Florida Prison Legal Perspectives

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RELIGIOUS FREEDOM STATUTE ADOPTED

by Teresa Burns

. Florida is only the third state that has quickly responded to the U.S. Supreme Court's striking down the federal Religious Freedom Restoration Act of 1993 by adopting a state law concerning religious freedoms. Floridians will have greater protections from government intrusions on their religious freedoms under a law that Governor Chiles has allowed to become law without his signature. *The new law went into effect June 17th.*

The new law requires courts to use the strictest test, a "compelling interest" test, in determining whether state or government actions infringe on the religious freedoms of Florida citizens. That standard had been in effect nationwide from 1963 through 1990 when it was struck down by the U.S. Supreme Court.

The U.S. Congress had responded by the adoption of the Religious Freedom Restoration Act of 1993 (RFRA), but the high court ruled last year that the 1993 federal law infringed on states' rights and struck it down also. Florida has now adopted its own version of the RFRA. Only two other states, Connecticut and Rhode Island, have a similar law. Legislation for such a law in Illinois is pending the governor's signature, and Alabama is expected to put the issue before voters this year.

This law was not passed without controversy in Florida. Florida's Attorney General Bob Butterworth had been one of the leaders in pushing the U.S. Supreme Court to overturn the federal RFRA because prisoners were not exempted from the Act. Although it received little mainstream media attention, prisoners being exempted from the new Florida law also stirred up a hornet's nest during this last legislative session.

State Rep. Allen Trovillion, who is chairman of the House Corrections Committee, and who has presented an appearance of supporting religious groups—and especially prison ministry groups-received an education in April. Trovillion, after having attended the recent Criminal Justice Ministry Conference in Orlando sponsored by several prison ministry groups (*FPLP*, Vol. 3, Iss. 6. pg. 11), and having assured them he supported their efforts, went straight back to the legislature and pushed to expempt prisoners from the religious freedom bill. It was a case of "read my lips."

Trovillion found himself flooded with phone calls during April protesting his switch out *stance* to exempt prisoners from the bill. Prison ministry groups all over Florida and from around the country took to the airwaves on national Christian radio shows criticizing Trovillion's stance. He was forced to retract his position and vote to let the bill (CS/HB 3201) become law without exempting prisoners. The House specifically voted against exempting prisoners after that.

It is interesting that AG Bob Butterworth did not have anything to say about prisoners being exempted from this state law, at least not publicly. Evidently he saw the writing on the wall—that such a position would be roundly criticized and opposed by the influentially growing prison ministry groups in Florida. Butterworth had been one of the lead demagogues that argued for the supreme court to strike down the federal RFRA, claiming that if prisoners aren't exempted they will be wanting to sacrifice chickens, use drugs religiously, or practice all kinds of "quack religions."

Governor Lawton Chiles said that he earlier had concerns about letting the new law be adopted because of fears that prisoners would abuse the legis-

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lation, but enigmatically he has now stated that "it looks like we can worked around those." Many in the religious communities had feared that Chiles would veto the legislation citing concerns of prison officials.

Many prison activists and those in prison ministries have said time and again that prison officials are exaggerating those concerns. Courts are not suddenly *going to uphold* any religious activity inside the prisons that creates a true security concern. In such a case the "compelling interest" test would come into play, as true security concerns are a compelling government interest in maintaining safe prisons. Both state and federal courts have the authority and responsibility now to dismiss any prisoner-brought legal actions that are patently ridiculous or frivolous, and it is reasonable to assume that they will exercise that ability. Prisoners now are punished with loss of gain time and confinement for filling frivolous lawsuits, the courts and FDOC have been imposing such punishments.

The true "fear" of prison officials is that they simply would have to accommodate prisoners wishing to practice their religion. Prison officials view any freedom granted prisoners, even religious, as a threat to their control, which they desire to be total.

The good news is that all Floridians now will perhaps have true protection from governmental intrusions into their religious rights. It is a basic principle of both the state and federal Constitutions that the government will not interfere with the right to practice one's religion. The Florida legislature has only affirmed that right with this new law. ■

SERIOUS MEDICAL CONDITION—NICOTINE ADDICTION

On May 5th, in what attorneys in the case called a historical settlement, Thomas Waugh settled his federal lawsuit against the Florida Department of Corrections (FDOC) for help in kicking his nicotine addiction. Waugh, a Florida prisoner, agreed to settle the case on the second day of trial after four FDOC Assistant Secretaries appeared in court and expressed a desire to settle the case. After nine hours of hammering out the specific terms a settlement was reached giving Waugh what he was asking for-nicotine patches and Zyban—to help him quit smoking. Governor Lawton Chiles had to be contacted to approve the agreement.

This settlement is the first time the FDOC, or the State of Florida, has been forced to provide medical assistance to someone to quit a tobacco addiction. It was an amazing case that has set historical precedence for those addicted to nicotine, and especially for prisoners who have no way of obtaining assistance in kicking their nicotine addictions which the state promotes by selling them millions of dollars worth of tobacco every year, at a cost to taxpayers of millions more.

The full story in Thomas Waugh's case has never been told and appears here in *FPLP* for the first time. No punches are pulled. The lies and underhanded tactics that are commonly used against prisoners whenever they attempt to vindicate legal rights are exposed here. It took courage and determination to do what Tom Waugh did, and that courage and determination will benefit all Florida prisoners who follow Tom's lead.

FDOC: Nicotine Isn't Addictive

When Tom Waugh asked an FDOC doctor for help in kicking his smoking addiction in 1994 he was told that "whether nicotine is addictive or not is a gray area" and that it was his choice "whether you purchase these products or not." Waugh's request was denied. This occurred at the Florida State Prison medium security work camp where Waugh was serving a 20 year prison sentence for unarmed robbery.

Tom Waugh, a smoker for 21 of his 37 years, was not expecting such a cavalier response to his plea for medical help to quit smoking. He had tried to quit on his own several times and had been unable to. In August 1994 Waugh read

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that the Federal Drug Administration had declared nicotine an addictive drug, the same as heroin or cocaine. After reading a lot of the current information on the negative effects of smoking and the medical position that nicotine addiction often requires medical treatment to successfully quit, Waugh thought if he had access to some type of cessation aide like nicotine patches or gum he could finally quit.

But that was not to be. The prison where Waugh was did not sell tobacco cessation aides, no prison in Florida does, although they do make a killing selling millions of dollars worth of tobacco to prisoners every year. Nor was Waugh allowed to have someone on the outside purchase and send him nicotine patches or gum so that he could try to quit, Florida prisoners are strictly prohibited from receiving any medical assistance from the outside, even when they offer to pay for it themselves.

Waugh, realizing that he was truly addicted to nicotine, and that it was not as simple as the FDOC medical staff claimed, continued trying to get help to quit smoking. The only avenue open to *him at that point* was to pursue help through the prison grievance procedures. Waugh hoped to reach someone in the FDOC bureaucracy who was familiar with the same widespread reports on nicotine addiction. However, even though Waugh referred to his sources of information in his grievances, they were denied and when he appealed to the Chief Medical Officer of the FDOC in *Tallahassee* he was also denied help there. The responses to Waugh's grievances and appeals maintained essentially what the first doctor had told him: that nicotine isn't addictive and that he might as well quit on his own because the state will not provide him any medical assistance in the form of nicotine cessation aides, nor allow him to obtain them from anywhere else. Crucially, the FDOC did not provide treatment for nicotine addiction in any manner.

Waugh did get something from his grievances. After filing them Waugh found himself singled out by prison officials for a fabricated disciplinary action. And in March 1995 Waugh was suddenly transferred from the medium security work camp to a higher security major prison, Columbia Correctional, reputedly the worse managed prison in Florida.

Reluctantly, after failing to get anyone's attention in the FDOC that viewed nicotine addiction in the same light as the federal government, during July 1995 Waugh filed a civil rights complaint in the federal district court in Jacksonville, Florida. Waugh claimed that prison officials were being "deliberately indifferent" to his serious medical need to kick his nicotine addiction. He was not seeking any money, he only wanted the FDOC to furnish or make available for sell to prisoners proven nicotine cessation aides-or as a last resort, for the FDOC to establish smoking and non-smoking prisons.

There was U.S. Supreme Court case law in support of Waugh's claims. That court had held in 1976 that prison officials could not be "deliberately indifferent" to the serious medical needs of prisoners in the case Estelle v. Gamble. As recent as 1993, in another lankmark case, Helling v. McKinney, the U.S. Supreme Court had ruled that exposing non-smoking prisoners to second-hand smoke of other prisoners, because of the serious medical consequences associated with what is termed Environmental Tobacco Smoke (ETS), violated the Eighth Amendment of the U.S. Constitution's ban on cruel and unusual punishment.

Attorneys from the State Attorney General's (AG) office were assigned to represent the FDOC in Waugh's lawsuit. Those attorneys, under AG Bob Butterworth, responded to Waugh's legal action by trying to have it dismissed. The state asserted that the FDOC was not deliberately indifferent to Waugh's serious medical needs, and while supporting the position that Waugh received in his prison grievances, these attorneys maintained that: "If [Waugh] feels that he is addicted to nicotine, and that this is a serious medical condition, he is always free to quit cold turkey."

Assistant Attorney General (AAG) Donna LaPlante continued on in the motion to dismiss to assert *that the* "[d]efendants are not responsible for [Waugh's] decision to purchase cigarettes any more *than they* would be responsible for [him] buying a candy bar at the canteen." The motion to dismiss also stated that Waugh "is in no way entitled to medical intervention to 'cure' a habit which [he] himself continues to indulge, and over which [he] has ultimate control."

The court, however, refused to accept that simple an argument and for the next year and a half Tom Waugh continued to litigate back and forth against the state which tried every tactic in the book (and some out of the book) to have his case thrown out of court.

The state even attempted to persuade federal Judge Harvey Schlesinger that Waugh had access to sufficient smoking cessation aides provided by the FDOC—written booklets about the effects of smoking and the medical need to quit. Unfortunately, for the state, upon closer examination those booklets all stated that cessation aides such as nicotine patches are an essential part of treatment for nicotine addiction. The state was embarrassed, but simply ignored the inconsistency and kept plowing blindly on. After all it was just a prisoner who had filed the suit, who was the court suppose to believe?

State V. Big Tobacco
Nicotine Highly Addictive

Ironically, at the same time that Tom Waugh was preparing and litigating his largely unknown case against the state, another lawsuit concerning tobacco and its effects that would garner state and nation-wide attention was being prepared. That case was the State of Florida's case against the major tobacco companies seeking to recover alleged Medicaid costs that the state had expended in providing medical care for smoking related illnesses to Medicaid patients.

The state, through AG Bob Butterworth and the state legislature, had been

planning for years to sue the tobacco companies under the claim that they were addicting people to nicotine and then leaving the state to pick up the tab when these people became sick with tobacco-related diseases. A key to the state's legal strategy was to change Florida law to make it easier for the tobacco companies to be sued and harder for them to defend themselves.

To achieve that goal, in 1990 the legislature, with the guidance of Bob Butterworth, amended its Medicaid Third-Party Liability Act. Then in 1994, as tobacco became big news all over the country, the Act was amended again. This was done to virtually assure that the state could not lose when it sued the tobacco industry (or any other industry) to recoup claimed Medicaid expenses that amounted to billions, according to the state.

These amendments practically rewrote the traditional rules on common law torts in Florida. The amendments abolished the "assumption of risk" defense for industries—the defense that the plaintiff knowingly took the risk and so could not recover damages. The amendments also provided that "causation" no longer had to be specific. Where in ordinary tort cases the plaintiff has to show that the particular defendant caused the plaintiff harm, under the amended Medicaid Act the state (plaintiff) could substitute "statistical analysis" for specific causation.

Under the amendment, the state no longer had to identify the actual Medicaid patients it was supposedly trying to recoup medical expenses for; the statute of limitations on bringing such an action were abolished; while liability could be "apportioned" based on "market share" among several different companies; and the state was authorized to obtain attorney fees, if it won, to pay for attorneys outside the AG's office to litigate any such case (probably to avoid sabotage from inside the AG's office with the amount of money involved). The state could not lose under these rules, or so it was thought.

Once Florida had its "laws" in order, that gave the state every advantage, it filed suit in 1995 (the same year that Tom Waugh filed his action) against several major tobacco companies. Yet, totally different from the position that the state was taking in Tom Waugh's case, in the state's lawsuit against the tobacco companies it was claimed that "cigarettes ... contain nicotine, a highly addictive substance," and that "the [tobacco companies] know of the difficulties that smokers experience in quitting smoking and of the tendency of addicted individuals to focus on any rationalization to justify their continued smoking." The state's lawsuit asserted that "nicotine addiction is similar to the additions of illegal drugs such as heroin, cocaine, and amphetamines," and that the "addictive nature of nicotine in cigarettes virtually extinguishes personal choice in those who become addicted."

In a planned campaign in support of the state's lawsuit against the tobacco companies, after the action was filed, Florida's Governor, Lawton Chiles, and Attorney General, Bob Butterworth, were notable for leading the public media blitz designed to obtain and keep public support for the state's position. Governor Chiles and AG Butterworth were both in the news frequently denouncing the tobacco companies and railing about how they knowingly addicted smokers, targeted minors, and lied about nicotine addiction and the serious health effects of smoking. Bob Butterworth was seen on national TV almost crying while he wondered how many lives would have been saved if the tobacco industry had not lied to smokers about the dangers of tobacco.

The state's lawsuit proceeded from 1995 until early 1997 with the state appearing to have a hands-down win of the case that was scheduled for trial in August of 1997.

Using Tobacco to Control

At the same time that the state was suing the tobacco companies for selling cigarettes, addicting people to nicotine, lying about nicotine not being addictive, targeting minors, and even engaging in a RICO organized type crime violation, while leaving the taxpayers to pay the costs, out of the public's eye the state itself was also buying millions of dollars worth of tobacco from the tobacco companies and selling it to Floridians-who just happened to be prisoners.

According to a 1997 legislative report, an estimated 75% of Florida's prison population are tobacco smokers, and presumably addicted to nicotine. In an in-house report compiled by the FDOC's Office of Health Services, dated February 25, 1997, it was estimated that the potential per-year health care costs related to tobacco use in prison has been "exceeding 2 million dollars for some time." (This estimate was amended upwards to $4 million in another in-house memorandum sent to the FDOC's legislative director on March 11, 1998.)

This was too much for some state lawmakers. Bills were filed in both the state Senate and House during 1997 to completely ban tobacco inside Florida's prisons. These bills would have imposed a ban on prisoners-and staff, which was a mistake. The inclusion of staff in the prison tobacco ban bills sparked a firestorm.

Upon announcement that the prison tobacco ban would also affect FDOC staff an explosion of opposition erupted during the 1997 legislative session. Instead of focusing on the fact that many correctional officers would quit the department rather than give up the butts (and where there is an approximate 33 percent turn-over rate of department staff already) a smokescreen was decided on and the emphasis was shifted onto an alleged "security threat" that prisoners would present if such a ban was adopted.

Organized cadres of correctional officers, supported by the FDOC central office and the Police Benevolent Association (a union that represents many correctional officers in Florida), rallied in the capitol in protest of the prison tobacco ban. These rank-and-file correctional officers loudly decried that such a ban would cause riots and increased assaults on officers by prisoners.

FDOC spokeswoman, Kerry Flack, was quoted in the mainstream *news media as saying*, "*If you prohibit cigarettes, they become contraband, then become the drug of choice.* Then officers are assaulted by frustrated inmates." FDOC sergeant S.D. Williams told the legislature, "If you take these cigarettes away ... you're going to have officers going to the hospital in large numbers," and that they should have they ambulances ready on the day ban becomes effective. *But no* evidence was ever offered that would support any of these spurious claims. In fact, the statistics showed the exact opposite. Several states have banned tobacco in their prison systems with the only problem being black-markets operated by prison staff. Most county jails in Florida have banned tobacco and it has caused very few problems among prisoners.

Another reason for the FDOC's opposition to banning tobacco in the prisons did become apparent, however, when a spokeswoman for Governor Lawton Chiles, Karen Pankowski, defended the state selling prisoners tobacco in a news release. "We know that cigarettes are one way to help control the prison population. Taking them away would create one less tool corrections officers have in guarding our prisons," said Pankowski.

And then there are the economics involved. In the 1995-96 fiscal year the FDOC pur-

chased more than $5 million worth of tobacco products for resell to prisoners. Gross sales of tobacco to Florida prisoners during 1996 alone totaled $7,592,712. Tobacco is the biggest selling item sold in the prison canteens, according to FDOC sources.

The scare tactics and economic realities worked. The legislature, especially overwhelmed by the vociferous response from the FDOC, shelved the prison tobacco ban bills during 1997 for reconsideration in 1998 with the ban on staff use of tobacco removed.

It is notable that those bills did provide that when tobacco was eliminated in the prisons that a smoking cessation program would have been offered, but according to an April 11, 1997, legislative committee report that program would only have consisted of pamphlets, reports, and training aides. The bills did not suggest that the FDOC would provide nicotine patches or medication when the ban was imposed.

Joe Camel is a Con

Meanwhile, back in the state's suit against the tobacco companies, in March 1997 the state's litigation team was shocked when the tobacco companies filed a counterclaim against the state. The counterclaim alleged that the state had engaged in the same conduct alleged against the tobacco firms manufacturing tobacco, addicting people, and leaving taxpayers to pick up the tab.

Tobacco attorneys were allowed to introduce documentation that from 1935 until 1979 the State of Florida, through its Department of Corrections, had manufactured, distributed, sold, and even provided free tobacco and cigarettes to both adult and juvenile offenders in state facilities. Even though it is illegal to give or sell cigarettes to minors in Florida, the tobacco companies produced a 1993 memo showing that the state had spent taxpayer monies to buy cigarettes from a private company for distribution to juvenile detainees.

Numerous Florida prisoners, including the author of this article, provided depositions detailing the history and practices of the FDOC in providing free tobacco and cigarettes to prisoners up until 1979. Documentation introduced by attorneys for the tobacco companies showed that between 1972 and 1980 the state of Florida spent more than $500,000 a year in taxpayer monies on free cigarettes for prisoners. Some of the deposed prisoners who had received the free tobacco and cigarettes had indicted that further digging would reveal kickbacks to prison officials from the tobacco suppliers, many of whom were North Florida tobacco growers, which may have been one real reason for the free cigarettes. The mainstream news media carried headlines stating, "State Secret: Prison Made Cigarettes." The state was embarrassed as its case started going up in smoke.

Just three months later, in June 1997, the attorneys for the tobacco companies staged another coup against the state's position. The tobacco attorneys had discovered Tom Waugh's lawsuit. In Waugh's case the state was claiming that nicotine is not addictive and is a personal choice over which Waugh "has ultimate control." Yet in the state's case against the tobacco industry the total opposite was being claimed-that tobacco is so addictive it "virtually extinguishes personal choice in those who become addicted."

The mainstream news media headlines blared "State Accused of Double Talk." A spokesman for AG Bob Butterworth, Peter Antonacci, was left to try to explain the apparent hypocrisy. "We're in an uncomfortable position here because we're in the middle," Antonacci said. The state was so embarrassed by this turn of events that it was forced to settle its case against the tobacco companies for $11.3 billion in August 1997 rather than take the case to a jury trial.

FDOC Litigation Tactics:

But what was happening with Tom Waugh while all these big money power moves were being made between the state and the tobacco companies? On June 2, 1997, reporters from the Capitol News Services interviewed Waugh for a television story about the inconsistencies in the state's position in his case as opposed to the position being taken in the Medicaid case. Three days later Waugh was asked to give a deposition for the tobacco companies against the state.

One week after Waugh give that deposition an alleged institution-wide search was conducted at Columbia Correctional Institution. Drug sniffing dogs were brought into the institution and were taken directly to Tom Waugh's cell. According to the officers in charge, the dogs "alerted" to drugs in Waugh's cell and a search was conducted but no drugs could be found. This did not deter prison officials. Tom Waugh, along with approximately 25 other prisoners whose cells the dogs also supposedly "alerted" in (so Waugh could not say he was being singled out apparently) were handcuffed and temporarily held in confinement and subjected to a "for cause" urinalysis test. Only one of the 25 tested positive for drugs, and Tom Waugh had to be released.

About that same time, one of the state's attorneys, Cecilia Bradley, interviewed Waugh and offered him a transfer to a "better" prison--if he would drop his case against the state for nicotine cessation aides. Waugh declined that "generous" offer. Bradley's response was to inform Waugh that if he did not voluntarily dismiss the case that the state would seek to forfeit all his previously earned gain time, plus make him pay all the costs of the action. This also did not dissuade Waugh. (AAG Cecilia Bradley later vehemently denied having made that offer or threat when it came up during a deposition.)

During late June 1997 Waugh was asked to give another newspaper interview. Overnight that interview was reported in newspapers and Waugh's case was widely publicized. Again AG Butterworth's spokesman, Peter Antonacci, went into spin-control mode when asked about the inconsistencies between Waugh's case and the state's case against the tobacco companies. Antonacci was forced to admit, however, that the prison doctor who responded to Waugh's prison grievance "very carelessly and haphazardly said cigarettes are not addictive."

Neither Antonacci, nor other state officials, cared to explain why that doctor's "careless and haphazard" response had been upheld though all levels of the grievance process, or why it had been defended by attorneys from Bob Butterworth's office for the previous two years that Tom Waugh had been fighting single-handedly, and without much legal experience, just to keep his case alive. In fact, no one ever explained why the attorneys general's office continued gathering affidavits from FDOC officials for use in Waugh's case which stated that nicotine is not addictive.

Dream Team Shatters Defense

As usual with any prisoner litigation in Florida, once the state's attorneys realized that Tom Waugh could not be bribed or intimidated into dropping his suit, they begin to inundate him with complicated, and largely frivolous, legal proceedings designed to bog him down in a furious flow or paperwork that he would not be able to respond to and procedural deadlines that he would not be able to meet. This tactic is designed to afford the state a procedural default, leading to dismissal of the case.

In particular, the state filed several motions for summary judgment trying to out-litigate Waugh. Without much legal experience, Waugh, nevertheless, managed to keep up with and actually defeat the best efforts of the state's attorneys. But, he was beginning to tire.

A trial had originally been set in Waugh's case for August of 1997. Yet, the state wasn't quite ready and had the trial postponed. The state was working on refining its defense with the position that since Waugh was claiming to have an addiction that the FDOC had numerous substance abuse programs to address his problem. The state asserted that groups like A.A., N.A., Tier groups, Wellness groups, and surprise, a brand new nicotine addiction program, "Fresh Start," is all prisoners need to kick nicotine. The Fresh Start program was implemented in a direct response to Tom Waugh's lawsuit in October 1997. The program consists of 4 one hour meetings with a FDOC recreation coach

who received one hour of video training in how to give the course. No nicotine cessation aides are available in the course, although they are recommended by the course materials distributed to prisoners.

Now the state was ready to take Waugh to trial. He would be overwhelmed with FDOC "experts" testifying that nicotine is not addictive, that he would have no way to counter, and the court would be bombarded with all the substance abuse programs and booklets available to prisoners who want to quit smoking.

But, the state had delayed too long. Tom Waugh was contacted in November 1997 by a trio of Jacksonville attorneys, George Shultz, Scott Maker, and Patricia Sher, from the law firm of Holland and Knight. The judge had asked them to represent Waugh. The state's attorneys were stunned. Tom Waugh had a dream team that few prisoners could ever hope for in a prison conditions case.

Within weeks of taking the case, Waugh's attorneys placed the state firmly back on the defensive. During August Waugh had introduced the state's case against the tobacco companies into his lawsuit. His attorneys developed that important move by obtaining copies of many of the discovery documents that were filed in the state's case. This included depositions from FDOC officials that were taken after the tobacco companies exposed that the state had manufactured, sold, and provided free tobacco and cigarettes to adult and juvenile prisoners for decades.

The state and FDOC begin scrambling like rats in one of the old Florida State Prison tobacco warehouses. When Waugh's attorneys pointed out that many of the counselors of the FDOC's substance abuse programs were smokers themselves an emergency memo went out January 20th to the program contractors informing them that substance abuse counselors are prohibited from using tobacco inside the prisons.

By February 1998, Waugh's attorneys had forced the state to partially admit, through discovery interrogatories and admissions based on the state's case against the tobacco companies, that the state believes that nicotine is addictive. The state was also forced to admit that nicotine addiction is similar to addictions to drugs such a heroin, cocaine, and amphetamines. Also admitted was that Florida prisoners have experienced premature deaths related to tobacco; that nicotine virtually extinguishes personal choice in those addicted to it; that the FDOC continues to sell cigarettes to prisoners; and that in the past the FDOC (a state agency) manufactured, assembled, and engaged in the production of high tar and nicotine cigarettes.

The FDOC, through its barely competent attorneys, retrenched in the old blanket that it throws up whenever backed into a corner-security. Mendaciously it was claimed that nicotine cessation aides would be a very dangerous security threat if provided to prisoners.

The state objected to nicotine gum on the fairly reasonable ground that it could be used to foul up locks inside the prisons. But the only "threat" they could come up with concerning nicotine patches was that they could be used to "inject" illegal drugs like heroin and cocaine. The state claimed that medication like Zyban could be "checked" by prisoners and then sold on a black-market. Each of those claims were picked apart by Waugh's dream team.

The "security threat" defense was further eroded when Waugh's attorneys produced the results of a study showing that 30 other states make nicotine patches available to prisoners. Of those states, 13 allow prisoners to purchase nicotine patches in the commissary/canteen, and 13 states provide medication (Zyban) in conjunction with nicotine patches. No states had reported a security problem with nicotine patches or nicotine therapy medication.

During the first weeks of February new depositions were taken of FDOC security and medical officials. Top FDOC medical officials tried to straight-face claim that they do not believe nicotine is addictive, nor believe that nicotine cessation aides have been shown to work. Exhibited was an almost complete ignorance of current medical standards as regards nicotine cessation.

In late February Waugh's attorneys announced that they intended to present Dr. David P.L. Sachs as an expert witness for Waugh. Dr. Sachs is a nationally recognized respiratory research scientist and director of the Palo Alto Center for Pulmonary Disease Prevention located in California. In connection with his extensive research, Dr. Sachs has done numerous well respected studies on tobacco's effects and nicotine treatment. He served as a consultant to former U.S. Surgeon General C. Everett Koop, and currently is also an attending physician at the Stanford University Chest Clinic that specializes in pulmonary medicine.

A deposition was taken from Dr. Sachs on February 26, 1998, which proved devastating to the state's position. In that deposition Dr. Sachs testified as to his extensive research concerning tobacco and nicotine which had started as early as 1976. In a prior examination of Tom Waugh, Dr. Sachs had diagnosed Waugh as having chronic bronchitis related to smoking. Other points made by Dr. Sachs included:

- That scientific data consistently shows that use of nicotine cessation aides doubles and triples the chance of quitting smoking and staying stopped.

- According to studies, only between 2 and 5 percent of people are able to quit cold turkey and stay off nicotine for a year.

- The current standards of medical care adopted by the U.S. Department of Health and the American Medical Association accepts that nicotine cessation aides are a necessary component of treatment for nicotine addiction.

Within a week of Dr. Sachs deposition being taken the state began offering suggestions for a settlement of the case. Two FDOC policy bulletins were produced: Health Services Bulletin 15.03.35 (Effective date 3/5/98), and Education and Job Training Bulletin 98-0.1 (Effective date 3/2/98). Both these bulletins establish a policy for the implementation of a tobacco cessation program for prisoners, including nicotine cessation aides. Essentially, the program requires a prisoner wishing to quit using tobacco to participate in the Fresh Start course. Upon completion of Fresh Start if the prisoner has not quit tobacco he may request a referral to a Tier 2 program that has been modified to include nicotine cessation. If after two months in Tier 2 the prisoner still requires additional cessation assistance he will be referred to Health Services which may prescribe nicotine patch treatment.

In Tom Waugh's situation, however, the state was trying to get him to agree to being placed in the prison medical clinic before he could receive nicotine patches. The state also did not want to give Waugh Zyban in conjunction with the patches. Both of those issues were not acceptable to Waugh or his attorneys. The state maintained that these issues were not negotiable and the case proceeded to trial on May 4, 1998.

A Battle Won

After only one day of trial with Dr Sach's on the stand the state and FDOC gave up. On the morning of May 5th FDOC officials and their attorneys appeared in court almost frantic to settle the case. Over the next nine hours of settlement discussions Florida's governor, Lawton Chiles, was personally called twice to approve parts of the settlement.

At the end of the discussions, Tom Waugh had got what he had sued for. The settlement agreement provides, in pertinent part, that:

- The FDOC admits that Tom Waugh's nicotine addiction constitutes a serious medical condition.

- The FDOC shall provide Tom Waugh with an examination by a neurologist and pulmonologist that meets his approval.

- Unless not recommended by such

medical professionals, Waugh will be prescribed Zyban and nicotine patches.

■ Waugh will have to participate in the Tier II Two-Month Core Program and live in a smoke-free dormitory during patch therapy treatment.

■ Waugh's attorneys agreed to waive in excess of $250,000 in attorney fees (they were not after money).

■ And, the FDOC will pay Waugh's costs and expenses of $65,000.

On the Side Lines

A prison tobacco ban bill was again introduced in both the Florida House and Senate during this 1998 session. Unlike the 1997 bills, these bills would have allowed correctional staff to smoke and use tobacco inside the prisons. There was absolutely no claims from the FDOC this time that banning tobacco would create a security risk from prisoners. The House passed its bill but the Senate failed to pass theirs, thus killing the issue for another year.

The 1998 legislative session did vote overwhelmingly to repeal the Medicaid Third-Party Liability Act, legislators said it had *served it's purpose with the* tobacco companies' settlement. Controversy continues to surround that settlement where the state has refused to pay the 12 private attorneys who represented the state an agreed upon 25% of what was recovered. A senate ethics panel lead by state senator "Gangbang" Charlie Crist has largely been unsuccessful in investigating the negotiations involved in the tobacco settlement.

A federal grand jury in Tallahassee is also looking into Governor Lawton Chile's and AG Bob Butterworth's involvement in the tobacco settlement and alleged renege on the lawyers' fee contract. During May, the governor's former chief inspector general, Harold Lewis, refused to answer any questions put to him by that grand jury, pleading the Fifth Amendment right against self-incrimination 118 times during questioning. It has been implied that AG Bob Butterworth never intended that the private attorneys would receive the agreed upon attorney fees. Business as usual. -BOB POSEY ■

LITERATURE REVIEW

Death Penalty/Criminal Justice

Frontiers of Justice, Volume 1: The Death Penalty; Volume 2: Coddling or Common Sense?
Edited by Claudia Whitman, Julie Zimmerman & Tekia Miller
Biddle Publishing (1997-98)

As the professed War on Crime in America continues little in the way of effective stategies to reduce crime has emerged. Instead, capital punishment and "tough on crime" tactics have increased. The crime rates continue to drop as the incarceration and recidivism rates continue to rise. The United States has the infamous distinction of using capital punishment more than any other industrialized nation in the world, while also leading the world in the use of incarceration and imprisonment.

These two volumes are a collection of essays from various authors, bringing together voices of reason amid the knee-jerk clamor for revenge and retribution as the solution to the crime problem.

Volume I: The Death Penalty (268 pgs.), is perhaps the most powerful anthology today representing men and women of reason and conscience, both the incarcerated and the free, who deplore the use of legalized killing to solve America's criminal justice problems. The more than 30 authors in this collection have all been personally touched in one way or another by capital punishment. Essays are presented by prisoners sentenced to death, their families and their victims' families, by professionals in the areas of law, criminal justice, government, religion, journalism and advocacy.

Volume 2: Coddling or Common Sense (383 Pgs.). Former U.S. Attorney General Ramsey Clark introduces the tone of the essays in this volume with his "America's War on Crime." Clark writes: "Politicians appeal to the worst instincts in society—fear, hatred, racism, greed. They fail to address realistically the meaning of crime in a society and the means of its prevention. Shouts of 'coddling' criminals ring out from these political protectors of the people; they rail against programs which have the potential of providing a safe return from prison to society, sentences that are less than draconian, or failures to seek the death penalty. No society has ever coddled people it calls criminals, or the poor from whom most charged with crime come. Use of the word is an appeal to those that want to punish, inflict pain and demonize. Only a demagogue would claim that coddling occurs."

The authors in this collection include professionals in law, law enforcement and corrections, from volunteers and advocates to crime victims and offenders themselves. This anthology explores how society has been induced to turn from rational programs that have been proven to work to reduce crime and recidivism to avoid an appearance of "coddling" criminals.

Available from: Biddle Publishing Co., P.O. Box 1305 #103, Brunswick, ME 04011. Price: Volume 1 @ $15.95; Volume 2 @ $19.95. Shipping: $2 first book, .50 ea add bk. Sales tax (Maine only) 6%. Send check or money order to Biddle Publishing Co. ■

Federal Post Conviction

Secret Tools For Post-Conviction Relief
by Joe Allan Bounds
Zone DT Publishing (1998)

Styled as: "The Manual for Lawyers and Post-Conviction Litigants for Prevailing on Ineffective Assistance of Counsel Claims, and Methods of Establishing 'Cause' for Procedural Default" this book covers a large variety of issues associated with post-conviction relief practice. This soft bound volume has 314 pages with a 13 page table of contents. Topics include, but are not limited to: Preparing for Post-Conviction Relief; Ineffective Assistance of Counsel; Conflict of Interest; Retroactive Application of Law; and Intervening Change of Facts. There are over 400 quick reference subtopics with favorable federal case law citations and synopses.
This is primarily a research reference.

Available from: Zone DT Publishing, P.O. Box 1462, Allen, TX 75013-0024. Regular Price: $69.95, plus $5.00 S&H. Prisoner discounted price: $49.95, plus $5.00 S&H. Check or money order payable to Zone DT Publishing. Allow 1-3 weeks for delivery. ■

RAINES SETTLEMENT PUBLISHED

In the last issue of *FPLP* was coverage of the U.S. Supreme Court granting certio-

rari review of a case involving the applicability of the Americans with Disabilities Act (ADA) to prisons (*FPLP*, Vol. 4, Iss. 3, "U.S. S. CT. GRANTS CERTORARI REVIEW OF APPLICABILITY OF ADA TO PRISONS"). That article also included some discussion of the recent settlement of Raines v. State, a class action concerning the inability of disabled Florida prisoners to earn gain time in the same manner as non-disabled prisoners. That discussion noted that a previous opinion in the Raines case had just been released in published form on March 2, 1998, approximately one year after the opinion was written.

At the time that the article in the last issue of *FPLP* was written the settlement agreement in Raines had not been published. The last issue of *FPLP* had already been laid out when the settlement was published and change was not possible. The published settlement agreement appears at: Raines v. State, 987 F.Supp. 1416 (N.D. Fla. 1997). It is noted that a stipulation in the settlement provides that the continued validity of the settlement depends on what the U.S. Supreme Court decides on the issue of whether the ADA applies to prisons. Raines, supra at 1420.

As noted in the previous article, copies of the settlement that were initially placed in the law libraries were then removed in a system-wide "security" raid preventing access to affected prisoners. A full copy of the settlement is now available in published form as above. ■

RULE REVIEW
First Amendment Targeted

"Nobody misses the loss of another man's freedom."
-Irving Stone from *The Agony and the Ecstasy*

Over the past few years Florida prisoners have largely sat unconscious as more and more restrictions have been placed on almost every gain that was achieved during the 60s and 70s. Prisoners have did little but act stunned and gripe and whine as medical co-payments were introduced, as legal copying costs (even for the indigent) were implemented, as new restrictions and higher costs were placed on the collect telephones, package permits prohibited, personal property taken, canteen prices increased exorbitantly. Not even aware of what is happening until it is a fact, prisoners have obtusely watched the severe reductions in educational programs, elimination of Inmate Welfare Trust (sic) Fund benefits, reductions in the law library collections, increased used of sensory depriving confinement (GM), and wholesale denial of due process in disciplinary proceedings.

Instead of devoting themselves to learning how to and legally challenging rules, policies and illegal laws, most prisoners have been content as long as they don't miss "Pinky and the Brain" or the basketball/football game on TV. Instead of devoting every minute, or even a few minutes a day, to educating themselves about what is really happening around them, the majority is content to gripe and rumormonger while waiting for someone else to file a grievance or suit to challenge or change excessively onerous, or outright illegal, conditions.

Now this majority can quietly chew their cud as their most important rights-First Amendment rights-are targeted, and their contact, association and interaction with almost every facet of the outside world is restricted or prohibited.

New Publication/Book Rules

On May 10, 1998, new FDOC rules and policies concerning books and other publications that prisoners may or may not possess, and procedures for rejecting, confiscating, and tightly controlling prisoners' access to almost all reading materials, became effective at Rule 33-3.012, F.A.C. and Policy and Procedure Directive (PPD) 7.01.01 (Eff. 5-13-98).

In part, these new regulations provide that on July 1, 1998, all prisoners may not possess more than 4 personal books or single copies of any publication. Anything in excess of that limit will be confiscated as contraband, and prisoners will not be allowed to personally possess any book, including religious or legal, if a copy of same is in the institutional library collection. The entire rejection procedure for incoming reading materials has been changed.

Non-Contact Visiting Rules

On June 15, 1998, new FDOC rules became effective at 33-5.0081, F.A.C., creating authority for a three-member Non-Contact Visiting Team to be established at each institution which will be allowed to prohibit contact visits between prisoners and their families and friends for a variety of vague and arbitrary reasons. Such non-contact visiting will become routine and may be imposed and extended for six month periods at a time-indefinitely.

Personal Mail Proposed Rules

On May 29, 1998, the FDOC published the final rulemaking notice to adopt new and amended Routine Mail rules at 33-3.004, F.A.C. These new regulations (that may be in effect by the time you read this) creates severe restrictions and prohibitions on prisoners' incoming personal mail. In part, postage stamps in letters will be prohibited, only 5 SASE envelopes may be received through routine mail, no blank greetings cards will be allowed, only 5 pages of written or printed material other than letters will be allowed per incoming envelope, and mail will be rejected for non-compliance with any of the above.

Legal/Privileged Mail Proposed Rules

Also on May 29, 1998, the FDOC published a final rulemaking notice to adopt new Legal and Privileged Mail regulations at 33-3.005 and 33-3.0052, F.A.C.

The new Legal Mail rules will provide, in part, that indigent prisoners will no longer receive any free postage for legal mail. Attorneys or the courts will not be allowed to send photographs concerning anything other than a criminal case to a prisoner. Mailroom staffs are encouraged to open and read incoming legal mail to determine that it does not contain "articles or clippings or other written materials of a non-legal nature." Attorneys or the courts will not be allowed to include any non-paper items in Legal Mail, such as plastic brief binders, brief fasteners, laminated objects, paperclips, staples, etc. Prisoners will not be allowed to fashion custom-made envelopes for mailing odd sized legal mail packages and will be limited to mailing only what will fit within canteen sold or law library furnished envelopes.

Privileged Mail to or from public officials, government agencies or the news

(Continued on page 12)

NOTABLE CASES
by Sherri Johnson and Brian Morris

First Amendment Retaliation Claim Heightened Burden Of Proof Standard Struck Down By Supreme Court

On May 4, 1998, the U.S. Supreme Court, in a 5-4 decision, allowed the "iron curtain" that is again lowering on prisoners' access to the courts to remain open a crack--for now. However, Justice Stevens, writing for the majority, and Justice Kennedy concurring, provided clear directions to Congress that some legislative "welding" on the curtain may be necessary to seal the remaining cracks. For now, the high court has struck down a federal appeal court decision that had held that plaintiff[s] must show "clear and convincing evidence" that government officials acted with improper motives to survive a motion to dismiss asserting the defense of qualified immunity. The results of this case affects not only prisoners, but every citizen seeking redress for unconstitutional actions taken by government officials for a retaliatory, or discriminatory, purpose.

Leonard Crawford-El is a prisoner serving a life sentence in the District of Columbia prison system. He is considered a litigious and outspoken prisoner who has filed several lawsuits during his confinement and is known for assisting other prisoners with their litigation. Crawford-El has also been active in reporting prison conditions to news media reporters and participating in media interviews for stories about prison conditions.

In 1988 Crawford-El was transferred from a District of Columbia prison to a county jail in Washington State because of overcrowding. He was then moved several more times: from the jail to a Washington State prison, then to a Missouri facility, back to two prisons in the District of Columbia system, and ultimately to the federal prison in Marianna, Florida.

In all this moving Crawford-El had three boxes of personal property, including legal materials, that were transferred separately. When the District of Columbia received the boxes from the Washington State prison, instead of sending them to Crawford-El at Marianna, a correctional officer gave the boxes to Crawford-El's brother-in-law which resulted in a several month delay in his receiving the boxes. The female correctional officer that gave the boxes to the brother-in-law, however, had previously demonstrated animus against Crawford-El because of his litigious nature and association with the news media.

First Crawford-El filed a section 1983 action alleging that the correctional officer had diverted the boxes containing his legal materials to interfere with his access to the courts. After a back-and-forth between the district court and appeal court, Crawford-El then amended his complaint adding two additional claims: a due process claim and a claim that the diversion was motivated by retaliation for his exercise of his First Amendment rights.

According to the amended complaint, Crawford-El had had previous problems with the particular correctional officer that later acted to divert his property. In 1986 Crawford-El had invited a newspaper reporter to visit him and obtained a visitor application for the reporter, which resulted in a front-page article on prison overcrowding. The same female officer, Patricia Britton, had been the one to approve the visitor application for the reporter. After the newspaper article appeared she allegedly accused Crawford-El of tricking her to receive the reporter visit and threatened to make life "as hard for him as possible."

Two years later, in 1988, Crawford-El had another run-in with Britton when he complained about invasion of privacy and Britton allegedly had told him, "You're a prisoner, you don't have any rights." Later in 1988, another front-page newspaper article quoted Crawford-El as saying that litigious prisoners had been "handpicked" for transfer to Washington State so prisoner lawsuits "will be dismissed on procedural grounds." Britton then had allegedly referred to Crawford-El as a troublemaker.

The district court dismissed the amended complaint, granting defendant's motion to dismiss -asserting qualified immunity, because the court access and due process claims were "legally insufficient." The First Amendment retaliation claim was dismissed because it did not allege "direct evidence of unconstitutional motive." This last dismissal was based on prior Court of Appeals' decisions from that jurisdiction that had held "allegations of circumstantial evidence of such a motivation [are] insufficient to withstand a motion to dismiss."

Crawford-El appealed the dismissal and the appeal court affirmed the dismissal of the first two claims, but reviewed the First Amendment retaliation claim en banc. Crawford-El v. Britton, 93 F.3d 813 (CA DC 1996). The en banc appeal court held, pertinently, that in order to prevail in an unconstitutional-motive case, the plaintiff must establish that motive by clear and convincing evidence. The court relied on a prior U.S. Supreme Court case in making this decision. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Crawford-El sought certiorari review of the appeal court's decision from the U.S. Supreme Court, which granted same. Crawford-El v. Britton, 117 S.Ct. 2451 (1997). The majority of the Supreme Court held that the Court of Appeals erred in fashioning a heightened burden of proof for unconstitutional motive cases against public officials. The court found that Harlow does not support the imposition of a heightened burden of proof standard.

The Supreme Court held that, "Our holding in Harlow, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation. Nevertheless, the en banc court's ruling makes just such a change in the plaintiff's cause of action. The court's clear and convincing evidence requirement applies to the plaintiff's showing of improper intent (a pure issue of fact), not to the separate qualified immunity question whether the official's alleged conduct violated clearly established law, which is an 'essentially legal question.'"

The Supreme Court held that in cases alleging unconstitutional motive the plaintiff's allegations of improper intent have nothing to do with whether a defendant is entitled to qualified immunity. The former is an "issue of fact" while qualified immunity is a "legal issue" depending on what law has been previously established. Therefore, consideration of plaintiff's improper intent allegations is improper in considering whether a defendant is entitled to qualified immunity.

The catch inserted by the Supreme Court in both the majority opinion and in Justice Kennedy's concurring opinion, is the result of this having been a prisoner's case. The court expresses sympathy for the heightened standard attempted by the appeal court, but opines that if such a heightened standard is necessary to protect officials from prisoners' actions for damages then Congress should "respond [with] future legislation." Justice Kennedy echoes that suggestion in his concurring opinion. See: Crawford-El v. Britton, 118 S.Ct. 1584.11

FLW Fed. S505(1998).

Two Certified Questions Arise From Claim For Credit Time Served

In January, 1996, Stuart Michael Vanderblomen was sentenced on four second degree felony convictions to four concurrent four year prison terms. The record reflects that the sentencing court only allowed Vanderblomen credit for presentence jail time on one of the four concurrent sentences. Vanderblomen filed a Florida Rule of Criminal Procedure 3.800(a) Motion containing sworn allegations that his sentences were illegal because the sentencing court had failed to allow presentence jail time credit on three of his four concurrent sentences. The sentencing court summarily denied Vanderblomen's Rule 3.800(a) motion and an appeal was taken to the First DCA.

In a well articulated opinion addressing the "History of Jail/Prison Credit Claims Under Rule 3.800(a)," the "History of Jail/Prison Credit Claims Under [Rule] 3.850," and the "Postconviction Jail/Prison Credit Claims After July 1995," the First DCA certified two questions of great public importance:

1) "DOES THE DEFINITION OF AN 'ILLEGAL' SENTENGE SET FORTH IN KING V. STATE, 682 S0.2D 1136 (FLA. 1996), DAVIS V. STATE, 661 S0.2D 1193 (FLA. 1995), AND STATE V. CALLAWAY, 658 S0.2D 983 (FLA. 1995), PRECLUDE CLAIMS FOR ADDITIONAL PRESENTENCING JAIL OR PRISON CREDIT FROM BEING RAISED IN 3.800(a) MOTIONS UNLESS THE DENIAL OF THE CLAIMED CREDIT RESULTS IN A SENTENCE BEYOND THE STATUTORY MAXIMUM FOR THE PARTICULAR OFFENSE?"

and

2) "DOES THE DEFINITION OF AN 'ILLEGAL' SENTENCE SET FORTH IN KING V. STATE, 681 S0.2D 1136 (FLA. 1996), DAVIS V. STATE, 661 S0.2D 1193 (FLA. 1995), AND STATE V. CALLAWAY, 658 S0.2D 983 (FLA. 1995), PRECLUDE CLAIMS FOR ADDITIONAL PRESENTENCE JAIL OR PRISON CREDIT FROM BEING RAISED IN 3.850 MOTIONS, WHEN THE DENIAL OF THE CLAIMED CREDIT HAS NOT RESULTED IN A SENTENCE BEYOND THE STATUTORY MAXIMUM FOR A PARTICULAR OFFENSE, BECAUSE SUCH CLAIMS COULD OR SHOULD HAVE BEEN RAISED ON DIRECT APPEAL."

Finding Vanderblomen's Rule 3.800(a) motion was sworn to and filed within two years of the sentences becoming final, the First DCA "reversed in part, and remanded with directions" holding that "the trial court erred in failing to treat Vanderblomen's sworn motion filed within two years of the finality of his convictions and sentences as a motion filed pursuant to Florida Rule of Criminal Procedure 3.850." See: Vanderblomen v. State, ___ So.2d ___, 23 FLW D795 (Fla 1st DCA 3/24/98).

Claim for Credit Time Served May be Raised In Rule 3.800 Motion

Joseph Sal Mancino filed a rule 3.800(a) motion seeking the award of pre-sentence jail time credit he was legally entitled. The Circuit Court for Pinellas County denied relief on the basis that "the motion is not cognizable under rule 3.800 and must be raised in a motion filed pursuant to Florida Rule of Criminal Procedure 3.850." Mancino v. State, 693 So.2d 73 (Fla. 2d DCA 1997). On appeal, however, the Second DCA reversed and remanded citing Swyck v. State, 693 So.2d 618 (Fla. 2d DCA 1997), for the proposition that it has "consistently held that rule 3.800 is a proper vehicle for raising a credit time served issue where jail credit can be determined from the face of the records." Mancino, 693 So.2d 73. In reversing the order of denial, the Second DCA directed "the trial court to consider the merits of Mancino's motion." Id. Even better, recognizing that its decision was not consistent with the majority of appellate court decisions, the Second DCA certified conflict with the decision entered in Berry v. State, 684 So.2d 239 (Fla. 1st DCA 1996); Sullivan v. State, 674 So.2d 214 (Fla. 4th DCA 1996); and Chaney v. State, 678 So.2d 880 (Fla. 5th DCA 1996).

Significantly, on June 11, 1998, the Florida Supreme Court responded to the certified conflict and, in the process, provided some long overdue clarification on this troubling issue by, among other things, stating: "As is evident from our recent holding in *Hopping [v. State*, 708 So.2d 263 (Fla.1998)], we have rejected the contention that our holding in *Davis [v. State*, 661 So.2d 1193 (Fla.1995),] mandates that *only* those sentences that facially exceed the statutory maximums may be challenged under rule 3.800(a) as illegal."

The Supreme Court approved the Second DCA's decision entered in Mancino and expressly acknowledged that, "[a]s noted by Judge Altenbernd in *Chojnowski [v. State*, 705 So.2d 915, 918 (Fla. 2d DCA 1997)], since a defendant is entitled to credit time served as a matter of law, 'common fairness' if not due process, requires that the State concede its error and correct the sentence 'at any time.'" Ultimately, the Supreme Court held that "credit time issues are cognizable in a rule 3.800 motion when it is affirmatively alleged that the court records demonstrate on their face an entitlement to relief." See: State v. Mancino, So.2d ___, 23 FLW S301 (Fla. 5/11/98).

Legislature's Unreasonable Restriction on Scope or Standard of Appellate Review Violates Constitutional Separation of Powers

Jonathan Denson took an appeal from his sentences imposed on January 2, 1997, in four different criminal case numbers. On appeal, Denson's attorney presented three issues, only one of which had been preserved for appellate review. The Second DCA affirmed the trial court's ruling on the preserved issue but, in a well articulated opinion, reversed and remanded for re-sentencing on the two unpreserved issues because the DCA found those unpreserved issues presented "serious, patent sentencing errors."

The two unpreserved issues that the DCA found to warrant reversal were: 1) That the trial court imposed unauthorized habitual offender sentences, and 2) that the written sentence differed from the orally pronounced sentence. The appellate court's analysis found that "there is no legal authority permitting a ten-year term of imprisonment or a habitual offender sentence for the third-degree felony of possession of cocaine," and that "the five-year increase in the term of imprisonment in the written sentence clearly violates the rule that the written sentence must conform to the oral pronouncement."

Significantly, the Court addressed the statutory amendment affecting its "jurisdiction and scope of review" contained in section 924.051(3), Florida Statutes (Supp. 1996), which was enacted as part of the Criminal Appeal Reform Act. Section 924.051(3) states:

An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

The Second DCA "read the first sentence as an effort to restrict [its] jurisdiction over the case. An appeal 'may not be taken,' i.e., the appellate court has no jurisdiction to hear an appeal, unless a prejudicial error is either preserved or is fundamental." The Court then found that "[t]he second sentence attempts to restrict either [its] scope of review or Eits] standard of review because ... the legislature is attempting to prohibit the court from reversing a sentence on an issue concerning a prejudicial

error that is neither preserved nor fundamental." The Court discusses the legislature's use of the words "fundamental error" and notes that "there is little question that 'fundamental error' for purposes of the Criminal Appeal Reform Act is a narrower species of error than some of the errors previously described as fundamental in case law."

Finding that the newly revised appellate rules pertaining to sentencing errors have not been fully delineated, the Court notes that "there is a real risk that serious sentencing errors, raising significant due process concerns, may not be corrected or may not be corrected in time to provide meaningful relief to a prisoner filing pro se motions if they cannot be corrected with the assistance of counsel on direct appeal."

The Court concluded that under separation of powers, "the legislature is not authorized to restrict [its] scope or standard of review in an unreasonable manner that eliminates [its] judicial discretion to order the correction of illegal sentences and other serious, patent sentencing errors." Noting that its "power to address these issues is not clear and presents an issue of great public importance," the Court certified the following questions to the Supreme Court of Florida:

1. IF A DISTRICT COURT HAS JURISDICTION TO REVIEW A CRIMINAL APPEAL PURSUANT TO SECTION 924.051, FLORIDA STATUTES (SUPP. 1996), DOES IT HAVE DISCRETION TO ORDER THE TRIAL COURT TO CORRECT AN UNPRESERVED ILLEGAL SENTENCE?

2. IF A DISTRICT COURT HAS JURISDICTION TO REVIEW A CRIMINAL APPEAL PURSUANT TO SECTION 924.051, FLORIDA STATUTES (SUPP. 1996), MAY IT ORDER THE TRIAL COURT TO CORRECT A WRITTEN SENTENCE IMPOSING A LONGER TERM OF IMPRISONMENT THAN THAT CONTAINED IN THE ORAL PRONOUNCEMENT?

Acting Chief Judge Campbell and Judge Green both concurred with the Honorable Judge Altenbernd's well reasoned opinion. Interestingly, there was no dissent.

See: Denson v. State, ___ So.2d ___, 23 FLW D1216 (Fla. 2d DCA 5/13/98).

Use of Improper Predicate Offense For Habitual Violent Felony Offender Purposes Does Not Render Sentence Illegal

On July 14, 1997, Jason Tyrone Speights was sentenced as an habitual violent felony offender (HVFO) to a 22 year prison term for the offense of aggravated battery with great bodily harm. Speights appealed to the First DCA arguing that his sentence is illegal because the State relied on a prior carjacking conviction as the predicate offense for imposition of the HVFO sentence. "Carjacking is not a statutorily listed predicate offense for an HVFO sentence."

Prior to the Criminal Appeal Reform Act of 1996, and prior to the decisions entered in Davis v. State, 661 So.2d 1193 (Fla. 1995), and State v. Callaway, 658 So.2d 983 (Fla. 1995), the First DCA had held that "an HVFO sentence is illegal if the necessary predicate conviction is absent and that no contemporaneous objection is necessary to preserve the issue for appeal." Watkins v. State, 622 So.2d 1148 (Fla. 1st DCA 1993), overruled in part on other grounds, White v. State, 666 So.2d 895 (Fla. 1996); see also, Gahley v. State, 605 So.2d 1309 (Fla. 1st DCA 1992); Williams v. State, 591 So.2d 948 (Fla. 1st DCA 1991), quashed on other grounds, 599 So.2d 998 (Fla. 1992) "('Without the necessary predicate convictions appellant's sentence as an habitual offender is illegal. No objection is required to raise the issue of an illegal sentence on direct appeal.')." In Speights' case, however, the First DCA held that the alleged sentencing error "does not satisfy the definition of an illegal sentence set forth in Callaway and Davis." The First DCA found that "[i]n Washington v. State, 653 So.2d 362, 367 (Fla.1994), cert. denied mem., 116 S.Ct. 387 (1995),... the Florida Supreme Court held that it is 'improper' to sentence someone under the Habitual Violent Felony Offender Statute in reliance upon a predicate offense outside those listed in the statute, and did not use the word 'illegal.'" The Court found that Speights' based his claim that his sentence is illegal on the fact that "no enumerated predicate offense appears in the record" and that, presumably, if Speights' "sentence was vacated for lack of a proper predicate offense, the state could present evidence on remand of additional prior convictions which might justify an HVFO sentence." (Emphasis added).

In this case, the Court held "that reliance on an improper predicate offense does not render the sentence 'illegal' for purposes of determining whether the error may be raised for the first time on appeal." The Court also rejected Speights' claim that his 22 year prison sentence was illegal on the ground that it exceeds the statutory maximum for the second degree felony offense of aggravated battery. In rejecting this claim, the Court found that "[u]nder section 775.082(3)(c), [Florida Statutes,] a second degree felony is punishable by a term of imprisonment not to exceed 15 years. However, in the absence of any objection to habitualization, the trial court did not err in relying on the statutory maximum sentence for a habitual violent felony offender convicted of a second degree felony. Under section 775.084(4)(b)2., the statutory maximum sentence for this offense, after habitualization, is 30 years."

Fortunately, either to ease the courts own conscience for not causing this serious sentencing error to be corrected or as a feeble attempt to shift the blame to another court, the First DCA did certify the following question to the Florida Supreme Court as a matter of great public importance:

When a habitual violent felony offender sentence is imposed without record evidence of a prior conviction of an enumerated predicate felony, but without any objection by the defendant to the imposition of such a sentence, and the resulting sentence is above the statutory maximum without habitualization but below the statutory maximum period of incarceration after habitualization, is the sentencing error one that may be raised on appeal for the first time, and corrected despite the lack of any motion in the trial court to correct the sentence pursuant to Fla.R.Crim.P. 3.800(b)?

Notwithstanding the fact that the State relied on an improper predicate conviction to qualify Speights as an HVFO, the First DCA concluded that it must affirm the sentence "[b]ecause the sentence is not illegal, and the issue was not preserved for review by a motion filed in the trial court to correct the sentence." See: Speights v. State, So.2d ___, 23 FLW D1220 (Fla. 1st DCA 5/13/98).

[Comment: Notable cases is intended to assist *FPLP* subscribers with information pertaining to what is happening in the courts. With the limited space available for such information, *FPLP* staff places a special emphasis toward providing information that will benefit the largest number of individuals. The decision to include this particular case in this- issue of FPLP was two-fold. First, like the decisions entered in Callaway and Davis, the Criminal Appeal Reform Act of 1996 has had a major impact on a very large number of convicted felons in the State of Florida. Second, as the Honorable Judge Altenbernd pointed out in his well articulated opinion entered in Denson v. State, ___ So.2d ___, 23 FLW D1216 (Fla. 2d DCA *5/13/98*), "appellate judges take an oath to uphold the law and the constitution of this state. The citizens of this state properly expect these judges to protect their rights." With the decision entered in Speights, however, the citizens should be concerned if they can truly expect the judges, at least from the First DCA, to protect their rights. The Speights Court made no reference to the fact that "[p]risoners are entitled to legal representation on direct appeal, but not in most postconviction proceedings." Denson, 23 FLW at 1217. Could it be that the First DCA is not at all concerned with the fact that "there is a real risk that serious sentencing errors, raising significant due process concerns, may not be corrected or may not be corrected in time to provide meaningful relief to a prisoner filing pro se motions if they cannot be corrected with the assistance of counsel on direct appeal"? Id. Even more egregious is the fact that the Speights Court did not expressly state that it was affirming the serious sentencing error without prejudice to Speights seeking relief through a rule 3.850 motion. Decisions such as the one entered in Speights can reasonably "jeopardize the public's trust and confidence in the institution of courts of law." Denson. If the Florida Supreme Court refuses to grant review or grants review but fails to remand for resentencing pursuant to the Laws of Florida, FPLP respectfully suggests Speights, and similarly situated convicted felons, should pay particular attention to Judge Alten-bernd's concurring opinion entered in Cholnowski v. State, 705 So.2d 915, 917 (Fla. 2d DCA 1997)-bm] ■

(Continued from page 8)
media will be prohibited if any part of it contains photographs, articles or clippings (any written or printed materials), greeting cards, non-paper items of any description, address labels, etc.

An agency left without fearing any effective administrative or judicial challenges begins to feel an immunity to adopt any regulation it wishes. Only by grievances, rule and statute judicial challenges is a "check and balance" created to limit arbitrary discretion. Or you can sit back and ruminate on important issues like what's on today's soap opera, who will go to the Superbowl, who wants to gamble at Spades, what's the latest rumor, or how can I get in my neighbor's business. After all, no one will miss your few remaining freedoms-except you. ■

$10 MILLION LAWSUIT FILED FOLLOWING PRISONER'S DEATH

An Osceola County, Florida, jail corrections officer, Greg Wilson, wrapped a towel around the mouth and nose of prisoner Daniel Sagers and then pulled and twisted back on his head, laughing he asked "why" when he was told to ease up. Jail Nurse Shelley DePaz gave that testimony in a pre-trial deposition during May in a $20 million lawsuit filed by Sagers' family against Osceola County officials.

The assault on Sagers by several correctional officers occurred on March 5, 1997. After Sagers allegedly pushed a female correctional officer, Gail Edwards, into a wall, officers Wilson, Edwards, and reportedly at least four other officers, jumped Sagers and brutally beat and choked him, resulting in Sagers' death seven days later.

Following Sagers' death, three officers, Wilson, Edwards, and Milton Santiago, were indicted by a grand jury on criminal charges. Typical in jail and prison murders by corrections officers, Santiago and Edwards were only charged with misdemeanor battery for what witnesses have described as a "long and bloody beating." Both Edwards and Santiago have already been allowed to plead guilty to the misdemeanor charges and were sentenced to community service and anger management classes. Officer Greg Wilson is still awaiting trial on the most serious charge—manslaughter.

During May, Santiago also gave a pre-trial deposition in the lawsuit against his fellow officers. He supported DePaz's testimony and went further, testifying that three other officers who were directly involved were not even charged in Sagers' death or beating. Santiago claims that he only held Sagers down on the floor with his foot as the three other uncharged guards punched and kicked Sagers in the stomach, jammed a thumb into his neck, applied karate chops to his neck, yanked his head back by the hair, and later bragged about the beating.

Santiago also testified that he had reported excessive use of force against other prisoners in the jail to higher-ups before the Sager incident, but that nothing was ever done about it.

The county tried to have a gag order placed on the pre-trial depositions of Nurse DePaz, Santiago, and several other witnesses, but the *Orlando Sentinel* challenged that and federal Judge David Baker ruled that the public had a right to know what happened to Sagers.

Such beatings have reportedly become common not only in our jails in Florida, but also, perhaps more frequently where they can be covered up more easily, in our prisons. It was only fortune that provided willing witnesses in Sagers' case.

Prison activists claim that only approximately one percent of such beatings by jail and prison guards ever reach the attention of the public, even when as in Sagers' situation, death is the result. Many feel that recent actions of the courts and politicians to adopts rules and laws that effectively deny prisoners access to the courts to challenge official abuse will once again encourage jail and prison guards to feel that they can do anything they want to a prisoner, and little or nothing will be done about it.

[Source: *Orlando Sentinel*, 5/19/98, 5/21/98] ■

BRIEFS

■ The last issue of *FPLP* reported on the negligent death of Susan Bennett in the Orange County, Florida, jail ("NURSES ARGUE AS JAIL INMATE DIES"). Bennett's family had filed a $10 million lawsuit against the county and several corrections workers at the jail. On April 27, 1998, Orange County agreed to settled the case out of court for $3 million. Additionally, as many as 80 health-care workers at the jail may lose their jobs as investigations continue into negligent medical care at the jail.

■ In the May issue of *F.L.I.P.*, the newsletter of Families with Loved ones In Prison, it was reported that the Florida House of Representatives' Corrections Committee will be reviewing FDOC visiting policies and procedures during that committee's interim legislative session this summer. The April 9th Capitol Rotunda Rally is given credit for this achievement. Much more, however, needs to be done.

To find out more about F.L.I.P contact:

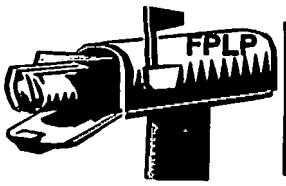
F.L.I.P.
710 Flanders Ave.
Daytona Bch., FL 32114
904/254-8453
EMail: flip@afn.org

■ According to the February issue of *The Bridge*, the newsletter of the New Jersey Prisoners Self-Help Clinic, prisoners in that state boycotted the implementation of a collect telephone scheme similar to the one recently implemented in Florida. Since November, 1997, when the new phone system became operative, approximately 90% of New Jersey prisoners have refused to use the monitored phones or to complete the limited phone lists. When prison officials tried to issue prisoners a PIN number the prisoners returned the numbers to prison officials, and vowed to write letters rather than subject their families and friends to the exorbitantly high phone charges. The FPLP staff wishes New Jersey prisoners the best in their ongoing, unified, struggle.

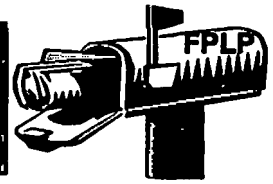
AMATEL V. RENO UPDATE

The following information appeared in the Fall/Winter 1998 issue of *The Na-*

(Continued on page 14)



FPLP SOUND OFF



Dear Perspectives: Thanks so much for all the support and for a newsletter that keeps us informed. I have my sister ordering a subscription for me and herself so we can keep up with the changes taking place and I want her to have the opportunity to join forces wherever she may be able to help. In a recent issue of FPLP there was a note about the possibility of Pell Grants coming back. I was taking courses towards a degree when they stopped Pell Grants. I would like to know more about this issue. **B.W., JCI**
[Dear B: We have no more information than what appeared in the issue you reference. We believe that C.U.R.E., P.O. Box 2310, National Capital Station, Washington DC 20013-2126, may be working on this situation and may be able to provide more info. The U.S. Congress controls such education grant programs.]

Dear FPLP: Several months ago JCI opened a close management unit. Broward CI then transferred their CM prisoners here. Now JCI has received numerous youthful offenders and somehow changed their classification from Y.O. to adult, and placed them on CM. These young girls are locked in a cell 24/7, except for a 2 hour "exercise" period once per week. They are not receiving the required child nutrition meals per state law, and there are no programs being provided to them. Mental health only has "walkthroughs" twice a month and talks to them briefly through a crack in the door. Some adult women coming here are being CM reviewed due to past records, some dating back to the 80's with no disciplinary problems since then. Disciplinary due process is almost non-existent here in the DR hearings. Numerous officers here are rude, unprofessional, provocative, and liars. It is a game to them. **S.B., JCI**

Dear FPLP: The Jan/Feb issue of FPLP hit the mark with "Big Bob's Opinion Service." My offense occurred Oct 95', the 857~ law did not go into effect until Jan 96', but the FDOC has stated that I, along with thousands of others whose offense occurred before Jan 96', don't qualify for the award of our proper gaintime. Second let me inform all Muslims who follow the Quran and the Journal of Prophet Mohammad (SAS) that this place has a nice CM cell waiting for your arrival. There, your mail will be highly censored, you will be harassed because of your faith, and the grievance procedure is nonexistent. So, reroute if you can. This is one time I don't want for my brother what I have. **S.M.S., SRCI**

FPLP: Enclosed is a change of address. I am to be released soon but want to continue receiving FPLP. On 12/1/97 privately operated Gadsden CI banned smoking. Now it is a smoke-free compound-except for the healthy black-market that has developed. One pack of cigarettes now sells for $100, yes, that's $100 for 20 cigarettes. Cartons sell for $1,000, and no officials seem to care. Of course, a few prisoners have been caught smoking, but there is no FDOC rule prohibiting it, so the rumor is the FDOC will not process a DR for such "offense." Isn't banning cigarettes at just this one prison discriminatory? It really angers me speculating on how the black-market cigarettes are getting in the gate, they're making a killing. **W.D., Gad CI**
[Dear W: After the Tom Waugh settlement newly arriving prisoners at your institution probably need to immediately file medical grievances seeking nicotine cessation aides. Where the FDOC has been forced to admit that nicotine addiction is a serious medical condition requiring medical treatment with cessation aides this would equally apply to any private prison company seeking to ban smoking. Those who have already been forced to quit would likely have less of a claim than those just now being forced to quit cold turkey. Do the "homework" first - research, document, work together and do it right.]

FPLP Friends: Even though my subscription is still good for a while I don't want to wait until the last minute, so here is a renewal. I also want to say that I appreciate all the wonderful work the staff does for me and all the others on this side of the fence. You have told it right about ECI. The officers jump on inmates for little or no reason and then falsify reports to cover it up. They are letting other inmates into cells to jump on others. When Tallahassee sends investigators everything is different and in good order. Well, I'm just a nobody trying to let a little light on the truth. Peace.
R.S., ECI

Dear Friends at FPLP: Recently while attending a Hamilton CI AA meeting, all the inmates were informed that there had been a memo concerning the extra 6 days those under the Waldrup system had been receiving. The inmates were told, by the new program supervisor, that as they (DOC) were able to go over the individual records, they would be deducting any gain time given for attending the AA programs from the end of July 1997 until the present. It is only 6 days a month, however, over the years it adds up to 72 days a year or approximately 2 1/3 months yearly off the end of a sentence. Over a few years that makes a big difference. I decided to check into this. After a few phone calls I found the person to speak with was Fred Roesel, head of the DOC classification department. He explained that because of court decisions in other states and complaints from some inmates in the Fla. system this policy had been adopted. He said this policy affected all programs that had a "quasi-religious component." Speifically, AA and NA programs. It seems that there have been a lot of inmates who felt is was mandatory to attend these programs to get the extra Waldrup gain time and that the religious nature of the programs was offensive. So this is the DOC's answer to those inmates. Mr. Roesel said this was a policy, not a rule or statute, and that he was unsure when it was adopted or became effective, that he would have someone else contact me. Ellen Roberts, Tallahassee office, phoned me back with more information. She said the policy did take effect 7/15/97, however, no back gain time would be taken, the inmates just would not be able to earn any in the future. I asked her how this "policy" was disseminated as no one else in the Tallahassee office seemed to know anything about it. She said all institutional program supervisors had received a copy of a memo July 1997. It seems that until recently this was a well kept secret. This is confusing. Those inmates under Waldrup Gain Time are suppose to be allowed to receive the extra "program" gain time. How are they to earn it if it is not being awarded for participating in the programs. Thank you so much for all you do and for being there when we need you. I am ... **D.J. Alestra, CA**

Dear D: The FDOC is looking at every angle that it can to reduce gain time awards to prisoners, not only Waldrup eligible prisoners. The FDOC has thousands of empty beds and the legislature has refused to provide more money for two years now because of those empty beds. This has seriously disrupted the FDOC's plans to build and keep building prisons at taxpayer expense. Notice of this policy was posted at numerous institutions a few months ago. No explanation was provided for the "policy," however, your research appears to answer that question. It would seem that where the law provided that prisoners covered by the Waldrup decision would be able to earn extra gain time for attending programs, that there must be programs in place to afford that opportunity. It is suspected the FDOC will not provide alternatives, however, unless forced to do so by the courts, as they have had to be forced in every gain time situation over the past few years. Thank you for your information.]

Perspectives: On June 1st James Quigley finally went to a federal trial in Tampa trying to get two photographs back that prison officials had taken from him over five years ago. After a one and a half day trial, a decision was made in his favor. This decision may help those prisoners who have had family photographs taken by the DOC under the new property rules. As FPLP pointed out in a recent issue, photographs are not being addressed in the class action on the new property rules. The new property rules limit family photographs to only fifty. Those who have not already had their photos taken will, sooner or later. Prisoners will either be forced to send any photos in excess of fifty out or dispose of them. Many prisoners have no place anymore to send photos to. The First Amendment is implicated in this. Prisoners can receive a thousand picture postcards and keep them, but they cannot possess over fifty photos. This needs to be challenged. **L.C., HAR CI**

Dear FPLP: It begins July 1st. The DOC intends to tightly regulate everything that Florida prisoners see, read, or hear. On July 1st the book ban goes into effect, and no books are excluded. Secular books, religious books, legal books, newspapers, magazines, flyers, will all be limited to no more than four per prisoner. If the library already has a copy of a particular type book, too bad, prisoners will not be able to personally possess it. Mass censorship is going to occur on incoming reading materials. Where they already control everything that is seen on TV inside the prisons, and only garbage (violent programs, talk shows, soap operas, cartoons) is allowed, where the telephones are now recorded and monitored, and where visiting is going to be reduced under the new visiting rules, with the book banning the control will almost be complete. What is seen, heard, and thought will be regulated. The weak, beaten, psychotropic controlled or mentally ill will be programmed for more destruction, one by one, divided they will conquer. Shades of the Gulag, they have learned well, while prisoners learn less. **S.T., Polk CI**

[All letters received cannot be printed because of space restrictions. Unsigned letters will not be printed or letters that obviously are not intended for publication. Please indicate in your letters if you do not want it printed, otherwise FPLP reserves the right to print all letters received and to edit letters for length.]

(Continued from page 12)

tional Prison Project Journal (ACLU) concerning Amatel V. Reno, 975 F.Supp. 365 (D.D.C. 1997). The ACLU's National Prison Project furnished attorney representation in this ongoing case:

Amatel V. Reno (District of Columbia) This case challenges the "Ensign Amendment," passed by Congress in 1996, which prohibits the Federal Bureau of Prisons from allowing prisoners to receive publications featuring nudity. On August 12, 1997, the district court held the statute unconstitutional and granted a permanent injunction against its enforcement by the Bureau of Prisons. The defendants have appealed to the District of Columbia Circuit Court of Appeals. Oral argument is set for May. In the meantime, Congress has reenacted the challenged statute.

This case is not controlling in Florida. This case does appear to be the leading case at this time that is challenging prison bans on "sexually explicit" publications. According to the above notice, this case is now pending an appeal decision in the federal District Court of Appeals. *FPLP* will carry more information on this important case as it becomes available.

[Subscriptions for prisoners to the ACLU's quarterly *National Prison Project Journal* are only $2.00. Subscriptions for all others are $30.00. To subscribe send payment to: National Prison Project Journal, ACLU, 1875 Connecticut Ave. NW #410, Washington DC 20009.] ■

JUVENILE INJUSTICE

by Holly DeSue

From 1994 to 1995 there was a 3 percent decline in juvenile arrests for violent crime, from 1995 to 1996 there was a 6 percent decline according to data from the National Center for Juvenile Justice. Largely due to high profile cases like the recent shooting deaths of four students and a teacher in Jonesboro, Arkansas, charged to 11 and 13 year old boys, or the school shooting deaths on May 21 in Springfield, Oregon, attributed a 15 year old, who is also accused of killing his parents, the nation's fears are focused on juvenile crime, perhaps unreasonably so.

The 1997 study conducted by the National Center for Juvenile Justice shows that between 1987 and 1996, the number of juvenile arrests increased 35 percent. In 1996 juvenile arrests totaled over 135,000. Yet, the conclusion reached by the study shows that "today's violent youth commits the same number of violent acts as his/her predecessor of 15 years ago." What has changed is the number of guns available to the youth of today compared to 15 years ago, the increasing breakdown in family units, values, and morals. Focusing the public's attention on juvenile crime also means diverting it's attention from child poverty and our failing education systems-problems some believe are the true crimes being committed.

Along with these high profile violent juvenile incidents has concurrently arisen an attitude that juveniles should be punished as adults, that this is the only viable solution to our societal problems. To make it more palatable, politicians and the mass medias demonize juvenile offenders as "juvenile predators," not worthy of rehabilitation or socialization. Instead our demagogues—the get tough promotionists—spoon-feed the public's consciousness with the harsher punishment solution, the "treat them as adults," and "adult-crime adult-time" slogans designed to perpetuate the economically motivated criminal justice/prison industrial complex in America.

Florida is one of the leading states that has bought into the movement to treat children as adults were crime is involved. According to figures from the state Department of Juvenile Justice, Florida has the highest rate of transfers of juveniles to adult court in the country. The number has hovered between 5,000 and 6,000 such transfers per year for the last few years. A 1996 study of that practice in Florida that was recently released in the national publication *CRIME AND DELINQUENCY* found that Florida's efforts in this respect are actually counterproductive.

That study found that youths who are transferred from juvenile to adult court were more likely to be re-arrested upon release than a parallel group of non-transferred youthful offenders. The authors pointed out that despite the rhetoric and demagoguery being used by politicians and the mass media to promote such transfers, the fact remains that only one half of 1 percent of all juveniles are ever arrested for violent crimes. Statistically, the majority of those juveniles who make up this small group of violent offenders are predominately males, from low-income urban minority families, and have been exposed to alcohol, drug and physical abuse in the home. This, the public is assured, is immaterial, or something that cannot be solved so it can be ignored.

Another recent study by authors Jason Ziedenburg and Vincent Schiraldi for the Justice Policy Institute found that juveniles that are incarcerated with adult offenders are 8 times more likely to commit suicide, 5 times more likely to report being raped or sexually attacked in the adult facility, 2 times as likely to be beaten or abused by correctional staff, and 50 percent more likely to be attacked with a weapon than an adult prisoner. Yet, the public sentiment *is being* carefully groomed to accept that juvenile/adult incarceration, and adult punishments for children, are the answer. A bill is pending before Congress to allow even more juvenile/adult incarceration.

One thing for sure, putting off what should be addressed today for "feel good" solutions will return to haunt our society as a whole in the future. If "children are the future," just what are we creating for the coming millennium? ■

U.S. SUPREME COURT HOLDS ADA APPLIES TO PRISONS

With almost unprecedented speed the U.S. Supreme Court ruled, unanimously, June 15, 1998, that the Americans with Disability Act (ADA) applies to prisoners. Usually conservative Justice Anthony Scalia wrote the opinion, which all the other justices agreed with, finding that Congress did not exclude any citizen, including prisoners, from the protections of the Act. The ADA protects the exclusion of people who have a disability from government funded programs and pro-

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PRISON LEGAL NEWS

Perhaps the most detailed journal describing the development of prison law is Prison Legal News." - Marti Hiken, Director Prison Law Project of the National Lawyers Guild.

PLN is a 24 page, monthly magazine, published since 1990, edited by Washington state prisoners, Paul Wright and Dan Pens. Each issue is packed with summaries and analysis of recent court rulings dealing with prison rights, written from a prisoner perspective. 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 $15 for prisoners. If you can't afford to send $15 at once, send at least $7.50 and we will pro-rate your subscription at $1.25 per issue. Please send no less than $7.50 per donation. New (Unused) U.S. postage stamps may be used as payment.

For non-incarcerated individuals, the subscription rate is $20/yr. Institutional subscriptions for attorneys, libraries, government agencies, non-governmental organizations, etc. are $50/yr. Sample copies are available for $1. Contact:

Prison Legal News
2400 N.W. 80th St., Ste 148
Seattle WA 98117

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Assisting Inmates On
Their Individual Needs

Dear FPLP Subscriber:

As many of you know, I was falsely accused of a heinous crime and suffered through many years on the receiving end of the Florida judicial system before I was released after winning my direct appeal. See *Smolka v. State*, 662 So.2d 1255 (Fla 5th DCA 1995), *rev. denied*, *State v. Smolka*, 668 So.2d 603 (Fla. 1996).

Undoubtedly, many of you may be in need of effective assistance. In this regard, I would urge you to contact me, as I provide representation on a fee paid basis.

Best wishes,

Thomas E. Smolka

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vides that accommodations be provided by state and federal departments to assist disabled persons.

Thirty-four state Attorney General's (AGs), including AG Bob Butterworth of Florida, criticized the Supreme Court's decision, claiming it will cost millions of dollars to provide assistance to disabled prisoners and that disabled prisoners will be filing frivolous lawsuits for trivial things like wheelchair ramps, lower water fountains, rails around toilets, etc. Similar to what occurred with the Religious Freedom Restoration Act of 1993 (RFRA), AG's from around the country have vociferously opposed the ADA because they claim it should not apply to prisoners. Using prisoners as the scapegoat, these AGs really sought to limit all disabled persons' rights.

The high court rejected the AGs argument, finding that it was indisputable that Congress specifically did not intend that prisoners be excluded from the ADA's protections against disability discrimination. The various AGs apparently were furious that the Supreme Court would uphold the disableds' right to be free of discrimination. They pointed out that the court did not address the issue of whether the ADA infringed on states' rights, which was used to strike down the RFRA last year. The case decided June 15, 1998, did not contain that question for the court to consider (that case was covered in the last issue of *FPLP*, Vol. 4, Iss. 3, Pennsylvania DOC v. Yeskey, No: 97-634 (1998 WL 21894)).

There is a California case, however, seeking Supreme Court review that does raise the "state infringement" issue that the court may hear later this year. For now though, disabled prisoners cannot be discriminated against any more than any other citizen can be. ■

TELEPHONE OVERCHARGE REFUNDS

On April 30, 1998, the Florida Public Service Commission (PSC) issued a final decision in last year's PSC proceedings requiring prison collect telephone service provider MCI to refund over $1 million in overcharges to prisoners' families and friends. The PSC's final order requires MCI to distribute credits across-the-board on the remaining $123,739.62 to all families and friends of Florida prisoners who currently are hooked up to MCI. This was felt to be the only fair way of distributing the remaining overcharges.

FPLP, FLIP and other groups associated with FPAN were instrumental in overseeing the PSC proceedings in this situation and in assisting MCI and the PSC to ensure that as many people as possible who were initially overcharged by MCI did receive a direct refund last year. We all need to continue vigilance on the prison collect telephone scheme and continue pressure on the PSC to reduce and keep these rates comparable with society as a whole. Prisoners' families and friends, who must pay the exorbitant telephone rates, must demand an end to the gouging and monopolization of the Department [illegible] which realized over $15 mil[illegible] telephone commissions last [illegible] nothing but allowing the te[illegible] panies to install phones for [illegible] use. ■

GEORGETOWN LAW JOUR[illegible]

For several years the wo[illegible] at the Georgetown Univer[illegible] have devoted time, wo[illegible] in providing hundreds of [illegible] copies of the highly re[illegible] *town Law Journal Annual Review of Criminal Procedure* to indigent prisoners around the country. This is no longer possible. The following notice is being provided to prisoners requesting this year's Annual Review:

Effective immediately, the Georgetown Law Journal Annual Review of Cr[illegible] (the CCP) will no longer be ma[illegible] mentary basis. The Georgetow[illegible] Center regrets this change in [illegible] requests exceed our ability to supply [illegible] tary copies. To purchase the 1998 Criminal Procedure Project, send a check or money order for $10.00 with your name and addres[illegible]

Journal Administration (Subscriptions)
Georgetown University Law Center
600 New Jersey Ave., NW
Washington DC 20001

The Center is sending out notices to many prison law libraries that complimentary copies are available to the libraries for all prisoners to use. Check with your librarian if they have ordered the new 1998 issue, or order yourself one for $10. ■

FLORIDA PRISON LEGAL PERSPECTIVES

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