FLORIDA PRISON LEGAL

Perspectives

VOLUME 8, ISSUE 4 ISSN# 1091-8094 JULY/AUG 2002

ARAMARK MISSES THE MARK

by Oscar Hanson and Sherri Johnson

Aramark Corporation, a leading player in the "outsourcing" business, manages food service facilities throughout the nation for such companies as Boeing, Los Angeles Convention Center, Duke University, Oriole Park at Camden Yards, and in 11 state prison systems. Florida is among the 11 prison systems. Florida contracts with Aramark to provide food service for approximately 63,000 prisoners.

It is notable to recognize that Aramark ranks No. 1 in the outsourcing category of *Fortune Magazine's* 2002 list of "America's Most Admired Companies." Aramark provided food service for the 2000 Republican National Convention, and its top executives gave thousands to Republican campaign accounts for the 2000 election, including Bush for President.

With such credentials, it cannot be disputed that Aramark, with a 176.5 million dollar net income for fiscal year 2001, is a leader in food service vending. While Aramark has many satisfied customers, something is amiss with one of its major customers: Florida prisons.

In 2001, Aramark contracted with the Florida Department of Corrections to provide food service operations in 126 kitchens within the DOC. The five-year 58 million dollar deal is projected to cut the state's prison food costs from 80.2 million in 2000 – 2001 to 72.2 million in the 2001 – 2002 fiscal year. Aramark provides meals at a cost of $2.32 per inmate each day. How is Aramark managing to save the state millions while earning the same? The answer will not surprise most Florida prisoners, but may shock the conscience of those beyond the prison fence.

Recently the *St. Petersburg Times* exposed unscrupulous acts of the Aramark Corporation. At Madison Correctional Institute, Corrections Captain Hugh Poppell noticed the featured entrée of sloppy joes was particularly soupy. Further investigation revealed that Aramark staff had diluted the entree several times, adding ketchup and tomato paste to make it stretch among the 700-plus inmates still lined up to be fed. The Warden was summoned and his investigation revealed that the recipe had been shorted by 70 pounds of ground beef and turkey. The other ingredients such as onions, celery and green peppers were completely absent in the entrée. This is just one of many food episodes revealed by the *St. Petersburg Times*.

Other scenes from the Aramark kitchen include: In Marion County, inmate kitchen workers, on orders from an Aramark supervisor, soaked spoiled chicken in vinegar and water to take away the smell before cooking. Corrections officers

FAMILIES ADVOCATES PRISONERS

UNITED FOR PRISON REFORM

ON THE INSIDE

FLORIDA PRISON LEGAL PERSPECTIVES
P.O. Box 660-387
Chuluota, Florida 32766

Publishing Division of:
FLORIDA PRISONERS' LEGAL AID ORG., INC
A 501(c)(3) Non Profit Organization
Fax (407) 568-0200
Email: fplp@aol.com
Website: www.fplao.org

FPLAO DIRECTORS
Teresa A. Burns-Posey
Bob G. Posey, CPL
Darrell E. Blackwelder, CPL
David W. Bauer, Esq.
Loren D. Rhoton, Esq.
Oscar Hanson, CPL
Linda Hanson

FPLP STAFF

Publisher	Teresa A. Burns-Posey
Editor	Bob G. Posey
Co-editor	Oscar Hanson
Research	Sherri Johnson
Administrative Assistant	Darrell E. Blackwelder

FPLP ADVISORY BOARD
William Van Poyck
Philip Bagley-Terry Vaughn
Michael Lambrix-James Quigley
Linda Gottlieb-Susan Manning
Enrique Diaz-Gene Salser
Michael Palmer-Mark Sherwood
Trish Mills

FLORIDA PRISON LEGAL PERSPECTIVES(FPLP) is published up to six times a year by Florida Prisoners' Legal Aid Organization, Inc. (FPLAO), 15232 East Colonial Drive, Orlando, FL 32826-5134, mailing address: P.O. Box 660-387, Chuluota, FL 32766.

FPLP is a non profit publication focusing on the Florida prison and criminal justice systems. FPLP provides a vehicle for news, information, and resources affecting prisoners, their families, friends, loved ones and the general public of Florida.

Reduction of crime and recidivism, maintenance of family ties, civil rights, improving conditions of confinement, promoting skilled court access for prisoners, and promoting accountability of prison officials are all issues the FPLP is designed to address.

FPLP's non attorney volunteer staff cannot respond to requests for legal advice. Due to volume of mail that is received and volunteer staff limitations, all correspondence that is received cannot be responded to, but all mail does receive individual attention.

Permission is granted to reprint material appearing in FPLP that does not indicate it is copyrighted provided that FPLP and any indicated author are identified in the reprint and a copy of the publication in which the material is published is provided to the FPLP publisher.

The material in FPLP should not be relied on as authoritative citation and may not contain sufficient information to deal with a legal problem.

FPLP is automatically sent to all members of FPLAO, Inc., as a membership benefit. Membership dues for FPLAO, Inc., run on a yearly basis and are $9 for prisoners, $15 for family members/individuals, $30 for attorneys/professionals, and $60 for businesses/institutions/organizations. Family members or loved ones of prisoners who are unable to afford the basic membership dues may receive membership for any size donation that they can afford.

found out and ordered 500 pieces of chicken thrown out.

In Brevard County, inspectors found maggots on serving trays and kitchen floors.

In Indian River County, inmate workers struggled one morning to cook pancakes while an Aramark supervisor was found sleeping at his computer terminal.

In Putnam County, corrections officers discovered pans of refrigerated food with altered dates, a serious infraction that sparked a major investigation. Officials suspected Aramark was subverting the prison system's strict rules on using leftovers – rules intended to prevent mass inmate sickness.

In Hernando County, officers discovered that Aramark prepared a spaghetti dinner using old chili con carne from the previous week and creamed beef from the day before. The cream sauce was washed off and the beef reused.

At an Avon Park work camp, inmates complained when the pork roast servings were the size of saltines.

In Sumter County, Aramark habitually deviated from the master menu, preparing food in a manner not consistent with the required method, constant food shortages resulting in long delays, and unauthorized food substitutes.

Though Aramark boasts that it has saved money for Florida, its methods, have raised a new set of concerns for frontline corrections officials. Dirty kitchens that in one county produced maggots, frequent cooking delays that throw off prison schedules, food quality that often fall beneath expectations and a chronic inability to follow state rules and regulations are among the concerns raised by corrections officials. As a result of Aramark's actions, the state has assessed $110,000 in fines against the corporation.

FDOC inspection reports disclosed by the *St. Petersburg Times* describe Aramark kitchens as "filthy" and in one case, "horrendous." Other reports reveal that Aramark employees were constantly late for work and in some cases didn't show up at all, leaving corrections officers to start preparing meals.

Shortly before signing with Aramark, Florida prison officials were made aware of similar problems at an Aramark-run prison food service in Ohio. There, an inspection team found "inexcusable" sanitation problems and "observed a near riot during breakfast as a result of Aramark's strict compliance with portion sizes." So vigilant is Aramark's cost-cutting that supervisors are trained to order workers to scoop food from pans in a way that wouldn't jam too much food into the ladle notwithstanding the mandated size portions established by state dietitians. The Ohio investigation team suggested Aramark" should be liable for damages as a result of the lack of training, cleaning, and maintenance." Ohio's contract with Aramark was not renewed.

On its website, Aramark promises to reduce the costs of its corrections customers without "shortcuts" or a drop in quality. It boasts of a computerized recipe and menu system that reduces waste and prevents the ordering of excess meals.

Ohio was not the only state to experience problems with Aramark. In August 2001 a Wisconsin state lab confirmed that 55 prisoners in the Winnebago County Jail had been poisoned by salmonella-tainted food. The country's health director said analysis found salmonella strains C-1 and C-2 in spaghetti that had been served to the jail's prisoners. Several prisoners had to be hospitalized with salmonella

poisoning. The county sheriff's department confirmed that foodservice at the jail is handled by Aramark Inc., a Philadelphia-based food service corporation. Aramark was hired in 2000 to take over the jail's food service. The $7.8 billion company was low bidder for the jail contract. Sheriff Michael Brooks said he couldn't justify spending more taxpayer funds on prisoner meals than necessary. Doug Warner of Aramark said his company prides itself on its sanitary preparation and handling of food and is careful to avoid food-borne illness threats.

In Florida, however, the problems have been caused by not enough meals. On many days Aramark runs out of food leaving many inmates in line for 20 – 30 minutes while additional food is prepared. Often, the hastily prepared food has no relationship to the day's scheduled menu, a violation of the rule that mandates consistency.

Aramark's methodology for earning millions from the corrections system is not complex. First, Aramark is fully aware that complaints of prisoners will rarely reach beyond the fences of the prison so they are not a potential threat to the company's operations. Second, Aramark is paid for each inmate listed on the institution's daily roster regardless whether each inmate visits the chow hall for their meals. Consequently, Aramark habitually under prepares the number of meals by anticipating only a portion of the prison population.

Al Shopp, a former corrections officer who now monitors working conditions in prisons for the Florida Police Benevolent Association, said that Aramark too often gambles on a lower inmate turnout at each meal. Too often, he said, corrections officers are forced to intervene when quality is low or the portions too small. In effect, Shopp said, they "prop up" Aramark.

As corrections officers will readily tell you, in a world where eating is perhaps the day's only pleasure, if prisoners are not properly fed the potential for riot exists. "It's an officer safety issue, " said Shopp, referring to Aramark's food episodes. "It's just a situation that I'm afraid will eventually go awry."

Though prisoners have complained, "there have been no security incidents whatsoever," said Elizabeth Hirst, a spokeswoman for Gov. Bush. That may depend on which side the fence you are on.

In February, in an unusual show of unity among Florida's new age prisoners, prisoners at a major institution in Hardee County staged a one-day food strike.

In Jackson County, where prisoners recently received watered-down roast pork, cold spaghetti, undercooked meat and watered jelly in place of pancake syrup, there was "tension in the dining hall" when Aramark served crumbled cake that had to be served by spoon, a corrections officer wrote in a report.

When Aramark served up undercooked potatoes and grits to confinement prisoners at a Walton County institution, an officer reported, they "began to yell. Rattle cell doors and became disorderly."

Hirst discounted such incidents. "There have not been any riots or lives in jeopardy. The inmates are not always pleased with the food, but that's going to happen from time to time.... No one's going hungry," Hirst said.

"We're almost always hungry since Aramark took over," said one prisoner at a Sumter County prison, who asked not to be identified for fear of retaliation. "I'd estimate that a good third of the food isn't edible, undercooked, poorly prepared or spoiled," the prisoner told an FPLP reporter. "If you don't have money to eat out of the canteen, and the prices there keep going up and up, then you either go hungry most of the time or get it the best way you can. A lot of food stealing and selling goes on, guys just trying to survive."

Teresa Burns-Posey, chairperson of Florida Prisoners' Legal Aid Organization that is based in Orlando, said the situation is actually more complex that recently reported in the *St. Petersburg Times*. The problems being reported against Aramark now are nothing new, she said, the same problems existed when the Department of Corrections ran the kitchens; only then they weren't officially reported by inspecting corrections officers against their fellow officers running food service.

"There's a lot of disgruntled state prison employees right now," Burns-Posey said. "They would like to see Aramark fail." They see any privatization as a threat and believe if Aramark can be forced to pull out then they can keep privatization from spreading further in Florida's prisons, according to Burns-Posey.

That view would support why shortly after Aramark took over food service at most of Florida's prisons the FDOC suddenly revised its rules concerning food service operations, making the rules much stricter. It might also account for why the administration at a major institution in Lake County uses food service job assignments for prisoners as punishment. There, records show, the prisoners with the worst disciplinary histories are forced to work in food service, placing the burden of trying to control such prisoners directly on Aramark employees who are not trained as corrections officers.

Commenting on Aramark's history in Florida's prisons so far, Sterling Ivey, the FDOC's new public relations director, said, "It was a bumpy start," but, "We feel like we're moving in the right direction."

[Sources: *St. Petersburg Times*, 6/17/02; *The Northwestern*, 8/29/01; FDOC records; interviews] ■

FOOD STRIKE SUCCESS

On July 2 the *St. Petersburg Times* ran an editorial entitled "Prisons need better food service" that complimented that paper's June 17 article concerning Aramark and the problems that company has been experiencing in Florida's prisons. (See above article.) FDOC Secretary Michael Moore was quick to respond with a letter to the Times' editor that was part spin control and part veiled threat.

Moore emphasized in his letter, that the *Times* printed, how much money has been saved taxpayers by Aramark taking over prison food services. He also noted that Aramark was only given 90 days to move into and take over food service operations at 126 correctional facilities, but failed to explain why such a short period was allowed for such a massive undertaking. He made no mention that Gov. Jeb Bush basically ordered the FDOC to give the contract to Aramark - immediately.

Perhaps most notable in Moore's letter was his labeling the horrible conditions at many prisons as exampled in the *Times'* June 17 article as "isolated incidents," an apparent favorite label of Mr. Moore and one he is reaching the point of abusing. He also warned the Times that, "What is critical now is to stop reckless rhetoric, including completely unfounded speculation about possible 'food riots.' I sincerely hope your editorial did not unwittingly exacerbate inmate anxiety or jeopardize safety."

Michael Moore apparently did not wish to mention that between June 22 and June 25 hundreds of prisoners at Avon Park Correctional Institution staged an almost unprecedented food strike against Aramark's food service. According to eyewitness accounts, the peaceful protest was in response to Aramark shorting on serving amounts, substituting constantly running out of food and prisoners having to wait in long lines while more was cooked.

Prisoners report that the food strike was successful. At the time Avon Park CI held 823 prisoners. On the first day of the strike only 210 ate, on the second day 188, on the third day 161, and by the fourth day only 110 ate. Reportedly, by the third day prison officials were concerned, with the Asst. Warden and Colonel going dorm to dorm asking prisoners to go eat. On the last day the Asst. Warden even had Aramark prepare fried chicken and french fries hoping to lure prisoners to the chow hall. A rumor circulated, however, that he was overheard saying fried chicken would surely get the black prisoners to eat and break the strike. Only 88 prisoners showed up for the fried chicken.

Prisoners report that after the strike the food did improve.

[Note: FPLP staff wishes to make it clear that we do not propose in any manner that food strikes are the solution to food problems. We, like the *Times*, are merely reporting news. If we were to suggest a solution it would likely be litigation. Hundreds of court cases filed against Aramark; that they would have to defend with their own lawyer's at great cost to the company, probably would have a significant impact] ■

JURY, NOT JUDGE, MUST MAKE DEATH DECISION

by Teresa Burns-Posey

WASHINGTON – In a 7-2 decision handed down by the U.S. Supreme Court on June 24, 2002, the high court ruled that juries, not judges, must decide whether there are aggravating factors that warrant the imposition of the death penalty. The decision throws into doubt potentially hundreds of death sentences in nine states, including Florida, where either judges alone decide whether factors exist to justify a death sentence or where judges can override a jury's recommendation of life and impose the death penalty.

In this latest ruling, that strikes a blow against disparity in capital punishment, an unusually united Supreme Court held that allowing judges, instead of juries, to determine whether factors exist to impose the death sentence violates defendants' right to a jury trial as guaranteed by the Sixth Amendment.

The decision is expected to have an impact on death-sentenced prisoner's sentences in Arizona, Idaho, Montana, Nebraska, Colorado, Florida, Alabama, Indiana and Delaware. The impact may be less in those latter four states as they allow the jury to make a recommendation on whether the death sentence should be imposed or not but then its up to the judge to make the final decision. In cases where the judge followed a jury-recommended death sentence there may not be a conflict with this latest Supreme Court decision. If the judge overruled the jury's recommendation against the death penalty, however, this new ruling will likely require the sentence to be thrown out. (See *FPLP*, Vol. 8, Iss. 2, "Wheel of Death: Florida's Other Lottery Game.")

Already debate has started in Florida about the court's ruling and how many death-row prisoners may be affected by it. Some prosecutors claim it will affect only a small number, while some defense attorneys claim it could affect the majority of Florida's 373 death-row prisoners.

Supreme Court Justice Ruth Bader Ginberg, writing for the majority of the court, made clear the extent of the ruling, stating, "This case presents a question of who decides; judge or jury. The context is capital murder; the issue, life or death.... Capital defendants.... are entitled to a jury determination of any fact" that increases their punishment.

Justice Sandra Day O'Conner, who dissented from the majority's ruling, said the decision will unleash a rash of claims by defense attorneys. But, she predicted, most will be unsuccessful because the prisoners are either too far along in the appeal process to raise new claims on this new decision or will be unable to show how they were harmed by being sentenced under the old procedure.■

ATTENTION PRISONERS

Have you ever requested the production of witnesses or evidence at a disciplinary hearing and been denied that production ? If so, did you grieve that denial of due process or proceed to a court action ?

A court action is currently pending that challenges such due process violations. If you ever filed a grievance or court action on this issue, please provide us an outline of the relevant facts. If you still do not possess your grievances or court pleadings, we can obtain copies with your information.

Contact:

Superior Investigations of Florida
Attn: Due Process Suit
PO Box 384
New Port Richey, FL 334654

DNA SCORE: 110 PRISONERS FREED

by Linda Hanson

For the 110 prisoners freed from prison after their convictions were overturned by DNA tests, the vindication brought neither a happy ending nor a happy beginning. Their time in prison, when totaled, surpassed 1,000 years.

Recently the Associated Press conducted an examination of what happened to the 110 prisoners who were all wrongly convicted, but released years later after DNA tests exonerated them.

Vincent Moto, a 39-year-old father of four, survives on odd jobs, welfare and food stamps. Moto was unjustly convicted of rape and imprisoned for over 10 years before being released. "I have to live with these scars all my life," Moto says. "It destroyed my family."

Richard Danziger is even less fortunate. Wrongly convicted of rape and sentenced to life, he suffered permanent brain damage when his head was bashed in by another inmate. Danziger was released in 2001 after he served 11 years in Texas.

In reviewing the cases the AP examination found:

- About half of the men exonerated had no prior adult convictions, according to legal records.
- Eleven of the men served time on death row; two came within days of execution.
- Slightly more than a third have received compensation, mainly through state claims. Some have received settlements from civil lawsuits or special legislative bills. For others, claims or suits are pending; and some had lawsuits thrown out or haven't decided whether to seek money.
- The men averaged 10 and a half years behind bars. The shortest wrongful incarceration was one year; the longest, 22 years. Altogether, the 110 men spent 1,149 years in prison.
- Their imprisonment came during critical wage-earning years when careers and families are built. The average age entering prison was 28. Leaving, it was 38.
- Their convictions follow certain patterns. Nearly two-thirds were convicted with mistaken testimony from victims and eyewitnesses. . About 14 percent were imprisoned after mistakes or alleged misconduct by forensics experts. Nine were mentally retarded or borderline retarded and confessed, they said, after being tricked or coerced by authorities.

Finally freed – by determined attorneys or their own perseverance – the men were dumped back into society as abruptly as they were plucked out. Often, they were not entitled to the help given to those rightfully convicted. "The people who come out of this are often very, very severely damaged human beings who often don't ever fully recover," says Rob Warden, executive director of Northwestern University School of Law's Center on Wrongful Convictions.

About 60 percent of the men were helped by a 10-year old legal assistance program called The Innocence Project located at the Cardozo School of Law in New York. The project's first DNA releases came in 1989.

Most of the 110 men released had been convicted of rape; 24 were found guilty of rape and murder; six of murder alone.

Legal experts differ on whom these men represent. But Peter Neufeld, who co-founded The Innocence Project with attorney Barry Scheck, says these men are the tip of the iceberg. In other words, many more men remain imprisoned for crimes they haven't committed.

The increase in exonerations has prompted legislation allowing prisoners access to DNA testing. Twenty-five states now have such laws, most passed in the last three years.

Meanwhile, the number of prisoners asking for genetic analysis grows. The Innocence Project says it has 4,000 requests. The biggest problem is racing against time.

In three-quarters of the Project's cases, physical evidence such as hair or blood has been lost, misplaced or destroyed. During a criminal trial, the disappearance of evidence can mean acquittal. After conviction, it can mean losing all chances to prove one's innocence.

When lawyers for Marvin Anderson wanted DNA analysis in 1993, they were told the evidence against him had been destroyed. But a swab containing genetic material was later found, taped to the inside of a lab technician's notebook. It proved Anderson was not guilty.

For those wrongfully convicted men who have no genetic material for testing their plight remains hopeless. They are caught in a Kafkaesque vortex – the rest is history.

[Source: AP Press, *Citrus County Chronicles*, 6/2/02] ■

GOT THE MESSAGE?

CONVICTED BY JURIES, EXONERATED BY SCIENCE

With the advent of DNA (genetic testing) many of our nation's prisoners have been exonerated and freed from their imprisonment. Seventy years ago Edwin Borchard produced a classic study of how the wrong person gets sent to prison or to death. The hapless innocents Borchard profiled in his book called *Convicting the Innocent* included a coal miner and a doctor, Central European immigrants and American blacks. In those days exoneration was almost always a matter of luck.

Today, thanks to genetic testing (when it is available), wrongful convictions can be reversed more confidently than ever before. And that confidence allows us to analyze the reasons for such convictions with greater centrality than Borchard or his contempories could.

Yet what is striking about the recently overturned death-penalty convictions (110 have been reversed in the past 30 years) and other cases in which DNA evidence belatedly showed the accused to be innocent is how clearly the convictions rested on the same flawed foundations that Borchard identified.

What appears to do in the wrongly convicted is the kind of evidence that seems clinching, that often is clinching – namely, eyewitness identifications and confessions. However, the human memory is not a video recorder; eyewitness testimony is notoriously flawed. And although most of those who confess are guilty, people can and do confess to crimes they did not commit. Most of the time the confessions are the product of law enforcement coercion. Sometimes confessions come because the suspect is bewildered, frightened, or exhausted. Other times confessions may come because they are children, or adults with the mental capacity of children.

Studies have shown that children in interrogation rooms will sometimes confess to crimes they did not commit on the assumptions that they will then be allowed to go home. The mentally retarded, too, will sometimes falsely confess, and for the same sorts of reasons; eagerness to please, naiveté about the legal weight of a confession, a yearning to be back home or to see their mothers.

Just last year, DNA evidence exonerated Jerry Frank Townsend; a twenty-seven-year-old retarded man, who had admitted in 1979 that he had committed six murders and a rape. Townsend served twenty-two years at FSP before being cleared.

As Borchard recognized, "even without the use of formal third-degree methods," as he described it, "the influence of a stronger mind upon a weaker often produces, by persuasion or suggestion, the desired result." Even able-minded adults, subjected to the right combination of coercion, sleeplessness and grief, can falsely confess.

In 1999 Keith Longtin, whose case was documented in a *Washington Post* series on wrongful convictions, allegedly made self-incriminating statements to the police about his wife's murder. Longtin had been held for thirty-eight hours of questioning, during which he slept (according to police logs) for a total of fifty minutes. While Longtin was in prison, the real killer, whose identity was later established by DNA evidence, sexually assaulted five women at knifepoint, one in front of her young child.

In 1988 Christopher Ochoa confessed to raping and murdering a young woman in Austin, Texas; he was later definitively cleared.

A 1996 Justice Department report entitled Convicted by Juries; Exonerated by Science detailed twenty-eight cases of wrongful convictions. Eyewitness identifications, usually by the victims, were the decisive factor in most of them. Like a confession, the testimony of an eyewitness, particularly a victim, is powerful stuff, oftentimes viewed as the gold standard of evidence. But in fact eyewitness accounts can be fragmented and changeable and subject to the deep desire to see somebody punished for a crime.

Experts have come up with two very good ideas for making wrongful convictions less likely in the future. One is to improve the standard police lineup by letting witnesses see only one purported suspect at a time, so they can make an absolute judgment about each one. When witnesses see six people at once, they make relative judgments, comparing the six and picking whoever looks most like the person they remember from the crime scene rather than evaluating each individually. Conducting lineups sequentially seems like a minor change, but research conducted by psychologists Elizabeth Luftus and Gary Wells has shown that it reduces the number of mistaken identifications by as much as 50 percent without significantly reducing the number of convictions. Ensuring the detective running the lineup does not know who the real suspect is, and so does not make leading comments (Don't you want to look at number 3 again?), helps too, for the same reason that good clinical research is double-blind; otherwise it's easy to contaminate the results with intentional or unintentional bias.

The second notable idea is to video tape all police interrogatories, so that a reliable record exists of the questioning that produced a confession – how leading, how

coercive, how open-ended and of the suspect's comportment during it. Many law enforcement agencies already employ videotaping during interrogations. Videotaping makes some police officers who haven't used it a little nervous. They worry that it will cost too much, that curbside or squad car confessions will be inadmissible because taping hasn't started yet, or that officers will feel constrained form using aggressive but legitimate interrogations techniques – for example, telling suspects they have evidence that they don't, a method the Supreme Court has upheld.

The objections are largely unfounded. Videotaping is cheap: cameras cost a few hundred dollars, and whatever expense police department incurs in videotaping is considerably less than the multi-million-dollar awards some states have paid for wrongful convictions. It is also ubiquitous, both in law enforcement (recall the buzz about those traffic tickets with a surveillance photo of your car?) and in everyday life. Indeed, in the era of amateur videos, Court TV, and twenty-four-hour-a-day news coverage, we have come to expect a video record of almost anything that matters to law or to history, and plenty of things that don't. Certainly laws can be written to include good-faith exemptions for confessions obtained off-camera. (It is noteworthy to mention that many police agencies have cameras mounted on the dashboards of their cruisers; just watch clip after clip of the greatest chase on network television.)

Despite some initial reluctance, police officers and prosecutors in the places where videotaping is already standard practice now tend to support it just as much as do advocates for the wrongfully convicted. According to a 1993 Justice Department study of police videotaping, the most thorough search to date on the subject, 97 percent of the departments that taped reported that it was "very useful" or "somewhat useful." The study found that videotaping increased the number of convictions and guilty pleas and decreased allegations of police misconduct. Moreover, when such allegations are made, videotapes can prove or disprove them to almost everybody's satisfaction.

Videotaping is one of those rare innovations that can help either side in the criminal-justice system, for the simple reason that it serves the quest to find out what really happened, which is to say the quest for the truth, that, in the end, is it's real virtue. "To me, videotaping is in the same category as DNA evidence," says William Geller, the author of the 1993 Justice Department study and currently a consultant to police departments. "It's a powerful truth-finding tool."

[Source: *The Atlantic Monthly*, "The Agenda," July/August 2002] ■

WIRED

AROUND THE SYSTEM

■ During June posters started appearing on bulletin boards at many Florida prisons encouraging prisoners to have outside sources send money to their prison accounts using Western Union wire transfer services. When the posters first appeared, obviously with the FDOC's approval, the Department's rules did not authorized such wire transfer. Before the month was over, however, the FDOC proposed a new rule that would authorize wire transfers (from Western Union only, which is specifically named in the rule proposal). Additionally, the rule proposal would only allow funds to be mailed to the FDOC's Tallahassee financial center and repeals the existing rule allowing funds to be sent to institutions to be forwarded to the main financial center. Questions have been raised about how Western Union was picked to be allowed to do wire transfers and how much the FDOC is receiving from the transfer charges. Western Union is charging approximately $12 for every $100 it wires to a prisoner's account. Prisoners at some institutions report they will boycott the Western Union service to prevent the FDOC making even more money off their families and friends than they already are with exorbitant collect phone rates and steadily increasing canteen and visiting park vending machine prices.

■ On May 24, 2002, the FDOC attempted to launch a surprise final rulemaking notice to quickly adopt major and negative changes to the Department's routine, legal and privileged mail rules. The initial notice on this proposal had been published almost 1½ years ago on January 5, 2001. The proposal, if adopted, will prohibit prisoners' outside correspondent from including more than three 8 1/2" x 11" pages of additional written material (not counting the letter) in routine mail per envelope. That provision would effectively hinder or prevent prisoners from sending legal materials to family members, friends or clerical services to be typed or photocopied and returned; prevent prisoners from receiving bank statements of more than 3 pages from outside bank accounts; prevent prisoners from receiving articles, clippings, Internet research except 3 pages at a time; prevent prisoners from obtaining case copies and law review article copies from state university law libraries; prevent prisoners from purchasing trial transcripts from court reporters, etc. The proposed rules would also limit photographs in mail to 3 per envelope and limit what items may be sent to a prisoner as legal mail. The proposal would also prohibit any written materials from being received as privileged mail, from public officials or the news media, except correspondence. Other written materials would not be allowed in privileged mail. FPLAO was prepared for such a sneak attack by the FDOC on this proposal. This is the fifth time the FDOC will have tried to adopt these or similar rules in the past four years, but was stopped by FPLAO the four previous times. FPLAO immediately moved to challenge this latest proposal by administrative means. FPLAO will do its best to stop adoption of this latest proposal that seeks to place severe and negative limits on all Florida prisoners' and their correspondents' First Amendment rights. (The outcome of FPLAO's challenge will be reported in the next issue of *FPLP*.) ■

ANOTHER PLANT CITY POLICE OFFICER PLEADS GUILTY

Tampa- Four days into his federal trial on corruption charges Plant city police officer Armond Contnoir pleaded guilty and agreed to testify in a federal probe that has implicated high-ranking police and city officials.

Contnoir is the third officer to plead guilty to corruption charges in the probe that has shaken the very foundations of criminal justice in this South florida town. Contnoir broke down in his defense after two former Plant City police officers testified that police there routinely searched homes without warrants, lied to judges, stole pornographic videotapes and bent the law to make arrests. Those two former officers, Gregory Laughlin and Robert D. Dixon, described a conspiracy stretching from the department's elite drug unit to the police chief and city manager.

Dixon testified that Cotnoir, his former partner, and he routinely operated in the "gray area of the law." Cotnoir will be sentenced at a later date and the sentence will be based on how much he cooperates with federal officials continuing the corruption probe. (*FPLP* reported on this in the last issue in "Plant City Mayor, Police Chief Accused of Cover-up".)

[Source: *Tampa Tribune*, 7/12/02]

JUVENILE OFFENDER ABUSE INCREASING IN FLORIDA

The Daytona Beach News-Journal reported in a recent article that since Jeb Bush became Florida's governor reports of alleged abuse of incarcerated children in Florida have almost doubled.

In the 1997-98 fiscal year, the last period before Gov. Bush took office and appointed former state Sen. Mill Bankhead to run the Juvenile Justice Department, there were 1,237 abuse allegations from juvenile prisoners. By the 2000-01 fiscal year abuse complaints had risen to 2,2285.

During the same four year period, the verified number of abuse against juveniles showed "some indicators" rose from 271 to 488. The *News-Journal* based its report on data compiled by the Department of Children and Families, which operates the Florida Child Abuse Hot line.

[Source: *Daytona Beach News-Journal, 6/30/02]*

PRO SE LITIGATION

by Justin Case

Most litigating prisoners proceed as indigents. Not surprisingly, most also proceed without counsel. Thus, in terms of both the judicial treatment of the litigants and the legal issues confronted, there is a fair amount of overlap. As a subject that is too often ignored and too little understood, however, pro se litigation merits separate attention.

One characteristic common to most pro se cases is frustration – from delay; from distrusting of opposing parties and counsel; from lack of familiarity with the law, judicial processes, and even legal terminology; and from lack of confidence in a legal scheme that routinely refuses to afford amends where the pro se litigant feels they are due.

On the problems of litigating without counsel, see: Larsen, A Prisoner Looks at Writ-Writing, 56 Calf. L. Rev. 343, 352 (1968): "The uneducated writ-writer is not capable of intelligently analyzing the function of law in our society or of interpreting the court decisions construing the law. Pro se litigants commonly make the mistake of selecting dictum from a decision and interpreting it as the absolute rule of the case. And when they lose they retort: Justice is nothing but an elusive abstraction, a fiction. It assumes an air of reality only because the majority of people in this country live their lives without being required to seek justice. The unfortunate ones who seek justice find that it exists only in the minds of the judges."

In 1972, the Supreme Court decided the case of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972), where the per curiam opinion held that pro se pleadings are to be held to a less stringent standard than formal pleadings drafted by lawyers. The reasons for the *Haines* test are manifest. A pro se complaint often provides an unsatisfactory foundation for deciding the merits of important questions because typically it is inartfully drawn, unclear, and equivocal, and because thorough pleadings, affidavits, and possibly an evidentiary hearing will usually bring out facts which simplify or make unnecessary the decision of questions presented by the naked complaint.

According to one court, pro se pleadings must be read with "the appropriate benevolence." See: Eisen v. Eastman, 421 F. 2d 560, 562 (2d Cir. 1969). But what is "appropriate benevolence?"

Recharacterization of pro se pleadings is a frequent occurrence. Typical examples of recharacterization include treating an application for a writ of habeas corpus as one for injunctive relief under 42 U.S.C. Section 1983. See: e.g. *United States ex rel Johnson v. Chairman, New York State Board of Parole*, 363 F. Supp. 416, 417 (E.D. N.Y. 1973), *affirmed* 500 F.2d 925, 926 (2d Cir. 1974); and treating applications for leave to proceed in forma pauperis or assignment of counsel on appeal as one for a certificate of probable cause (now a certificate of appealability), required by 28 U.S.C. Section 2253 before a habeas corpus appeal may be taken. See: e.g. *Madison v. Tahash*, 359 F.2d 60 (8th Cir 1966).

Unfortunately, the problems of dealing with pro se litigation are complicated further by the fact that not only are these mostly-handwritten petitions, letters, requests and motions disorderly, numerous, repetitive, discursive, and sometimes mad, but many are illegible and unintelligible.

Another major problem with pro se litigation is the "frivolous filer." While not all pro se litigation is frivolous, the number of suits that are overshadow the more meritorious suits that may not receive a fair determination because of the court's frustration with the frivolous cases. And, indeed, the courts and legislators have responded by putting laws on the books to curtail prisoner pro se litigation. See: 18 U.S.C. 3624, 3626, The Prisoner Litigation Reform Act of 1995; 28 U.S.C. 2244 et. seq., Antiterrorism and Effective Death Penalty Act of 1996.

When Shakespeare wrote in King Henry VI, "The first thing we do, let's kill all the lawyers," he probably did not have the pro se litigant in mind. Although appointed attorneys sometimes are indifferent to their clients' concerns, see e.g., *Wilkins v. United States*, 441 U.S. 468, 99 S.Ct. 1829 (1979), the fact remains that the vast majority of pro se post conviction litigants seek not only leave to proceed in forma pauperis, but the appointment of counsel at state expense. This is no wonder. In one empirical study of habeas corpus cases, for example, pro se petitioners were successful in only 0.9 percent of the cases, while petitioners represented by counsel had won in 13.7 percent of the cases. See: P. Robinson, *An Empirical Study of Federal Habeas Corpus Review of State Court Judgments*, 58 (1979); See also: Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321 (1973).

The authority to appoint counsel stems from 28 U.S.C. section 1915 (d) (1976), which provides in part that the court may request an attorney to represent any indigent person unable to employ counsel, and 18 U.S.C. section 3006A (g) (1976), which provides in part that any person subject to revocation of parole, in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of Title 28 may be furnished representation whenever the U.S. Magistrate or the Court determines that the interests of justice so require and such person is financially unable to obtain representation.

A question that has begged an answer is whether appointment of counsel in post conviction proceedings should be of right, rather than in the court's discretion. Both the Committee on the Federal Courts of the New York City Bar Association and the American Bar Association have recommended that counsel be appointed in 1983 actions and habeas corpus applications to avoid inefficient treatment of the substantive merits of claims and in order to conserve judicial manpower.

In any event, under present law there is no broad right to court-appointed counsel in post conviction proceedings. Although no United States Supreme Court case is directly on point, *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974), provides a close analogy. Faced with the question whether *Douglas v. California*, 372 U.S. 353 (1963) – which requires appointment of counsel for indigent state defendants on their first appeal as of right – should be extended to require counsel for discretionary state appeals and for applications for review in the Supreme Court, in a six-to-three decision, the Court decided in the negative. The dissenters made a valid point: "there can be no equal justice where the kind of appeal a man enjoys depends on the amount of money he has."

Leave to proceed in forma pauperis and appointment of counsel are both significant aspects of access to the courts. But there are other important issues as well, not the least of which is how a pro se prisoner is to write a sufficiently intelligent application for such preliminary relief in order to get over the frivolousness hurdles.

In *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (1977), the Supreme Court held that the fundamental Constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. In *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747 (1969), the Supreme Court invalidated a regulation that prohibited state prisoners from assisting each other with habeas corpus applications. *Johnson* was unanimously extended to cover assistance in civil rights cases as well. See: *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974). Also in 1974, the Court struck down a regulation that barred law students and paraprofessionals employed by lawyers who were representing prisoners from seeing inmate clients. See: *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800 (1974). The touchstone in these cases was not merely access to the courts, but meaningful access to the courts.

To say that pro se litigation as come a long way, however, is not to say that no problems remain. Foremost among them is the definition of "meaningful." For example, what items must be included in an adequate prison library? An adequate law library is not the only problem facing pro se prisoners. What can be done for illiterate or unlearned prisoners? In Florida this problem was resolved in *Hooks v. Moore (Wainwright)* closing nearly thirty years of litigation. The District Court for the Middle District of Florida concluded that the plan submitted by the Defendant Department of Corrections designating the contents of the prison's law library collections provides inmates with the constitutional right to access the courts enunciated in *Bounds*.

At the time *Hooks* was decided, Florida's prisons were equipped with adequate law libraries, word processors and typewriters used to prepare legal documents, law clerks, and other legal services. Following *Hooks*, the DOC has begun to effectively dismantle the Plan promulgated by the DOC and accepted by the Court. Long gone are many of the legal books that once were available to inmates. Long gone are the available hours or the unrestricted access to law libraries to research and present meaningful actions in the courts. Long gone are the typewriters. Long gone are law clerks, replaced by research aides who can only provide answers on questions related to the inmate's criminal conviction, civil rights complaints, administrative actions filed with the Florida Parole Commission or the Florida Bar, and grievances filed with the DOC. Research aides cannot assist with Divorce, Paternity, or Adoption proceedings notwithstanding constitutional implications, especially when there is a risk of parental rights being terminated. The list goes on.

Among other things, the above concerns show that a particular legal decision is not necessarily carved in stone. It is only a resting point between the previous case and the succeeding one, and much more often than not it raises more questions than it answers.

While law is not a technical science, highly educated, devoted judges and practicing attorneys find it difficult to read a statute, a legal treatise or an opinion and determine its precise meaning. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time and more assistance than the trained lawyer in exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult. With the DOC dismantling the *Hooks* Plan, it may take another thirty years to restore what has now been lost. ■

NOTABLE CASES

by Oscar Hanson

The following are summaries of recent state and federal cases that may be useful to or have a significant impact on Florida prisoners. Prisoners interested in these cases should always read the full case as published in the Florida Law Weekly (Fla. L. Weekly); Florida Law Weekly Federal (Fla. L. Weekly Fed.).

U.S. Supreme Court

McKune v. Lile, 15 Fla. L. Weekly (Fed) s333 (Sup. Ct 6/10/02)

Kansas prisoner Robert Lile was convicted of multiple sex offenses and prior to his scheduled release was advised by prison officials that he would be required to participate in a Sexual Abuse Treatment Program (SATP). As part of the program, participating inmates are required to complete and sign an "Admission of Responsibility" form, in which they accept responsibility for the crimes for which they have been sentenced, and complete a sexual history form detailing all prior sexual activities, regardless of whether the activities constitute uncharged criminal offenses. The information obtained from SATP participants is not privileged, and might be used against them in future criminal proceedings. Officials informed Lile that if he refused to participate in the SATP, his prison privileges would be reduced, resulting in the automatic curtailment of his visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges. He would also be transferred to a potentially more dangerous maximum-security unit. Lile refused to participate in the SATP on the grounds that the required disclosures of his criminal history would violate his Fifth Amendment privilege against compelled self-incrimination. Lile sought injunctive relief pursuant to 42 U.S.C. Section 1983 and the U.S. District Court granted Lile summary judgment. An appeal to the Tenth Circuit Court of Appeals by the State was affirmed. On Certiorari review, the U.S. Supreme Court reversed.

In a 5-4 split decision, the U.S. Supreme Court held that the SATP serves a vital penological purpose and that offering inmates minimal incentives to participate does not amount to compelled self-incrimination prohibited by the Fifth Amendment.

[Comment: As Justice Stevens correctly observed in his well written dissent, no one could possibly disagree with the plurality's statement that "offering inmates minimal incentives to participate [in a rehabilitation program] does not amount to compelled self-incrimination prohibited by the Fifth Amendment." The question that this case presents, however, is whether the state may punish an inmate's assertion of his Fifth Amendment privilege with the same mandatory sanction that follows a disciplinary conviction for an offense such as theft, sodomy, riot, arson, or assault. Until this recent decision, the Supreme Court has never characterized a threatened harm as "a minimal incentive." Nor has the Court ever held that a person who has made a valid assertion of the privilege may nevertheless be ordered to incriminate himself and sanctioned for disobeying such an order. As Justice Stevens so pointedly remarked, this is truly a watershed case. Based on an ad hoc appraisal of the benefits of obtaining confessions from sex offenders, balanced against the cost of honoring a bedrock constitutional right, the plurality opinion holds that it is permissible to punish the assertion of the privilege with what it views as modest sanctions, provided that those sanctions are not given a "punitive" label. Indeed the sanctions are severe, but even if they were not so, the plurality's policy judgment does not justify the evisceration of a constitutional right.]

Devlin v. Scardelletti, 15 Fla. L. Weekly (Fed) s354 (Sup.Ct. 3/26/02)

The U.S. Supreme Court has held that no named class members in a class action lawsuit who have objected in a timely manner to the approval of a settlement agreement at the fairness hearing have the power to bring an appeal without first intervening.

Federal Circuit Court

Jackson v. FDOC, 15 Fla. L. Weekly (Fed) C 629 (11th Cir 6/7/02)

In this case the 11th Circuit Court of Appeals addressed the issue of whether a district court may determine that a habeas petition is time-barred even though the state did not raise the issue.

In analyzing the limitations period of the AEDPA, the Court reaffirmed that a criminal conviction for a Florida prisoner becomes final upon issuance of the mandate on direct appeal. See *Tinker V. Moore*,

255 F.3d 1331, 1333 (11th Cir. 2001), cert. Denied, 122 S.Ct. 1101 (2002). In *Tinker*, the Court held that even though Florida law allows prisoner two years to file a Rule 3.850 motion, the prisoner must file the motion within one year after his conviction becomes final in order to toll the one-year limitations period under the AEDPA.

In resolving the issue above, the Court recognized that every other circuit that had dealt with the issue has found that, even though the statute of limitations is a affirmative defense, the district court may review *sua sponte* the timeliness of the 2254 petition. Following the reasoning of the other circuits, the 11th Circuit held that the district court possessed the discretion to raise the timeliness issue.

Swan v. Ray, 15 Fla. L. Weekly (Fed) C 636 (11th Cir. 5/3/02)

The 11th Circuit reviewed the above case on appeal and held that no abuse of discretion existed when the U.S. District Court denied Swan's motion for joinder in a case fild by another inmate after entry of judgment. The Court reasoned that Swan did not have the right to the same injunctive relief as the other inmate claimed in his action.

The Court held that a district court may join a person to an action when the person seeking joinder asserts a right to relief jointly, severally, or in the alternative with the party who failed the action; that right to relief arises from the same underlying transaction or series of transactions; and, the claims have a common factual or legal basis.

Florida Supreme Court

Griffin v. Sistunck, 27 Fla. L. Weekly S378 (Fla. S.Ct. 5/2/02)

In this case the Florida Supreme Court revisited its prior decisions in *Haag v. State*, 591 So.2d 614 (Fla. 1992), which established the prisoner "mailbox rule," and *Thompson v. State*, 761 So.2d 324 (Fla. 2000), which remedied further problems associated with the "mailbox rule." Both cases established that for purposes of timely court filings, the document is deemed filed on the date the prisoner lists in his certificate of service.

The issue in this case was whether an inmate must include the exact language set forth in *Thompson* and rule 9.420, which was amended shortly after *Thompson* was decided, in order to invoke them mailbox rule. Recently, the Second DCA examined the *Thompson* decision and concluded that the Supreme Court did not intend that an inmate recite the exact phrase, "the pleading was placed in the hands of prison or jail officials for mailing" on a particular date in the certificate of service in order for the pleading to fall under the mailbox rule.

The Supreme Court agreed with the Second DCA and held that its decision in *Thompson* was intended to reduce the hurdles inmates encounter in gaining access to the courts, not to put in place additional hurdles. Currently, no special language other than the regular certificate of service is required.

[Note: The matter was referred to the Appellate Court Rules Committee to propose an amendment to Rule 9.420 to include a separate certificate of service form for use by prisoners.]

State v. Lemon, 27 Fla. L. Weekly S 563 (Fla. Sup. Ct. 6/6/02)

In a 4 – 3 split decision the Florida Supreme Court has held that a defendant sentenced outside the guidelines (departure sentence) under the 1995 amendments invalidated in *Heggs v. State*, 759 So.2d 620 (Fla. 2000), is not "adversely affected: if the reasons invoked for going outside the guidelines would be valid under both the 1994 and 1995 laws".

This case hinged on the meaning of the term "adversely affected" found in the *Heggs* opinion. The Second District Court of Appeal had interpreted the term to mean that a defendant would not be "adversely affected by the application of the 1995 guidelines law in a sentencing proceeding so long as the departure sentence was based on departure reasons that would be valid under both the 1994 and the 1995 guidelines." *See Ray v. State*, 772 So.2d 18 (Fla. 2d DCA 2000) and *Kwil v. State*, 768 So.2d 502 (Fla. 2d DCA 2000).

However, the Fourth District Court of Appeal interpreted the definition of "adversely affected" when applied to a sentence outside the guidelines as being based on whether the trial court would have initially sentenced a defendant to a departure sentence if it had seen a 1994 scoresheet, instead of a 1995 scoresheet.

Resolving the conflict the Supreme Court agreed with the Second District's analysis and disapproved the Fourth's. The term "adversely affected" is applicable to both guideline and departure sentences.

Young v. Moore, 27 Fla. L. Weekly S514 (Fla. Sup.Ct. 5/30/02)

In an original writ proceeding to the Florida Supreme Court Florida prisoner Chad Young argued that the Department of Corrections was precluded in his case from imposing a gain time calculation based on a gain time statute from a year different than used for sentencing. The Supreme Court rejected Young's argument and held the plain meaning of the statute governing Young's gain time calculation specifically directs the

Department to calculate Young's gain time as of the date the crime was committed.

In January 1997, Young pled guilty to first-degree scheme to defraud that began in 1991 and ended in 1996. In April 1997, Young was sentenced to two years on community control. However, in 1998, Young was adjudicated guilty of violating community control and the court resentenced Young under the 1991 guidelines to five and a half years in prison. Young was placed in the DOC on April 27, 1998. The DOC applied the 85 percent gain time statute to Young's sentence, which prompted this action.

Because Young's scheme to defraud, which was a continuing offense, which over-lapped into 1996, the DOC correctly applied the 85 percent statute to his crimes. For purpose of calculating date of offenses, the offense date is when the last overt act in furtherance of the scheme was committed.

State v. Seraphin, 27 Fla. L. Weekly S473 (Fla. S.Ct 5/16/02)

In this case the Florida Supreme Court accepted jurisdiction to resolve a certified conflict between the Fourth and Second District Courts of Appeal on the issue of the perceived view that a "per se" rule permitted a defendant threatened with deportation to withdraw his plea any time a trial court fails to provide the information required by rule 3.172 (c)(8).

In *Peart v. State*, 756 So.2d 42 (Fla. 2000), the Supreme Court identified the proper vehicle through which a noncustodial defendant could present, as a basis for post conviction relief, a violation of rule 3.172 (c)(8) due to the trial court's failure to provide advice regarding the possible immigration consequence of the defendant's plea. The Court expounded on the process.

In order to establish the required prejudice component as a result of the trial court's failure to provide advice regarding possible immigration consequences of plea, a defendant must show prejudice not only by subsequent threat of deportation, but also must demonstrate that he or she was prejudiced in the process by entering the plea because trial court failed to provide the information required by rule 3.172 (c)(8).

Even in cases where defendant mistakenly believes that he or she is a United States citizen, if defendant alleges that a plea would not have been entered had information been provided as required by rule, this would require review of the record in light of defendant's allegations, and an evidentiary hearing in the event the record did not conclusively refute defendant's allegations. The Court went on to caution that *Peart* did not create a "per se" rule allowing the automatic withdrawal of plea by all defendants threatened with deportation in cases involving violation of the rule, but explicitly requires showing that, absent the failure to inform defendant, he or she would not have entered plea.

Florida Appeal Courts

McConnell v. Moore, 27 Fla. L. Weekly D1112 (Fla. 1st DCA 5/9/02)

Florida prisoner Alan McConnell petitioned for a writ of certiorari that alleged the circuit court departed from the essential requirements of the law when it denied emergency gain-time he sought by the petition for writ of habeas corpus.

The trial court found that the Florida Supreme Court decision in *Gomez v. Singletary*, 733 So.2d 499 (Fla. 1998), foreclosed McConnell from litigating anew whether the DOC had correctly determined the amount of emergency gain-time McConnell and other similarly situated prisoners were entitled to for any period before November 30, 1995.

On certiorari review, the First DCA agreed that the Supreme Court's decision in *Gomez* foreclosed further review. The Court recognized that McConnell argued that *Gomez* was wrongly decided on the merits, but he had not contended that *Gomez's* precluding relitigation on the merits violated due process. Further, the Court found that McConnell failed to challenge the applicability of the charts listed in *Gomez* to his particular situation.

McConnell's petition sought "the award of emergency gain time credits for each month the prison population exceeded 99 percent of lawful capacity from October 19, 1990 to date." The Court noted that McConnell failed to allege that the prison population exceeded 99 percent of lawful capacity at any time after November 30, 1995.

In *Adams v. DOC*, 801 So.2d 150, 151 (Fla. 1st DCA 2001), the DCA held that the decision in *Gomez* does not preclude the possibility that a prisoner might prove that the prison population has risen again since November 30, 1995, to the applicable threshold. But again, McConnell had not made such an allegation. Instead, he argued that the DOC had incorrectly determined and calculated the formula in determining total design capacity and that the calculations the DOC provided in *Gomez* are not accurate.

The DCA denied certiorari finding that McConnell alleged no basis for relitigating the question and methodology for determining periods beginning on and after July 1, 1985 resolved in *Gomez*.

Newell v. Moore, 27 Fla. L. Weekly D 1195 (Fla. 1st DCA 5/22/02)

In this proceeding, the First DCA reversed a trial court order that denied a prisoner's motion to assess

costs following an earlier reversal on a significant issue on appeal. The trial court had denied the motion to assess costs because the appellant had not prevail on the merits of his earlier claim. As the DCA correctly recognized, under Rule 9.400(a), Fla. R. App. P., costs award does not depend on a party's ultimate success on the merits of a claim; it is sufficient if the party prevails on the significant issue raised in the appeal.

Whisner v. Moore, 27 Fla. L. Weekly D 1195 (Fla. 1st DCA 5/22/02)

On appeal from the denial of a petition for writ of mandamus, the FDOC sought to have the DCA treat the appeal as a certiorari review instead of a plenary review. The DCA denied the FDOC's motion. Although a portion of the order on review reflects that the trial court, in its appellate capacity, reviewed a quasi-judicial action of the FDOC, the order also involves an original disposition of constitutional claims over which the FDOC had no jurisdiction. Thus, Appellant is entitled to a higher standard of review to the appropriate portion of the order.

Harris v. State, 27 Fla. L. Weekly D 946 (Fla. 1st DCA 4/26/02)

In this case Morris Harris entered into a plea agreement which provided that he would be sentenced to a term of 15 years imprisonment, and, at the conclusion of seven years incarceration, the remainder of the sentence would be suspended and he would be placed on probation with the special condition that he complete a sex offender treatment program.

However, four days prior to his tentative release date from prison, the state attorney filed a petition seeking Harris' civil commitment under the Jimmy Ryce Act. Harris filed a motion to enforce the original plea agreement, which was denied by the circuit court. On appeal the First DCA held the doctrine of equitable estoppel was applicable and that the State can not violate the terms of the plea agreement, and that a motion to enforce the agreement is the most effective means to carry out the intent of the agreement.

[Note: The First DCA certified the following question to the Florida Supreme Court: May the State initiate discretionary civil commitment proceedings under the Ryce Act (Part V of Chapter 394, Florida Statutes) where, by seeking civil commitment, the State would violate the terms of a plea agreement previously entered into with the defendant?]

Gove v. Florida Parole Commission, 27 Fla. L. Weekly D 945 (Fla. 1st DCA 4/26/02)

Florida prisoner Shane Gove filed a petition for writ of habeas corpus that contended his detention was illegal because he had been unlawfully classified as a conditional releasee when he was released from prison in 1998 and that, as a result, his return to prison upon the Florida Parole Commission's determination that he had violated the terms of his conditional release was unlawful.

The First DCA determined that the circuit court *erred* by finding that Gove's acceptance of the benefits of conditional release constituted a waiver of his right to challenge the legality of that release. The DCA recognized that conditional release was not a benefit, but an additional burden. Because Gove did not meet the statutory requirements for placement on conditional release, Gove's violation and subsequent return to prison was unlawful.

Brooks v. State, 27 Fla. L. Weekly D 1035 (Fla. 1st DCA 5/7/02)

Florida prisoner Alvin Brooks sought a belated appeal of his judgment and sentence, pursuant to Fla. R. App. P. 9.141(c). In his petition, Brooks alleged only that at the time his sentence was imposed, the trial court advised him of his right to appeal, that he told his attorney he wanted to appeal, and that he did not learn that no appeal had been filed until after the time for doing so had passed.

An order to show cause was issued by the First DCA and the state attached an affidavit from petitioner's trial attorney to its response. The affidavit contained a denial by petitioner's attorney that petitioner had requested that he file a notice of appeal.

The DCA relinquished jurisdiction back to the trial court directing the chief judge to appoint a special master to receive evidence and make a finding regarding the factual dispute. Following an evidentiary hearing, the special master found that petitioner had not timely requested that his attorney filed a notice of appeal.

In an en banc decision, after the trial court proceedings, the First DCA found the master's report to be supported by competent substantial evidence and denied Brooks a belated appeal.

[Note: This principle established by the First DCA may eventually reach the Florida Supreme Court because the court failed to distinguish the fact in this case from those in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); indeed, the case above completely fails to acknowledge its potential applicability. The essential facts in *Flores-Ortega* and *Brooks* are nearly indistinguishable. Because of limited space, I cannot expound on the material facts, but I do encourage anyone who finds themselves in a like position to read this case carefully in order to develop your strategy when drafting your petition.]

State v. Famiglietti, 27 Fla. L. Weekly D 1056 (Fla. 3d DCA 5/8/02)

The question presented in this case is whether a defendant in a criminal case can invade the victim's privileged communications with her psychotherapist if the defendant can establish a reasonable probability that the privileged matters contain material information necessary to his defense. In a divided en banc decision the majority answered the question in the negative. The majority's opinion was premised on the fact that neither an Evidence Code provision, nor an applicable constitutional principle, allows the invasion of the victim's privileged communications with her psychtherapist. Further, the Court certified conflict with *State v. Pinder*, 678 So.2d 410 (Fla. 4th DCA 1996), which requires a defendant to first establish a reasonable probability that the privileged matters contain material information necessary to his defense before he can compel disclosure.

Bell v. State, 27 Fla. L. Weekly D 924 (Fla. 3d DCA 4/24/02)

Earnest Bell remains incarcerated within the Florida DOC following a violation of his probation. The sole basis for the violation and subsequent incarceration was that Bell failed to file a monthly report. The Third DCA affirmed Bell's incarceration but certified conflict with the First DCA decision in *Carter v. State*, 24 Fla. L. Weekly 1063 (Fla. 1st DCA 1999), *rev. granted*, 740 So.2d 528 (Fla. 1999).

The Supreme Court is scheduled to resolve the issue of whether the failure to file a monthly report can support a violation of probation absent a willful and substantial intent to file such report.

Alexander v. Bamash, 27 Fla. L. Weekly D 941 (Fla. 4th DCA 4/24/02)

Florida prisoner Stuart Alexander appealed an order by the circuit court which determined that he was not a beneficiary of an estate. He filed directions to the clerk to prepare the record and requested a transcript. Having received neither, he motioned the Fourth DCA for an order compelling the circuit clerk to prepare the record and furnish him a copy of the transcript at no costs.

The Fourth DCA denied Alexander's motion for a free *transcript* because there is no constitutional or statutory right to one in an appeal by an indigent litigant in a civil case. *See Lee County v. Eaton*, 642 So.2d 1126 (Fla. 2d DCA 1994). However, the DCA did direct the clerk to provide the *record* without charge pursuant to section 57.081 (1) Fla. Stat. (2001).

Ross v. Moore, 27 Fla. L. Weekly D 1296 Fla. 2 DCA 5/31/02)

Florida prisoner Dwight Ross sought certiorari review of the circuit court's order that denied his petition for habeas corpus. Ross claimed that he was entitled to credit against his prison sentences when the overcrowding statues in effect on the date of his offense were applied to current conditions.

Ross filed a habeas corpus in the circuit court seeking for the Court to determine "the amount of overcrowding in the Florida corrections system from November 30, 1995, until today." To state his claim that the prison population exceeded the pertinent levels, Ross alleged specific numbers regarding the bed counts and inmate population at the facility where he is incarcerated. The circuit court denied the petition, holding that Ross "falls outside the time period of relief under *Gomez* because he did not begin his sentence until 1996, which was after the last award required under *Gomez* on March 31, 1995."

On appeal, Secretary Moore argued that prison overcrowding has not occurred since November 1995. Because this is the determinative issue, and it is an issue of fact, the Second DCA reversed with directions for the DOC to provide record evidence to show the prison population for the times after Ross began service of his sentences.

As noted by the First District, "*Gomez* does not preclude the possibility that a prison inmate under sentence for an offense committed while an overcrowding statue was in effect might prove that the prison population has risen again since November 30, 1995 (the last date so identified in *Gomez*) to the applicable threshold". See : *Adams v DOC*, 801 So.2d 150, 151 (Fla. 1st DCA 2001).

Dellahoy v. State, 27 Fla. L. Weekly D 1293 (Fla. 5th DCA 5/31/02)

Florida prisoner Walter Dallahoy appealed the summary denial of his motion for post conviction relief. Dellahoy's motion alleged that he agreed to and was sentenced by the trial court to a period of 125 months with credit for 96 months. Subsequently, however, the DOC advised Dellahoy that 1098 days of gain time had been forfeited and he would have to serve approximately 3 years more than the 29 months called for by the agreement.

The Fifth DCA vacated the trial court's denial of Dellahoy's motion and remanded to either resentence him in a manner that effectuates the plea agreement after considering the DOC forfeiture of gain time or allow him to withdraw his plea. The DOC's forfeiture of gain time cannot be countermanded by the Court, but neither can that forfeiture thwart the plea agreement.■

-Part One-

THE FLORIDA PAROLE GAME

by Bob Posey

Currently, there are a little over 72,000 prisoners in Florida's state prison system. It might make one wonder then why last year only 101 Florida prisoners were released on parole. Largely unknown to the public is that the majority of prisoners in Florida cannot receive parole and haven't been able to since 1983. Equally unknown is that locked in Florida's prisons are a few thousand prisoners who are parole-eligible, but who have become captives to justify the continued existence of an agency that should have ceased to exist more than two decades ago. That agency is the Florida Parole Commission.

In order to more fully understand the parole situation in Florida it is necessary to understand some of the history of criminal sentencing and changes in sentencing that have occurred in recent decades.

In Florida, up until the 1980's, like inmost other states, people sentenced to prison were generally eligible to be paroled at some point before the end of their sentence. Parole-eligible, or what was termed "indeterminate," sentencing allowed judges great flexibility in what sentence to give to someone convicted of a crime. The idea was that giving judges such discretion would allow them to tailor the sentence to each individual according to the particular circumstances of the crime and the person who committed the crime. Hardcore criminals could be sentenced for a longer time in prison than say the first time offender who committed a similar crime to get food because he had lost his job under indeterminate sentencing.

Once in prison, regardless of the sentence, then the offenders were given an incentive to change their behavior. In order to get out of prison without doing the entire sentence the prisoner had to be paroled and in order to be paroled the prisoner had to show that at least he or she was trying to change their life and be rehabilitated. Everyone understood how the system worked. Judges knew everyone they sentenced to prison would be eligible for parole and they took that into account with the length of sentence they gave, which in turn was taken into consideration by the parole board when considering when to grant parole. Of course, those paroled weren't just turned loose. Being paroled involved close supervision for a set period of time after an offender was released back to the community. In that way, under the parole system of sentencing, the offender was punished for the crime committed, given incentives to change his or her life while in prison, and then supervised when released to help ensure a successful reentry into society.

Parole in Florida

The Florida Parole Commission (FPC) was created in 1941. Before the Commission was established the only way a prisoner could be released prior to completing a full sentence was by a pardon from the governor and Cabinet members.

From 1941 to 1975 the Parole Commission had total authority over which prisoners were granted parole and over the supervision parolees were under when they were released. In 1975, however, laws were changed and the Parole Commission was reorganized. Many of the Commission's duties were turned over to the Florida Department of Corrections (FDOC), including parole field officers and supervision responsibilities. From a high of 1,321 employees the FPC suddenly found employees reduced

APPRENDI NEWS

The U.S. Supreme Court hasn't done any favors to the Apprendi argument in recent decisions but neither has it abandoned the basic premise. It has been ruled that any sentencing within the statutory maximums, as in increased minimum sentences, is not proscribed. However, in another issue, and as disappointing as U.S. Cotton, 122 S. Ct. 1781, (2002), is, the arguments that any factor which increases a sentence other than prior record must still be charged and proven to a jury are still viable. Cotton says that it may not be a useful argument if the evidence is otherwise "overwhelming" and/or it was not preserved by objection. First, the exact context of Cotton is a drug case where the huge weight of contraband was so beyond dispute that even with the benefit of a trial with a jury of deaf, dumb, and blind, a conviction was inevitable. Cases like this, while not necessarily uncommon, are not the rule and if your sentence was extended beyond the statutory maximum for, say, victim injury, use of a weapon, gang affiliation, or in my opinion, even habitual offender, the argument is still open. The other prong of Cotton is that the argument won't prevail on appeal unless the attorney preserved it. So what? Because the attorney didn't preserve it is a perfect basis for a 3.850 attack. An issue which could affect a lot of people is the pronouncement of Scott v State, 808 So 2d 166 (Fla 2002), that knowledge of the illicit nature of the drug you're charged with is an element of the offense. This is a big deal. Most people in prison have not had their jury told that, nor have they pled to a crime that included that as an element. The state has to prove not only that you knowingly possessed the drug, or sold it, etc., but that you knew beyond a reasonable doubt what the drug was. This sentiment was again reinforced in McMillon v State, 815 So 2d 56 (Fla 2002), as the Court stated, "As we decided in both Scott and Chicone, where similar instructions omitting the knowledge element were used, these instructions were inadequate." All of this should be retroactive. In U.S. v Brown, 117 F 3d 471 (11th Cir. 1997), the defendant was allowed to withdraw his plea as involuntary because at the time of the plea the issue of knowledge had not been ruled to be an "element" of the offense of Federal structuring. "For purpose of determining whether defendant's guilty plea was voluntary, in accordance with due process, defendant does not receive 'real notice' of nature of the charge unless the defendant is informed of the elements of the charged offense." Specifically, the court ruled that for purposes of retroactivity, where the Supreme Court (state or Federal) interprets the reach of a statute that it has made a substantive finding, not a new constitutional rule as barred by Teague v Lane, 489 U.S. 288 (1989). If you have any questions about these issues contact Attorney Marc Lubet, 209 E. Ridgewood St., Orlando, Fla., 407 8419336, or fax 407 8721874.

to 155, including 8 parole commissioners who where the ones who actually made parole decisions.

Indeterminate Problems

About that same time, during the mid-1970s, the idea of parole itself started coming under fire nationwide. For years, some state and federal lawmakers and attorneys had been questioning reports that under indeterminate, or parole-eligible, sentencing defendants faced with similar or identical criminal charges were receiving widely different sentences. Judges, with almost total discretion over sentencing, might give one defendant no time for the same charge as the next defendant who got the book thrown at him and ended up in prison for years or even decades.

In states where judges were elected and not appointed (like Florida) the problem of disparity in sentencing was often worse. With crime rates increasing in the 1970s along with the public's fear of crime, judges depending on being reelected every few years often felt an increasing pressure to appear "tough" on crime. One of the best platforms for many judges was the media reporting large amounts of prison time being given out by a judge. Hardline judges, knowing that regardless of the amount of prison time a defendant was sentenced to, he would still be eligible for parole at the discretion of the parole board once in prison, began to feel no qualms about giving out large or even outrageous sentences. At the same time, lawmakers reacting to increasing crime rates were changing laws to allow judges to give even longer prison sentences. Other laws were passed that allowed stacking several sentences one behind the other for more than one crime for a consecutive sentence that in some cases resulted in hundreds of years for a single defendant.

Federal Retreat

On the federal level, members of Congress began to disparage indeterminate sentencing. In one study published in 1974, fifty federal judges were given twenty identical files of actual criminal cases and asked what sentences they would impose on the defendants. The answers ranged from 20 years in prison and a $65,000 fine to 3 years in prison and no fine. The issue was debated in Congress for years. In 1984 U.S. Senator Edward Kennedy called federal criminal indeterminate sentencing "a national disgrace" and called for change. The result was Congress stripping federal judges of almost all sentencing discretion to eliminate disparities in prison terms. Instead, a complex series of sentencing "guidelines" were implemented in the federal system in 1987 that mandated sentencing according to a chart and a point system for adding up "factors" related to the crime and/or the defendant's criminal history.

The federal shift from indeterminate parole-eligible to "guideline" sentencing was not without dissention. In 1984, U.S. Representative John Conyers, Jr., at the time chairman of the Criminal Justice Subcommittee in the U.S. House, argued strongly against the use of guidelines. He warned that the system was faulty in that political pressure could escalate the sentences imposed under guidelines and in turn create a huge increase in the country's prison population. Conyers also pointed out that removing sentencing discretion from judges "may merely place that discretion in the hands of prosecutors." The problem Conyers noted is that guidelines allow prosecutors to decide what charge to bring against a defendant, and where the sentence for the crime is predetermined, the charge dictates the sentence. However, Conyers and other Congressional dissenters were ignored on the issue and the expected problems they warned about.

The effect of guideline sentencing on the federal system was felt almost immediately. From 1987, when the new law took effect, to 1988, the number of drug offenders in federal prisons increased by almost 1,200; the next year it jumped by more than 3,900; and the year after that it leaped to more than 5,500 and has continued to increase every year.

States Lead the Way

Actually, although the states usually follow the federal government's lead in any type of criminal reform, in this situation some states had acted first.

In 1976, California's Governor Jerry Brown signed into law a new set of criminal sentencing schemes that did away with parole in that state. Significantly, where indeterminate or parole-eligible sentencing largely incorporated the idea that prisoners could be rehabilitated with incentives, the new California law essentially abandoned rehabilitation across the board. "The purpose of imprisonment," the new law read, "is punishment." Other states followed behind California. That same year Maine abolished parole and six other states – Pennsylvania, Arkansas, Ohio, Hawaii, Colorado and Delaware – lengthened prison sentences. Other states turned away from indeterminate, or flexible sentencing, and replaced it with guideline sentencing that guaranteed fixed prison terms. Within ten years, thirty-seven states had passed mandatory sentencing laws and the prison population explosion was in full swing.

Florida Abolishes Parole

It took a few years, but by the early 1980s the indeterminate vs.

guideline sentencing debate reached Florida. Following a study directed by the state Legislature into indeterminate sentencing disparities, indeterminate parole-eligible sentencing was abolished and guideline sentencing became effective for anyone sentenced after October 1, 1983. There was one exception to abolishing parole, however. The new guideline sentencing laws would apply to everyone *except* those charged with a capital crime and who instead of receiving a death sentence were sentenced to life in prison with a 25-year mandatory minimum that must be served before they could be considered for parole on the life sentence. After October 1, 1983, the Florida Parole Commission only retained parole authority over prisoners sentenced before that date and those sentenced to life with a 25-year mandatory after that date.

It was the intent of the Legislature when switching from indeterminate to guideline sentencing in 1983 that eventually the Parole Commission would be phased out completely. However, that "sunset" provision was later extended and a decade later was repealed altogether leaving the Commission intact.

The Commission, however, had a problem. Except for the relatively few new prisoner admissions with a 25-year mandatory life sentence who were sentenced after October 1, 1983, and who fell under the parole system, all new admissions after that date were guideline-sentenced and not eligible for parole. Most of those prisoners who were in prison before that date and who were parole-eligible had reasonable sentences with expiration dates that meant they would either have to be paroled or expire their sentences in the next few years. That kept the Commission busy up until the early 1990s, but the pre-1983 parole-eligible pool of prisoners was rapidly shrinking, and then in 1994 the state legislature did away with 25-year mandatory life sentences, cutting off the last source of prisoners who could be sentenced to any type parole-eligible sentence.

By 1997, with Florida's prison population standing at almost 65,000 people, having more than doubled since 1983 when guideline sentencing was implemented, only 6,076 prisoners remained in prison who were parole-eligible. Of that number 2,786 were serving 25-year mandatory life sentences and 3,290 had been sentenced before October 1, 1983. That latter group was largely made up of prisoners who had received the outrageously disparate sentences that had led the legislature to switch to guideline sentencing in 1983. In many cases if those pre-1983 sentenced prisoners had been sentenced to a sentence under the guidelines they would only have received a fraction of the time that they did and would have been out years before. In a curious twist, however, they had now become pawns in a bureaucratic game.

In 1996 the legislature, that had previously reduced the number of parole commissioners to five as their workload of parole-eligible prisoners was greatly reduced, further reduced the commissioners to only three. That same year a new law was adopted allowing the Commission the option of changing the parole review time from every two years to every five years for the majority of parole-eligible prisoners.

The fact remained, however, that for its continued existence as the "Parole Commission" there must continue to be parole-eligible prisoners. The solution was for the Commission to start paroling only about 100 prisoners out of the remaining parole-eligible pool per year and to replace them with parolees who had been out but suddenly found their parole revoked for, in the majority of cases, minor "technical" violations. Thus, parole in Florida has become a Sisyphean endeavor, with parole-eligible prisoners locked into an indefinite cycle of disparate hell.

[Source: FPC and FDOC Annual Reports; Florida Statutes; FPC records; correspondence from Peter Peterson, FPC Director of Operations, 7/11/97; FPC Website: http://www.state.fl.us/fpc; Joseph T. Hallinan, *Going up the River: Travels in a Prison Nation* (New York: Random House, 2001]

[Note: Part Two of this article will appear in the next issue of *FPLP* and will take up where left off here. It will cover the changes that have been made to the Florida Parole Commission in recent years and the impact those changes will have, or not have, on Florida's parole-eligible prisoners. Part Two will also detail the numbers, facts, and budget of the FPC up to the current time to show how parole-eligible prisoners continue to be disparately treated as compared to guideline-sentenced prisoners. FPLAO is putting together a complete section on its new Website at www.fplao.org concerning parole in Florida that will be available to the families, friends, and advocates of parole-eligible prisoners, with the intent of creating debate and activism on this subject – bp] ■

GAVEL CLUB FLOURISHES WITHIN DOC

by Phillip Stratos

Gavel Club #84, an affiliate of Toastmasters International, recently conducted its Awards Ceremony at Sumter Correctional Institution in Bushnell, Florida. As an invited guest I was amazed at the professionalism displayed by both

corrections staff and inmate members. The event was both informative and successful, and proved to me that programs within the Department of Corrections are vital to the growth and transformation of our state's criminal offenders.

The event was highlighted by confident orators that included Paul Sparato, Oscar Hanson and William Gage. George Rolle served as the Master of Ceremonies and Doug McCray was the evenings' Toastmaster. Club Sponsors John Langley, George Hummell and Assistant Warden of Programs Lanyard Owens accommodated a spectacular evening that I will remember for years.

It was especially rewarding to see the men of Gavel Club #84 conduct themselves with an aura of professionalism despite their incarceration. It was hard for me to continue to see these men as criminals. They became my friends.

I salute the men of Gavel Club #84 and credit the Administration at Sumter Correctional Institution for fostering such a successful program that allows the men to learn and develop important communication and leadership skills provided by the Toastmaster program. It is my hope that this program as well as others will continue to flourish as Gavel Club #84 has. ■

S. Ct. OKAYS HARSHER IMPRISONMENT FOR SEX OFFENDERS

WASHINGTON – Favoring government over individual rights, the U.S. Supreme Court ruled June 10 that incarcerated sex offenders who refuse to participate in treatment programs that require them to admit being guilty of the crime they are imprisoned for can be subjected to maximum security confinement and loss of privileges like work and recreation opportunities.

Voting 5 to 4, the high court's conservative justices held the majority vote to reject a claim by a convicted rapist, Robert Lile, that his right against self-incrimination was violated by being forced to choose between admitting his guilt in a treatment program or being placed in maximum security and losing privileges. Justice Anthony Kennedy penned the majority decision and was joined by Chief Justice William Rehnquist and Justices Antonin Scalia, Clarence Thomas and Sandra Day O'Connor in rejecting Liles' claim.

The Court's more moderate justices, John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer all dissented with the majority opinion, asserting that the majority had disturbed long-standing constitutional principles by now curtailing the Fifth Amendment rights of prisoners. The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself."

This case is the latest in a series of cases that have come before the supreme court in recent years testing sexual offender and sex offender civil commitment laws that have been passed by many states. This case was a test of a Kansas Sexual Abuse Treatment Program policy that allows prisoners convicted of sex offenses to be placed in confinement and have privileges taken away if they refuse to admit their guilt in the required program. Lile challenged the policy, claiming it was a violation of the Fifth Amendment because of the additional punishment factor and where any admission of guilt that he might be forced to make could be used against him in the future.

Four of the justices who voted to reject Lile's claims said that such a policy does not violate the guarantee against self-incrimination if the penalties imposed "do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life," quoting from the 1995 case of Sandin v. Conner, 115 S.Ct. 2293, that severely restricted prisoners' rights to remain free of arbitrarily-imposed punishments by prison officials.

Justice Sandra Day O'Conner, the swing vote for the majority, disagreed with the majority's limited view of Fifth Amendment protection for prisoners, but voted with them because she said that the penalties Lile would face were not so great that he should feel compelled to incriminate himself if he chose not to.

This decision will likely ensure the continuation of numerous other state and federal programs that permit confinement and retraction of privileges when imprisoned or civilly-committed sex offenders refuse to participate in treatment programs or refuse to disclose their entire sexual history.

In Florida, the impact of this new decision will most likely be felt with sex offenders who are civilly-committed after doing their prison time under the Jimmy Ryce Act, as no treatment is available for sex offenders who are in prison in Florida.

[Note: For a more legally detailed review of the *Lile* case see *McKune v. Lile* in this issue's Notable Cases-editor] ■

MEMBERSHIP FORM

1. Please Check ✓ One:

☐ Membership Renewal

☐ New Membership

2. Select ✓ Category

☐ $15 Family/Advocate/Individual

☐ $9 Prisoner

☐ $30 Attorneys/Professionals

☐ $60 Gov't Agencies/Libraries/Orgs./etc.

FAMILIES ADVOCATES PRISONERS

UNITED FOR PRISON REFORM

3. Your Name and Address (PLEASE PRINT)

_____ DC#_____

Name

_____

Agency/Library/Institution /Org/

_____

Address

_____

City State Zip

_____

Email Address and /or Phone Number

4. Additional Donation

I understand that FPLAO depends on its members to grow and operate effectively. Therefore, I would like to make an additional donation of:

___ ___ ___ ___ ___ ___

$10 $25 $50 $100 $250 Other

☞ Please make all checks or money orders payable to: Florida Prisoners' Legal Aid Organization, Inc. Please complete the above form and send it with the indicated membership dues or subscription amount to: *Florida Prisoners' Legal Aid Organization Inc., P.O. Box 660-387, Chuluota, FL 32766.* For family members or loved ones of Florida prisoners who are unable to afford the basic membership dues, any contribution is acceptable for membership. New, unused , US postage stamps are acceptable from prisoners for membership dues. Memberships run one year.

FREE COPY OF FPLP

Prisoners: Have a free copy of FPLP sent to a family member or friend on the outside. Simply send us their name and address on this form. PLEASE PRINT.

Name

Address

City

State **Zip**

☞ **Complete and Mail to:**

FLORIDA PRISON LEGAL PERSPECTIVES
P.O. Box 660-387, Chuluota, FL 32766

HAVE YOU MOVED OR BEEN TRANSFERRED?

If so, please complete the below information and mail it to FPLP so that the mailing list can be updated:

NEW ADDRESS (PLEASE PRINT CLEARLY)

Name

Inst.

Address

City **State** **Zip**

Mail to: FPLP, P.O. Box 660-387, Chuluota, FL 32766

ADVERTISING NOTICE

Due to a concern for our members, the *FPLP* staff tries to ensure that advertisers in these pages are reputable and qualified to provide the services being offered. We cannot meet every advertiser, however, so members are advised to always personally contact advertisers for further information on their qualifications and experience before making a decision to hire an attorney or other professional service provider. You should never send legal or other documents to an advertiser before contacting them and receiving directions to send such material.

For those wishing to advertise in *FPLP*, please write for rate information. Address such mail to:

Florida Prison Legal Perspectives
Attn: Advertising
P.O. Box 660-387
Chuluota, FL 32766
Or
Email: FPLP@aol.com

SUBMISSION OF MATERIAL TO *FPLP*

Because of the large volume of mail being received, financial considerations, and the inability to provide individual legal assistance, members should not send copies of legal documents of pending or potential cases to *FPLP* without having first contacted the staff and receiving directions to send same. Neither *FPLP*, nor its staff, are responsible for any unsolicited material sent.

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

CONTACTS

The Florida Corrections Commission is composed of eight citizens selected by the governor to oversee the operation of the Florida Department of Corrections. The Commission makes recommendations to the governor and state legislature concerning problem areas within the prison system. The Commission welcomes input from the public identifying problem areas. The Commission's activities can be found on its website. The Commission is independent from the FDOC.

Florida Corrections Commission
2601 Blair Stone Road
Tallahassee, FL 32399-2500
Ph# (850) 413-9330
Email: fcarcom@mail.dc.state.fl.us
Website: http://www.fcc.state.fl.us/

Additional:

Inmate Bank Information
Toll Free: (850) 488-6866

Email Addresses:
Gov. Jeb Bush – *jeb.bush@myflorida.com*
Michael Moore, FDOC –
moore.michael@mail.dc.state.fl.us

PRISON LEGAL NEWS

Prison Legal News is a 36 page monthly magazine which has been published since 1990. It is edited by Washington state prisoner Paul Wright. Each issue is packed with summaries and analysis of recent court decisions from around the country dealing with prisoner rights and written from a prisoner perspective. The magazine often carries articles from attorneys giving how-to litigation advise. Also included in each issue are news articles dealing with prison-related struggle and activism from the U.S. and around the world.

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

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

Prison Legal News
2400 NW 80th Street
PMB 148
Seattle, WA 98117

See *PLN*'s Website at:
http://www.prisonlegalnews.org

Email PLN at:
webmaster@prisonlegalnews.org

FLORIDA PRISON LEGAL Perspectives

MEMBERSHIP/SUBSCRIPTION RENEWAL

Please check your mailing label to determine your term of membership and/or last month of subscription to FPLP. On the top line of the mailing label will be a date, such as ***Nov 04***. That date indicates the last month and year of your current membership with FPLAO or subscription to FPLP. Please take the time to complete the enclosed form to renew your membership and/or subscription before the expiration date.

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

Volume 8, Issue 4 July/Aug 2002

Florida Prison Legal Perspectives
PO Box 660-387
Chuluota Fl 32766

NON-PROFIT
U.S. POSTAGE
PAID
OVIEDO, FL
PERMIT NO. 65