergency assistance and referrals to Jewish prisoners and their families.

Kairos Outside
140 N. Orange Ave., #180
Winter Park, FL 32789
407/ 629-4948
www.kiarosprisonministry.org
kairosjo@aol.com

Services: Provides mentoring, religious ministry, family reunification support and weekend retreats for female adults with incarcerated loved ones.

Prison Connection, Inc.
1859 Polo Lake Dr. East
Wellington, FL 33414
888/218-8464
www.theprisonconnection.com
seeacon@aol.com

NATIONAL
Newsletters/Journals

California Prison Focus
2940 16th Street, Ste. B5
San Francisco, CA 94103
www.prisons.org

Quarterly news journal reports on issues/conditions in CA SHU prisons. Some national info. Prisoners $4 per yr., all others $20. Sample copy $1.

FAMMGram
1612 K. St., NW, Ste. 1400
Washington, DC 20006
www.famm.org

Quarterly news journal focused on fight against mandatory minimum prison sentences. Published by Families Against Mandatory Minimums – a

National organization. Prisoners $10 individuals $25, professionals $50. Membership-based organization.

Fortune News
53 W. 23rd St., 8th Floor
New York, NY 10010
www.fortunesociety.org

Quarterly magazine of the Fortune society carrying wide variety of articles and info about prisons, prisoners, criminal justice, rehabilitation, etc. Free to prisoners.

Hepatitis C Awareness News
PO Box 41803
Eugene, OR 97404

Bi-monthly newsletter published by hepatitis C Prison Coalition with news and info about Hep C and HIV/HCV. Free upon request, but stamp donations needed and welcomed.

Justice Matters
PO Box 40085
Portland, OR 97240-0085

Quarterly newsletter published by the Western Prison Project. Prisoners $7 per year, $15 all others. Good resource info.

Prison Legal News
2400 NW 80th St. #148
Seattle, WA 98117
Web site: www.prisonlegalnews.org

Monthly journal carries summaries and analysis of recent prisoner rights cases, self-help litigation articles, prison-related news. Prisoners $18 per year, $25 others. Sample copy $1.

Nolo News
50 Parker St.
Berkeley, CA 94710

Quarterly self-help newsletter covers (non-prison) civil litigation issues. Two-year subscription $12.

Upendra Dasa
P.O. Box 9116
Boise, ID 83707-9116

Free materials on Krishna Consciousness

Liberation Prison Project
P.O. Box 31527
San Francisco, CA 94131

Offers Buddhist materials

Human Kindness Foundation
P.O. Box 61619
Durham, NC 27715

Free interfaith spiritual books and newsletter.

Coalition for Prisoners Rights Newsletter
P.O. Box 1911
Santa Fe, NM 87504

Prison-related newsletter published monthly. Free to prisoners and their families, all others $12 per yr. Donations/stamps appreciated to help with publishing/mailing.

NATIONAL
Book Projects

The following sources provide free books to prisoners. However, these projects rely on volunteers and donations to operate. Whenever possible, prisoners should help these projects when requesting free books by sending a few stamps for postage. Requests for specific books can rarely be honored, instead, request books by type, e.g. mystery, legal, historical, novel, etc. Requests are usually limited to 2 or 3 books at a time.

Books Through Bars
4722 Baltimore Ave.
Philadelphia, PA 19143-3503

Prison Book Program
c/o Lucy Parsons Ctr. & Bookstore
1306 Hancock St., Ste 100
Quincy, MA 02169

Prison Book Project
PO Box 396
Amherst, MA 01004-0396

Prison Book Project
P.O. Box 1146
Sharpes, FL 32959

Subterranean Prison Books
9 E. Gregory
Pensacola, FL 32501

Wayward Council Books
Gainesville Books for Prisoners
P.O. Box 12164
Gainesville, FL 32604

Books 4 Prisoners
c/o Groundwork's Books
0323 Student Center
La Jolla, CA 92037

Book 'em
P.O. Box 71357
Pittsburg, PA 15213

MEP
P.O. Box 5311
Madison, WI 53705

DC Prisoners Book Project
P.O. Box 5206
Hyattsville, MD 20782

Bound Together Bookstore
Prison Literature Project
1369 Haight St.
San Francisco, CA 94117

NATIONAL
Resource Lists

"ACLU Prisoner Assistance Directory"
(Florida prisoners see Volume 4 of "Prisoners and the Law" in major institutions' law library – contains above directory.)

"Resource Directory for Prisoners"
Naljor Prison Dharma Service
PO Box 7417
Boulder, CO 80304
www.naljor.com
(Directory can be printed off website for free.)

"National Prisoner Resource List"
available free from:
Prison Book Program
1306 Hancock St, Ste 100
Quincy, MA 02169

"Resource and Organizing Guide"
available from:
Prison activist Resource Center
PO Box 339
Berkeley, CA 94701
(Donation/stamps requested to help offset printing/mailing costs.)

"Directory of Programs Serving Families of Adult Offenders"
available free from:
National Institute of Corrections
Information Center
1860 Industrial Circle, Ste. A
Longmont, CO 80501

NATIONAL
Groups/Organizations

The Sentencing Project
918 F. St., NW, Ste. 501
Washington, DC 20004
202/ 628-0871

Services: Provides technical assistance to develop alternative sentencing programs and conducts research on criminal justice issues. No direct services to prisoners.

Stop Prisoner Rape
3325 Wilshire Blvd., Ste. 340
Los Angeles, CA 90010
www.spr.org

SPR works to end sexual violence against prisoners. Counseling resource guides for prisoners and released rape victims and advocates are available for: AL, AZ, CA, CO, FL, GA, IL, LA, OK, OR, MI, MS, NC, NY, TX, WI or nationwide. Specify state with request.

Amnesty International, USA
322 Eighth Ave.
New York, NY 10001
www.amnesty.org

AI is an independent, international organization that works to protect human rights.

CURE (Citizens United for Rehabilitation of Errants)
National Capitol Station
PO Box 3210
Washington, DC 20013
202/ 789-2126
www.curenational.org

Services: Organizes prisoners and their families to work for criminal justice reform. Many state chapters.

National Death Row Assistance
Network of CURE
Claudia Whitman
6 Tolman Rd.
Peaks Island, ME 04108
www.ndran.org

NDRAN is a new CURE project formed to help death row prisoners across U.S. gain access to legal, financial and community support and to assist prisoners' efforts to act as self-advocates.

National Clemency Project (FPLP)
8624 Camp Columbus Rd.
Hixson, TX 37343
www.nationalclemencyproject.com

Vietnam Veterans of America
8605 Cameron St., Ste 400
Silver Spring, MD 20910
www.vva.org

Publishes "From Felon to Freedom" a pre-release guide for imprisoned veterans. Write for more info.

Salvation Army
P.O. Box 269
Alexandria, VA 22313

Has parole/probation programs in almost every major city. Write for info.

Correct HELP
P.O. Box 46267
West Hollywood, CA 90046
HIV Hotline 323/822-3838

Provides info related to HIV. Contact if you can't access programs or are not receiving proper medication.

NATIONAL
Services

Let My Fingers Do Your Typing
PO Box 4178-FPLP
Winter Park, FL 32793-4178

Services: Professional typing services by mail. Computer, typewriter, transcription, black/color printing and photocopying. Free price list upon request. Special rates for prisoners.

Center for Constitutional Rights
666 Broadway
New York, NY 10012
www.jailhouselaw.org

CCR is one of the organizations that cooperates to produce the "Jailhouse Lawyer's Manual." Copies of the manual are provided to prisoners at no charge. The JLM can also be downloaded and printed from the above website at no cost.

Grant Publications
Alice S. Grant
P.O. Box 28812
Greenfield, WI 53228-0812

Discount magazine subscription service for prisoners. Send SASE for price list.

Tighwad Magazines
PO Box 1941
Buford, GA 30515

Discount Magazine subscription service. Write for price list.

[When contacting the above discount magazine services, please let them know that you learned about them in Florida Prison Legal Perspectives.]

INTERNET RESOURCES

Information on the Internet is available to prisoners with family or friends on the outside with online access who will print and mail material in. The amount of info on the 'Net' is tremendous. Info on almost any subject can be found online. The following lists some websites that may be useful for info.

Legal/Legislative

General

www.lawcrawler.com
Searches government and other sites for law.

www.nolo.com
Provides some general legal info and sells books on wide variety of legal topics useful to the public.

www.findlaw.com
Good site for searching out federal and state law.

www.washlaw.edu
Legal search engine for locating primary legal sources at the federal and state levels.

www.prisonactivists.org
Provides wide variety of prison-related info. Includes large "Link" section to many other related legal and nonlegal websites.

www.martindale.com
Provides info on lawyers nationwide, including contact info, area of practice, how long, etc.

Federal

www.thomas.loc.gov
Source for federal legislative material.

www.uscourts.gov
Links and information about U.S. Supreme and other federal courts.

www.ca11.uscourts.gov
Eleventh Circuit Court of Appeal website.

www.flnd.uscourts.gov
U.S. District Court, Northern District of Florida website.

www.flmd.uscourts.gov
U.S. District Court, Middle District of Florida website.

www.flsd.uscourts.gov
U.S. District Court, Southern District of Florida website.

Florida

www.myflorida.com
Links to state agency and government offices' websites.

www.flsenate.gov
www.flhouse.gov

Florida Legislature's websites. Provides directory of state legislators; complete Florida statutes (laws); Senate and House bills, bill histories and analyses.

www.flcourts.org
Provides directory and links to Florida courts' websites.

www.FCLA.edu
Florida State University law library website.

www.law.miami.edu/library
University of Miami law library website.

www.law.ufl.edu
University of Florida law library website.

www.stetson.edu/departments/library/law
Stetson University law library website.

www.legal.firn.edu
Posts the "Government in the Sunshine Manual" (Public meetings and public records manual).

www.flabar.org/newflabar/memberservices/CLE
Sells continuing Legal Education series of legal books concerning Fla. law.

Florida Supreme Court: www.flcourts.org

District Courts of Appeal:
First DCA: www.1dca.org
Second DCA: www.2dca.org
Third DCA: www.3dca.flxourts.org
Fourth DCA: www.4dca.org
Fifth DCA: www.5dca.org

Circuit Courts:
1st Circuit: www.firstjudicialcircuit.org
2nd Circuit: www.2ndcircuit.leon.fl.us
3rd Circuit: www.jud3.flcourts.org
4th Circuit: www.coj.net/Departments/Fourth+Judicial+Circuit+Court/default.htm
5th Circuit http//jud5.flcourts.org/courts/index.htm
6th Circuit: www.jud6.org
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10th Circuit: www.jud10.org
11th Circuit: http://jud11.flcourts.org
12th Circuit: http://12circuit.state.fl.us
13th Circuit: http://jud13.flcourts.org
14th Circuit: for information call 850-747-5327
15th Circuit: www.co.palmbeach.fl.us/cadmin
16th Circuit: www.jud16.flcourts.org
17th Circuit: www.17th.flcourts.org
18th Circuit: www.jud18.flcourts.org
19th Circuit: www.circuit19.org
20th Circuit: www.ca.cjis20.org

FPLP updates this list on a continuing basis as a service to readers. Please let us know if you are aware of other resources that prisoners, their families or advocates maybe interested in at the below address or by email:

FPLP
Attn: Resource List
PO Box 1069
Marion, NC 28752
fplp@aol.com

Please feel free to copy and distribute this resource list to others. ■

Florida's Prison Population Tops 100,000

On December 18, 2008, the 100,000th prisoner was booked into the Florida prison system. Consistent with FDOC Secretary Walter McNeil's professed commitment to reducing recidivism by expanding re-entry programs, the FDOC says there is a great need for education and drug treatment programs for prisoners. FDOC officials note that almost 90% of those in prison now will eventually be released and making sure they have educational skills is vital to help keep them from returning to prison. On the other hand, FDOC officials say that if the prison population continues to increase as projected, 19 more prisons will need to be built over the next five years.

Questions & *Answers*

Scientia est potentia
(Knowledge is power)

Got a question? *FPLP* has got the answer. Send questions to: *FPLP*, Q and A, P.O. Box 1069, Marion NC 28752, or fplp@aol.com.

Q: I had a law clerk tell me that I could not have or keep a copy of Chapter 33 (Florida Administrative Code, F.A.C.) rules in my locker. Is it that true?

A: No, that isn't true. You cannot, by rule, obtain photocopies of FDOC rules from the law library, even if you are willing to pay for the copies. However, nothing can legally prevent you from having some one on the outside from sending you a personal copy of such rules through the mail. Copies of Chapter 33 rules can be printed off the FDOC website, www.dc.state.fl.us, or all Florida agencies' administrative rules can be found on the Fla. Dept. of State website, www.dos.state.fl.us. To save space and mailing costs, it is suggested that you only have the specific section(s) of rules that you need sent by mail.

Q: I want to write a grievance about inadequate medical care. Do I have to write an informal grievance first?

A: No. A grievance on a medical issue within the FDOC is initiated by filing a formal grievance at the institutional level, Use a Formal Grievance (303) Form, write "Medical Grievance" on the first line of the form, then write your complaint. See: Rules 33-103.006, Formal Grievance-Institution or Facility Level.

Q: I am going to put in for a transfer and want to know which institutions have what programs and or PRIDE operations. Where can I find that info?

A: Every year, usually in February or March, the FDOC sends a copy of its official Annual Report for the prior Fiscal Year to each institutional library where they are available to the prison population. These Annual Reports contain the info you ask about along with many other useful facts and statistics about the FDOC. These reports are also posted on the FDOC's website each year.

Q: I just got back an order form the appeal court (District Court of Appeals, DCA) and it only states: Per Curiam Affirmed. What does that mean?

A: Essentially it means that the panel of appellate court judges (usually a panel of 3 judges) who considered your appeal adopts or confirms the decision of the lower court (usually the circuit court) which you were appealing.

Q: What is a Certificate Of Service?

A: A Certificate of Service is a section of a pleading or motion filed with a court, usually written on the last page, in which the filing party certifies to the court that a true copy of the document has been mailed to or otherwise served on all other parties.

Q: What type of grievances are filed directly as a formal grievance (303) and bypassing the Informal Grievance step?

A: Emergency grievances; grievances of disciplinary action; grievances on reprisal; grievances of a sensitive nature; medical grievances; grievances involving gaintime governed by Rule 33-601.101, F.A.C., Incentive Gaintime; grievances challenging placement in close management (C. M.) confinement or subsequent review; grievances alleging violation(s) of the Americans with Disabilities Act (ADA); and grievances concerning the return of incoming mail governed by Rule 33-210.101 (14), F.A.C. See: Chap. 33-103.006, F.A.C., Formal Grievances–Institution or Facility Level.

Q: Where is the Authorized Property List found in Chap. 33 Rules?

A: It is found in section 33-602.201, F.A.C., Inmate Property.

Florida Prison Legal Perspectives

Q: Am I allowed to establish or run my own business while in prison?

A: Not according to the FDOC. Chap 33-602.207, F.A.C., states: "(1) No inmate shall establish or engage actively in a business or profession while incarcerated" and "(5) Any inmate who attempt to conduct a business or profession through the mail, telephone, or any other avenue of communication while incarcerated shall be subject to disciplinary action in accordance with Rules 33-601.301 - .314, F.A.C."

Q: It seems like in the FDOC the only ones required to comply with the rules are prisoners. Aren't prison officials and staff also required to comply with the rules?

A: Yes. Once formally adopted, in Florida, administrative agencies' rules have the same "force and effect" as a law or statute. Administrative agencies, such as the FDOC, and agency employees, must legally follow and obey the agency's own rules. See: Decarion v. Martinez, 537 So.2d 1083 (Fla. 1st DCA 1989): Woodley v. Health and Rehabilitative Ser., 505 So.2d 676 (Fla. 1st DCA 1987); and Gadsen State Bank v. Lewis, 348 So.2d 343 (Fla. 1st DCA 1977). This principle has been applied in prisoner litigation challenging disciplinary proceedings. See: Williams v. James, 684 So.2d 868 (Fla. 2nd DCA 1996), citing Turner v. Singletary, 623 So.2d 537 (Fla. 1st DCA 1993). A Petition for Writ of Mandamus is the legal proceeding use to compel an agency or its employees to comply with the agency's own rules. For more information on Mandamus see the section on same in Florida Jurisprudence 2d – available in FDOC law libraries.

Q: If I file a legal challenge to a prison disciplinary proceeding or gaintime issue do I have to file it in Tallahassee, the Second Judicial Circuit Court?

A: It depends on what issue you raise. Generally, Sec. 768.28, Fla. Statutes, states that an action against the state or its agencies may be brought in any county in which the State or its agencies have an office and wherein the cause of action occurred. In a Mandamus action, however, the "place fixed by law" for performance of a duty determines venue. In other words, the State or its agencies have a common law venue privilege to be sued in the place of its central residence (such as the FDOC's central office location in Tallahassee). However, the "home venue privilege" is subject to exceptions, one being when constitutional rights (State or Federal) are at issue. Then the Mandamus action may be brought in the county in which the constitutional duty is to be performed. See: Conner v. Mid-Florida Growers Inc., 541 So.2d 1252 (Fla. 2nd DCA 1989). If you file in the local circuit court where you are incarcerated and the FDOC asserts home venue privilege, you can use the "sword welder doctrine" to overcome that privilege. See: Barr v. Fla. Board of Regents, 644 So.2d 333 (Fla. 1st DCA 1994); Graham v. Vann, 394 So.2d 180 (Fla. 1st DCA 1981). Considering the antagonism that some Second Judicial Circuit Court judges have for any prisoner litigation, often improperly charging filing fees for "collateral criminal actions" and rubber stamping petitions denied, the best practice may be to file Mandamus actions locally when constitutional issues (violations) were created at or by the institution where you are or its employees.

Q: My jailhouse lawyer told me there are laws that are on the Florida books that no one knows about. These laws are suppose to still be good today and when they are used the court has to let people out of prison because they don't want every one to know about them because it will cause toomany people to have to be released. Is this true or not?

A: If what he is talking about is some hidden law(s) that have not been removed from the books or are no longer published, in the state of Florida, he is pulling your leg. All laws in Florida are voted in or removed every two years and occasionally a supplement is published if there are laws to be added or changes in between this two years period. For the history of any law in Florida you simply have to go to the Florida Statutes Annotated, in your institutional law library, and look into it. You will find the answer to current changes, updates and/or repealed laws. There is no such thing as hidden statutes in the state of Florida.

Q: Is old case law the final authority for the courts, Stare Decisis?

A: In some instances yes, but not without referring to Shepard's to find out the case history, ie. dismissed, superseded, etc., and the most resent treatment of the case, i.e. conflicting authorities, overruled, etc. Look in the front of Shepard's Florida Citation for current status of the case.

Revisiting Denial of a Second or Successive Federal Habeas Corpus Using Recall of the Mandate

by Ricard Geffken

Leave to seek a second or successive 28 U.S.C. § 2254 habeas corpus application must be made to the appropriate U.S. Court of Appeals. Whether denied or approved, the AEDPA quite oddly prohibited use of the normal channels to review a decision made by the court of first instance.

28 U.S.C. § 2244 (2)(E) reads: "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

There is one way around this. Nothing prohibits a Motion to Recall the Mandate. The only grounds are actually somewhat broader than bring something a court overlooked to its attention. The ground which must be plead and demonstrated is that recall of the mandate is necessary to "prevent injustice." See e.g. 11th Cir. Lel. R. 41-1. The wording in other U.S. Circuit Court of Appeals may differ.

It is normally easier to show an injustice than an oversight which justices may tenaciously argue they either did not make, or now assert they already considered when ruling. Here, one can argue merits for a change, instead of the procedural quagmires used by courts to avoid ruling on the merits of a case.

Nowadays, courts spend more time arguing why they should not hear cases than they do hearing cases. Procedural bars have abdicated any claim courts remain in the business of providing any "justice" at all. Seeking recall of a mandate is one of the few instruments which still cares about whether the result is inherently just.

There is also a one year time limit for filing it. This is far longer than most limitation periods.

However, justice can be circumvented if careful attention is not paid to the grounds for which a second or successive application can be allowed. 28U.S.C. § 2244(b) states only two. The claim must rely on a new rule of Constitutional Law rendered retroactive. Alternately, it must depend on newly discovered evidence, and those facts, if proved, must clearly and convincingly show that but for the cognizable constitutional error no finder of fact would have found the applicant guilty.

Consequently, having circumvented one procedural bar, a prisoner ends up subjected to more gate keeping designed to condone illegal imprisonment.

The strong warning being given hopes to stop the common error of filing something without giving the matter proper thought. It is foolish to seek recall of a mandate, one's only shot to reconsider denial of a leave, when the pleading is wholly inadequate to overcome the reasons for not granting the motion.

Let's examine the restrictions. Too often prisoners neglect to state a federal issue. Although failure to word a cause of action for which a federal court has jurisdiction may be grounds to "prevent injustice," now is the time to carefully address why the claim shows the denial of a Constitutional right. If the claim relies on old, well established federal law, it is not "new".

If "new," survival depends on one, possibly two, conditions. It is certainly valid grounds if made retroactive. The second possibility depends very much on properly wording the pleading. Until federal courts close the door on it, even old law is retroactive, if on direct appeal of the issue raised in the state court for which the leave was sought in the first place, *Griffith v. Kentucky* 107 S.Ct. 708 (1987), Harper *v.. Virginia* 113 S.Ct. 2510 (1993), *Beard v. Banks* 124 S. Ct. 2504 (2004). Notice the adjustment needed in one's mentality. It is not that you were on direct appeal. It is that the U.S. Supreme Court has repeatedly allowed retroactivity during that period of time. Prisoners often the wrong thing. The court is not their friend. The court wants to bar granting relief.

Was the claim presented to a state court at all? Federal courts will not hear a claim which was not fully exhausted in the state system.

If new evidence is involved, it will "prevent injustice" only when clearly and convincingly argued that the outcome would of been different. Prisoner pleadings often poorly address *Strickland's* prejudice prong. This is a similar requirement. A court won't argue it for you, nor bother to figure out what is not expressly plead.

The bottom line to using this tool may be securing the assistance of some very good minds. ■

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Members are requested to continue sending news information, newspaper clippings (please include name of paper and date), memorandums, photocopies of final decisions in unpublished cases, and potential articles for publication. Please send only copies of such material that do not have to be returned. *FPLP* depends on YOU, its readers and members to keep informed. Thank you for your cooperation and participation in helping to get the news out. Your efforts are greatly appreciated.

PRISON LEGAL NEWS

Prison Legal News is a 48 page monthly magazine which has been published since 1990. Each issue is packed with summaries and analysis of recent court decisions from around the country dealing with prisoner rights and written from a prisoner perspective. The magazine often carries articles from attorneys giving how-to litigation advice. Also included in each issue are news articles dealing with prison-related struggle and activism from the U.S. and around the world.

Annual subscription rates are $18 for prisoners. If you can't afford $18 at once, send at least $9 and *PLN* will prorate the issues at $1.50 each for a six month subscription. New and unused postage stamps or embossed envelopes may be used as payment.

For non-incarcerated individuals, the year subscription rate is $25. Institutional or professional (attorneys, libraries, government agencies, organizations) subscription rates are $60 a year. A sample copy of *PLN* is available for $1. To subscribe to *PLN* contact:

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