Florida Prison Legal Perspectives

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SILENT KILLER STALKS PRISONERS IN FLORIDA

As the Florida Department of Corrections (FDOC) heads into the new millennium, a silent killer shadows Florida prisoners. A virus called Hepatitis C (HCV) is fast becoming a major health concern throughout the nation. Estimates generated by national public health experts show that as many as 60 percent of the two million prisoners in the U.S. have HCV.

While many states including Maryland, California, Rhode Island, Texas and Virginia have published scientific studies of the virus in their prison populations and taken steps to combat HCV, FDOC has chosen to remain mute on the subject despite the staggering influx of HCV cases in their own prison population. (1)

HCV infection wreaks havoc in the body, causing lymph cancer, exacerbating asthma sufferers, destroying kidneys and thyroids, as well as severe liver damage. HCV causes liver damage in about 70 percent of all cases and is 5 percent fatal even if treated properly. Standard treatment requires daily doses of protease inhibitors (ribavirin and interferon), costing approximately $15,000 per patient per year. Thus the limited medical enthusiasm for expenditures of "public health dollars" on prison HCV cases, even though Virginia Department of Corrections medical director, Dr. M.J. Vernon Smith has said, HCV in prisons is going to make HIV "look like a little baby." (2)

HCV is transmitted primarily by blood; therefore, needles used for street drugs or tattooing are being targeted as the sources of the very high prison infection rate (as compared to 2 percent in the general population). One study identifies five independent risk factors for HCV infection: intravenous drug use, prior incarceration, blood transfusions (a serum test for the blood supply was not available until 1992), sexual contact and tattooing. (3)

Currently medical data shows that already the HCV threat in prisons looms two to three times larger than HIV. In 1992, the American College of Physicians (ACP) and the National Commission on Correctional Health Care reported that AIDS incidents in the prison system (202 cases per 100,000), was fourteen times that of the general population; prison HCV incidents are already twenty times the rate in general society. The ACP report estimated the annual cost of caring for a HIV positive prisoner at $5,000; with HCV, the cost is $15,000. The implications are clear. FDOC has been slow to respond to the HIV crisis in its prisons at a cost much less per prisoner than will be needed for HCV infected prisoners. The same hesitancy can be expected, and has already been witnessed by Michael W. Moore, Secretary of FDOC.

In an article published in the *Tampa Tribune* March 4, 1999, Michael W. Moore made his plan for dealing with these virus infestations in FDOC clear by proposing a plan to segregate those prisoners found to be HIV positive, which includes approximately 2,400 prisoners. Although Michael W. Moore has yet to address the issue of the HCV epidemic, he is certain to have the same attitude. ACLU Executive Director Howard Simon called Moore's proposal analogous to the creation of "leper colonies".

In a recent article found in the Florida Corrections Compass, a publication directed at FDOC employees, it

In This Issue

was revealed that the Florida Department of Health has received a grant of $12 million dollars to help in combating HCV, especially in non-incarcerated persons. The $12 million has been set aside for the education of correctional officers and prison health care workers, said David Thomas, M. D., Health Service Director of FDOC. However, no plan was proposed by Thomas to institute screening for HCV of prisoners or the acquisition of the needed drugs to treat prisoners now suffering from the virus. To date FDOC has made no move to address this issue nor has FDOC published any medical reports delineating a plan to care for prisoners who test positive for the virus or taken steps proposed to prevent the further spread of the deadly virus.

The state of medical research on HCV today in FDOC might be compared to that of HIV in the 1980's. The epidemiology and natural history of the disease is in its infancy. The Georgia DOC recorded a soaring number of HCV cases between April and September of 1999. In those months the number rose from just 18 in April to over 50 in September. Florida, which boasts one of the largest prison populations in the country, over twice that of Georgia, can expect a comparative increase in the number of HCV cases in the months and years to come. If the FDOC does not recognize the severe health risk of HCV looming in its future immediately the virus not only will decimate the present prison population but will move into the general community while infected, untreated prisoners are released.

Randy Shilt's impassioned history of the AIDS crisis (And the Band Played On) recounts the massive buildup of militant organizations devoted to getting the federal medical research bureaucracies into action on AIDS research. Is this whole story going to have to be replayed with HCV? Haven't we seen enough tragedy from ignorance dealing with HIV...

1. A. Spaulding, et al., "Hepatitis C in State Correctional Facilities," *Preventative Medicine*
2. *Richmond Times Dispatch*, May 9, 1999.
3. G. Delage, et al, "Risk Factors for Acquisition of Hepatitis C Virus Infection in Blood Donors". ■

From VISITATION TO ALIENATION

by Bob Posey

The secretary of Florida's prison system has a problem. Although Michael Moore was picked by Gov. Bush to run the Florida Department of Corrections because of Moore's "get tough on prisoners" policies in Texas and South Carolina, the Florida system had already been "toughened" before Moore took over. In the mid-1990's, state lawmakers, playing the get-tough-on-crime card, had reintroduced the chain gang and passed laws designed to make doing time in Florida harder. By the time Moore took over, gone were most of the programs like Jaycees, veterans groups, hobby crafts and art programs. Gone too were packages from families and most personal property had been stripped from prisoners. Recreation programs had stopped receiving any funds, no new recreation equipment could be bought, or existing televisions replaced or fixed. The use of confinement for years at a time was expanded before Moore came to Florida, he inherited a stripped-down system, with not much to "get tough" on. Really, only one area remained relatively untouched, an area that Moore has now turned his attention towards to toughen up - visitation with family and friends.

Largely unknown to most prisoners and their families and friends, for the past year plans have been being made at the FDOC central office to radically change (and limit) prisoners' ability to receive visits from those on the outside. Since visitation is a privilege, and not a right, it is susceptible to arbitrary change by those wishing to appear tough on prisoners, or by those who see prisoners with an outside support system as a threat to their authority and control, Whatever the reason, visiting is under FDOC's microscope and is going to become more difficult and less congenial - if we are not prepared for what is planned.

Part of Moore's Plan

On March 31 an article appeared in the *Tampa Tribune* about a move by the

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(407) 568-0200
Web: http://members.aol.com/fplp/fplp.html

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FPLP is a Non Profit publication focusing on the Florida prison and criminal justice systems with the goal of providing a vehicle for news, information and resources affecting prisoners, their families, friends and loved ones, and the general public of Florida and the U.S. Reduction of crime and recidivism, maintenance of family ties, civil rights, improving conditions of confinement and opportunities, promoting skilled court access for prisoners, and promoting accountability of prison officials, are all issues FPLP is designed to address.

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

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FDOC to eliminate contact visits for death row prisoners. That proposal caught the attention of prison guards, public defenders and civil rights activists. Death row prisoners received information earlier in March that the prohibition on contact visits was being considered, along with limits on the number of library books they can check out, access to clergy and religious materials, and the number of times they may shower and shave.

FDOC spokesman C.J. Drake said the proposed restrictions are part of Michael Moore's plan to clean up the state's prison system; in fact, according to Drake, it has been part of Moore's plan since he took over the department more than a year ago. Moore had been a major proponent of similar policies in Texas and South Carolina before he came to Florida.

Randy Berg of the Miami-based Florida Justice Institute said this isn't the first time that this has been tried in Florida. He was part of a group of attorneys who filed a federal lawsuit in 1979 when prison officials tried to impose the same restrictions on death row prisoners visitation. That lawsuit was settled when prison officials agreed to let death row prisoners have contact visits, except for those whose appeals have been exhausted or who have disciplinary problems.

This latest proposal sparked unrest among death row prisoners at Union Correctional Institution. On the morning of April 3 more than 250 death row prisoners refused to eat in protest of the proposal to ban contact visits.

"No matter how disgusting the general public might think these people on death row are, they are human beings and they're going to react like human beings," said Hillsborough County's' Assistant Public Defender, John Skye, a former state prosecutor who helped send five people to death row. "What they're going to do [the FDOC] is make dangerous people more dangerous. It's like imposing a tougher sentence on the prison guards."

On April 12 a news conference was held at the capitol building in Tallahassee where family members of death row prisoners and some state lawmakers blasted the proposal. The hunger strike at U.C.I. lasted 10 days and was over, according to prison officials, on the 13th, when only 4 prisoners still were refusing food.

FDOC officials claim the new rules are not a response to any particular incident, but that they are intended to increase security. FDOC spokesman C.J. Drake offered another reason too - contact visits are allowed to encourage rehabilitation of prisoners. "For death row inmates, what's the purpose?" Drake asked. That same type logic, of course, could be used to ban contact visits to prisoners serving life or long sentences, if the death row ban is successful.

The FDOC's "security" justification for the non-contact visitation is ironic (some say moronic) considering a recent event that occurred in Texas. On February 21 two Texas death row prisoners took and held a female prison guard hostage for thirteen hours at the Charles Terrell State Prison. The prisoners claimed that desperate act was taken to protest, in part, overly harsh visitation rules similar to those being considered in Florida now. The irony is that Michael Moore was a prime supporter of those Texas visiting rules when he worked as a regional director in the Texas prison system six years ago. Texas prison officials now concede that putting limits on prisoners' visits hasn't done much to improve security there.

In Florida, DOC spokesman Drake said no prison guard has come forward to express concern about the rules being considered for death row. However, three prison guards who spoke to the *Tampa Tribune* on the condition that their names not be used said they fear an increasingly violent atmosphere if contact visits are stopped. "If they can't hug their kids, what else do they have to lose? What incentive do they have not trying to take my head off?"one guard commented.

As for coming forward as Drake suggested, another of the guards said, "Do they think we're going to stand up there and say we disagree with the secretary? That's crazy. Nobody wants to be saddled with the worst shift available." Despite those misgivings, according to a spokesman for Florida's governor, Jeb Bush fully supports Moore's plan that would hurt death row prisoners' families and friends and children as much, or more than, the prisoners themselves.

An Insidious Plan

Michael Moore's plan for *visitation* encompasses more than just prohibiting contact visits for prisoners on death row - much more.

For the past year Florida Prisoners' Legal Aid Organization (FPLAO) staff have been quietly monitoring FDOC activity concerning visitation after being warned by some South Carolina prisoners' family members about the changes Michael Moore had made in that state as the correction's secretary before coming to Florida. During February that vigilance paid off. It was discovered that the FDOC is planning changes to its visitation rules in a manner that is not going to benefit prisoners or their visitors.

Approximately six months ago, a new section was created in the FDOC central office called the Central Visitation Authority (CVA) , which is assigned to the Bureau of Classification and Central Records office. The stated purpose of the CVA is the "management of inmate visitation procedures, visitation records, and fact-based decisions on visiting requests." There are 10 employees assigned to the CVA.

Since its creation, the CVA has been working to draft new procedures and rules for visitation. They have also been working to computerize all visiting and visitor information for "identification and tracking purposes."

On February 3, FPLAO obtained a copy of the CVA's proposed draft of new visiting rules and procedures. Some of the provisions of that draft include:

- Prisoners cannot have more than 15 people on their approved visiting list.

- Prisoners may only delete or add to their visiting list, up to 15 people, every six months.

- All visitors 12 years old or older must complete a Request For Visiting Privileges form for the CVA's approval.

• All visitors 12 years old or older must present valid picture identification when seeking to visit.

• All visitors 12 years old or older must provide their social security number to the CVA when completing a Request For Visiting Privileges form, and the social security number may become public record as part of the FDOC's visiting records.

• All visitors 12 years old or older must allow institutional staff to take digital photographs of the visitors, which will be updated every four years.

• All visitors 12 years old or older must allow biometric hand scans to verify finger/hand prints when seeking to visit.

• All visitors, regardless of age, may be required to submit to questioning and search procedures upon entering or leaving a visit, refusing to answer questions will be cause to terminate visiting privileges.

• Visits may be denied or terminated if a visitor speaks to a prisoner other than the one they are authorized to visit, or if a prisoner speaks to another visitor.

• Only five visitors may visit at one time.

• Visitors may only bring $15.00 each for use in the visiting park vending machines.

• Only one kiss and embrace will be allowed at the beginning and end of a visit, lasting no more than "5 seconds."

• No other form of casual contact will be allowed or "displays of affection" between prisoners and visitors, except for holding hands with the hands in clear sight of the staff at all times.

• In addition to currently approved search procedures; visitors may be required to submit to K-9 and drug ion scanner searches.

• Prisoners who refuse to participate in or are removed from an academic, vocational or substance abuse program for negative behavior will have all visiting suspended for three months.

• Visitors will have visitation privileges suspended for two (2) years if they pass money or any other item to a prisoner (except approved items) , or for violation of visiting rules.

• Prisoners receiving visitation-related disciplinary reports will have visitation and telephone privileges suspended for two years (or permanently, depending on the seriousness of the offense)

• Death row prisoners will only be allowed non contact visits, with the time allowed set by the warden.

• Prisoners undergoing initial reception may be denied visits.

• Visitors not on a prisoner's approved visiting list but who request a special visit must submit to a criminal history check.

• Visitation may be denied prisoners who are hospitalized or in an FDOC infirmary.

Although none of the above rules have been formally adopted, some institutions have already begun enforcing selected parts of them. A new "Request For Visiting Privileges" form, including a requirement that the social security number be provided and listing many of the above provisions on the back of the form as new rules that must be followed, has been being distributed to visitor applicants. And many of the unadopted provisions have been posted on the FDOC's website as rules that all visitors must follow. *See:* http://www. dc .state. fl.us/facilities/info/visit

As the opening shot to challenge the adoption of this new visitation plan, on April 19 a petition to determine the invalid enforcement of unadopted rules was filed with the Florida Division of Administrative Hearings by FPLAO's chairperson, Teresa Burns. The petition alleges that the FDOC has engaged in the implementation of new visitation procedures that meet the legal definition of "rules" and that modify, exceed or rewrite existing valid rules without having followed the legally required rulemaking procedures of state law.

At best, this challenge will result in the FDOC being ordered to cease all enforcement and reliance on the unadopted rules until such time as they are adopted by valid rulemaking procedures. It is expected that the FDOC will at some point start the rulemaking process to adopt these provisions. When they do, and give notice of such intent, all prisoners and their visitors must be prepared to submit objections to the adoption - in mass numbers. The name and address where to send those objections will appear on the rulemaking notices that will be posted at all institutions.

We must be prepared to meet this challenge, or visitation conditions will become even worse than they are now. The FPLAO staff will be prepared to fight with the organization's members on this. Together we can persuade Mr. Moore that his plan might need to be changed.

Note: If you have access to any memorandums that may have been posted at your institution concerning the implementation of any "new" visiting rules, please send a copy to FPLAO. Also, if you as a visitor have had to comply with "new" visiting rules or had such enforced at the institution where you visit, please write to the FPLAO office and give the details. Thank you.]

A MESSAGE TO MEMBERS

I wish to personally thank all of the organization's members for making it possible for us to make a good showing at the Capitol Rotunda Rally during April. The extra contributions sent in by "free world" and prisoner members allowed us to present several nice looking displays, and distribute a ton (it seemed) of informational fliers, reprints, reports, manuals and books to the rallies attendees, legislators and their aides, and capitol visitors.

The organization focused on five top-

ics this year: Negligent and Inadequate Medical Care within the prison system; Female Prisoners - Abuse and Privacy issues; Visitation, and the FDOC's plan to Alienate Families and Prisoners; Close Management Confinement, Conditions and Negative Effects; and, for the third year, Prison Collect Telephone Rates. Other groups and organizations that attended the rally covered other topics, such as the death penalty, juvenile justice issues, abuse and rape of prisoners, the Florida parole system, and family issues. Everyone did a very professional job this year.

Because there are so many FPLAO members who were unable to attend the rally, we have run several photos of the event in this issue so members can see what their support helped finance, and through the photos share some of the excitement, optimism and effort contributed by so many people to make this year's rally the best yet.

I'd also like to extend the staff's appreciation to several members who lent a hand in putting together some of the material that FPLAO took to the rally, including, Robert Barish, James Quigley, Oscar Hanson, Robert Edwards and William Van Poyck.

While in Tallahassee for the rally, I was pleased to visit the FDOC's central office to present a plaque from FPLAO to the department's Office of Library Services. With more than half of Florida's prisoners having below functional literacy skills and all prisoners, by definition, having legal problems, the general and law library programs in place at each prison are among the most important and beneficial programs that serve the entire prison population. Mr. Joe Belitsky, the FDOC's Law Library attorney, accepted the plaque on behalf of all central office library services staff and institutional librarians and their assistants. The award was presented in recognition of the excellent job being done to maintain the quality of the general and law libraries around the state. Recently, these peoples' jobs have been made harder with Secretary Moore cutting many of the librarian positions, and we just wish those remaining to know that their efforts are recognized and appreciated by all prisoners and their supporters.

On a final note; recently the newsletter staff has been receiving a few letters from prisoners saying that they didn't receive an issue or asking the staff to let them know that their letter was received. If you do not receive an issue, and your membership is in good standing, write a short note letting us know and we will send you another copy or find out what the problem is. Occasionally we have a problem with a mailroom, but we can usually straighten that out. If you are on the mailing list, however, the issues are being mailed to you. As for responding to the receipt of letters, we just can't do that. We understand your concerns, but do not have the staff or finances to answer the 2 to 3 hundred letters being received each week. I assure you though, we are not aware of not having received any mail.

What is needed are funds to hire a full time office person to answer mail and the phone and do some of the many routine jobs that any office has. But, the funds to pay someone aren't available yet. We are working on that. In the mean time, please be patient with our limitations. All the staff now are volunteers and generously devote a lot of their time to doing everything we can at this point.

Teresa Burns
FPLAO Chairperson ■

NEW PROCEDURE DIRECTIVE FOR ADMISSIBLE READING MATERIAL

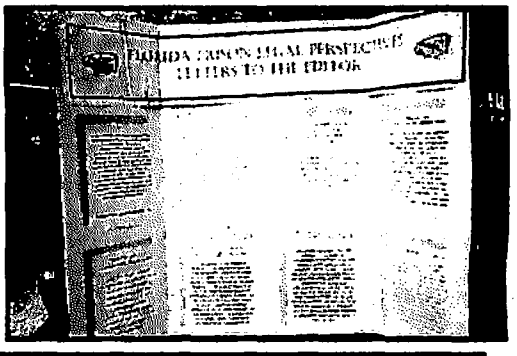
On April 14, 2000, the Florida Department of Corrections (FDOC) issued a new Procedure Directive (No: 501.401) concerning what type and amount of reading materials may be received by Florida prisoners through the mail and the procedure to be used to authorize or prohibit the receipt of such material.

This new Directive, entitled "Admissible Reading Material for Major Institutions," provides detailed guidelines for the implementation of the FDOC's formal rules concerning reading materials found at Chapter 33-501.401, Florida Administrative Code (F.A.C.) (formerly 33-3.012, F.A.C.). This new Directive replaces and invalidates all individual Institutional Operating Procedures (I.O.P.s), and provides uniform procedures to be followed by all major institutions operated by the FDOC.

The Directive does not make any radical changes to the admissible reading material procedures that the FDOC has been developing and applying over the last year and a half. But the Directive does contain some interesting, and potentially beneficial, provisions that may eliminate, or at least reduce, some of the confusion over what reading materials may or may not be received that has been exhibited by many prison mailrooms recently. A detailed guide is included in the Directive concerning what subject matter should or should not be considered to determine whether publications may or may not be received.

The Directive indicates that the recently established regional service centers are going to take over operating and staffing the mailrooms at major institutions. There are also provisions in the Directive increasing the possession limits for some publications and providing that a listing of all previously rejected reading materials and a listing of all reading materials that were approved after a rejection was overturned will be kept in every institutional mailroom and in a location accessible to prisoners.

All Florida prisoners who receive any type of reading material through the mail,



or who possess reading materials, should review and familiarize themselves with this new Directive. Access to the Directive should be available from every institution's law library. ■

CAMPAIGN 2000 ON THE INSIDE

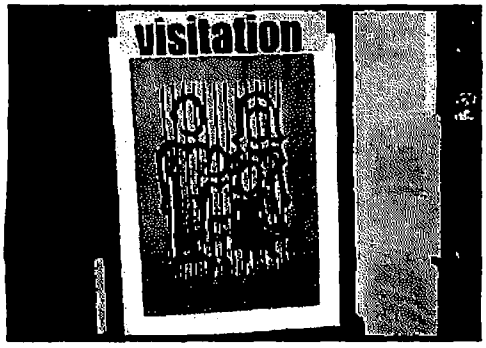
by Drew Hanson

As a prisoner within America's penal industry, Campaign 2000 may not appear to be an important issue to us, especially when other more important matters such as conditions of confinement and early release mechanisms demand our attention. But you may wish to reconsider your priorities.

Although as prisoners we cannot vote in the general election, we are not without a voice. Most of the 73,000 + prisoners within the DOC have family and friends who are qualified to vote. They cannot only vote for themselves but for us too.

For the politically challenged, you may wonder where I am going with this. For the politically wise, it is obvious. The balance of our nation's high court is at stake. For those prisoners who litigate, this balance is critical.

Usually the Supreme Court is not a political issue for presidential candidates on the campaign trail. However, this campaign shows signs of a hotly contested battle brewing regarding the future of the high court.



The high court's balance of power currently held by conservative members - Chief Justice William Rehnquist and Justices Antonio Scalia and Clarence Thomas - usually vote together on social and political issues such as state's rights and prisoner s rights. These Justices are often joined by more centrist conservatives Sandra Day O'Conner and Anthony Kennedy.

The more liberal Justices - John Paul Stevens, David Souter, Ruth Bader Ginsburg and Steven Breyer - usually band together to dissent. Change the balance by just one vote and the Court suddenly becomes more liberal, or in a worst-case scenario, much more conservative.

The tenuous balance of power may soon change. The 5-4 split that has defined the Court in recent years could be altered with the replacement of a single justice. Because of the aging Court, it is likely that one or more justices will retire in the next four years.

That means that our next president will have the rare opportunity to sharply tip the Court's scales to the conservative right or; the liberal left, for the next several decades.

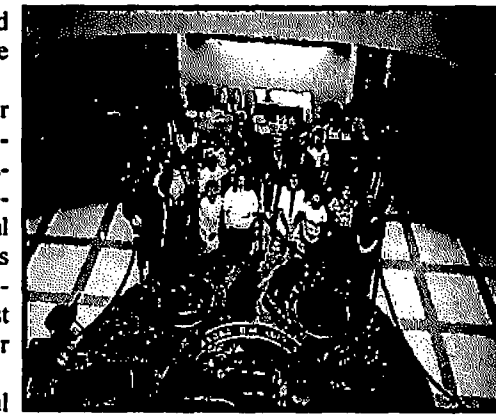
For example, if Al Gore is elected his appointee's votes could reverse the trend of Rehnquist 's stronghold on social and political issues, which include prisoner related issues. It is well known that Rehnquist is not a friend of the prisoner and often goes out of his way to rule against prisoner related issues.

On the other hand, if George W. Bush wins and has the opportunity to replace a retiring liberal his (presumably conservative) appointee would help further the trend of the high court on the side of conservatism.

Inside information has produced a list of potential nominees to the high court. In the Gore dossier, the names Jose Cabranes, Walter Dellinger, Merrick Garland, and David Tatel emerge.

Each of these potential nominees brings to the table favorable characteristics. It is important to note that at least one of Gore's potential nominees was a civil-rights lawyer and currently sits on the bench.

In the Bush dossier, the names Emilio



Garza, Samuel Alito, Edith Jones, and Michael Luttig emerge as potential nominees. Of these potential nominees, all share a common conservative position. Edith Jones is perhaps the most dangerous with her hard-line position in death penalty cases. Upon looking at each of the potential nominees from the Bush dossier, it becomes clear that prisoners will lose even more ground with a Bush win.

Throughout the Rehnquist years, many of the prisoner rights, fought for by previous reformers, have been eroded by the

* ATTENTION FLORIDA PRISONERS *

Have you ever requested live witness testimony at a disciplinary hearing but was denied by correctional officials? If so, we want to hear from you. Please complete a sworn affidavit and include any paperwork you may have that shows you made a request for live testimony. Include a list of the witnesses you requested for live testimony and how their live testimony was relevant. Make sure your affidavit includes your name, DC number, prison location (where you were denied live testimony), your current location, what official(s) denied your request for live testimony, and the approximate date of the denial. Send your affidavits and any other paperwork you may have to:

L.E. Hanson
P.O. Box 5693
Hudson, FL 34674

If you are sending additional papers other than your affidavit you may wish to send copies because these papers will not be returned.

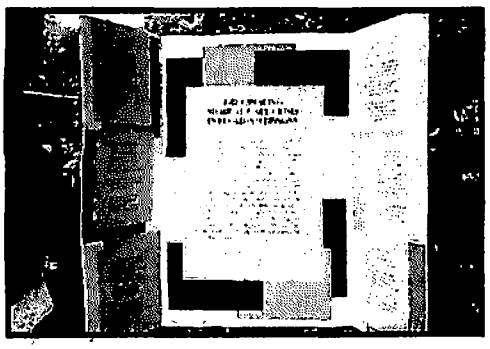
Web Page Address:
http://members.aol.com/fplp/fplp.html
E-mail Address: fplp@aol.com
Telephone: (407) 568-0200

conservative bench.

Whether or not you care about your current state of affairs within the DOC, lets band together (once again) and do something Positive. Lets encourage our family and friends to take a political position and vote for a position that could change our future.

As the legal scholar Alexander Bickel once wrote, "You shoot an arrow into a far-distant future when you appoint a Justice." Let's shoot the arrow in the "correct" direction.

Did you notice that I did not say "right" ■



FORMER SUPREME COURT JUSTICE CLAIMS INNOCENT MEN EXECUTED IN FLORIDA

Since 1972, Florida has had to release 20 people from its death row after evidence was found that they were innocent, or had been convicted because of prosecutorial misconduct or serious judicial errors. That is more than any other state. In February, former Florida Supreme Court Justice Gerald Kogan repeated what he has been saying since he retired in Dec. 1998 — that he believes innocent people have been executed in Florida.

Kogan, who served on Florida's highest court from 1986 until Dec. 1998, made his latest charge of Florida executing innocent people at a news conference in Washington, D.C., where he was pushing for new legislation that would require DNA testing that could exonerate some of those sentenced to death.

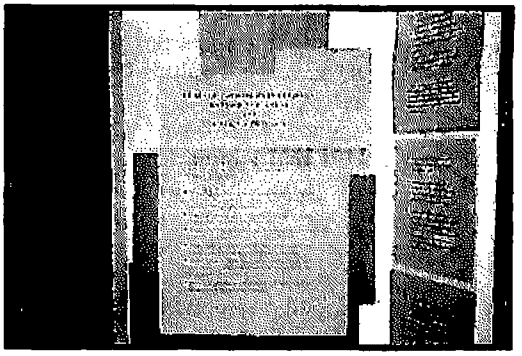
Florida's governor, Jeb Bush, responded to Kogan's latest call for closer scrutiny of death penalty cases by challenging Kogan to "identify the names of the individuals you believe were wrongfully executed." Kogan, a former Miami prosecutor, responded to Bush saying: No, "I'm not going to name names. I'm not going to get into a war of words with the governor's office on these cases." Kogan said that instead of interrogating him, Florida officials should be trying to ensure that convicted prisoners have access to DNA evidence when they claim innocence in death penalty cases.

"If the governor's office was really interested in this, what they would do is start looking to the 84 cases nationwide where people have been released from death row because of DNA evidence," commented Kogan. "It makes logical sense to say that if 84 people were set free, then how many innocent people were executed prior to DNA evidence coming to the forefront?"

The questions about wrongful executions have heated up recently after a decision earlier this year by Illinois Gov. George Ryan to put a moratorium on executions in that state. Ryan, a Republican and death penalty supporter, took that action following several high profile releases of death row prisoners in his state after DNA evidence eliminated them from being guilty.

In Florida, some prosecutors have resisted such testing, pointing to a two-year time limit on introducing new evidence as a bar to such tests. And the state's Republican lawmakers, working with Gov. Bush, convened a special session in January to pass the Death Penalty Reform Act of 2000, legislation designed to speed up executions by limiting the appeal process. Some death penalty opponents claim that legislation is guaranteed to result in the execution of innocent people in Florida where it has taken an average of seven years for those who have been released from death row to have proven their innocence. The Florida Supreme Court heard arguments in March on a challenge to the new law brought by death row attorneys who claim the law is unconstitutional. During April, the Fla. Supreme Court found that new law unconstitutional, but now legislators are trying to get a constitutional amendment to override the Supreme Court's decision.

In February U.S. Senator Patrick Leahy (D), of Vermont, introduced a bill in the U.S. Senate that would require



preservation of biological evidence, make DNA testing available to federal and state prisoners, and set national standards to ensure competent legal representation for indigent defendants accused of capital crimes.

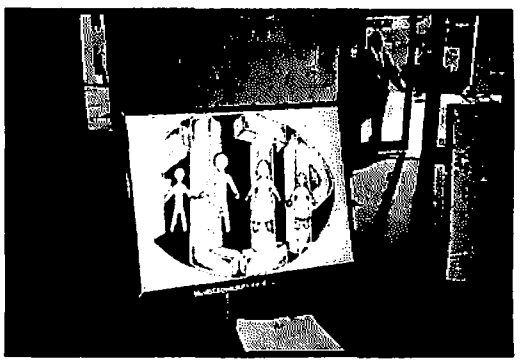
A similar bill, entitled the Innocence Protection Act, was filed in the U. S. House of Representatives during late March.

"These problems are being recognized all over the country," Kogan said, "but Florida is just putting up a stone wall." ■

OUTSIDE IN

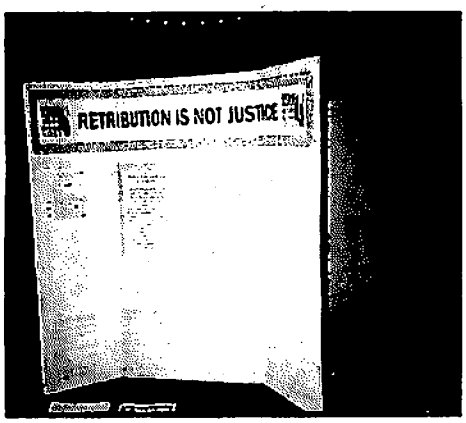
by G. E. Russell

The Florida Prison Action Network Project 2000 in Tallahassee once again was held in the Capitol Rotunda. Men and women in business suits hurried past with the requisite cell phones pressed to their ears. Some stopped to read the information, but most hurried past the ten tables with exhibits and handouts presented by the *FPAN* groups that were in attendance. We were disappointed in the turnout as we expected to see more family members this year than last. Fortunately, the groups representing prisoner families, friends, advocates were there in



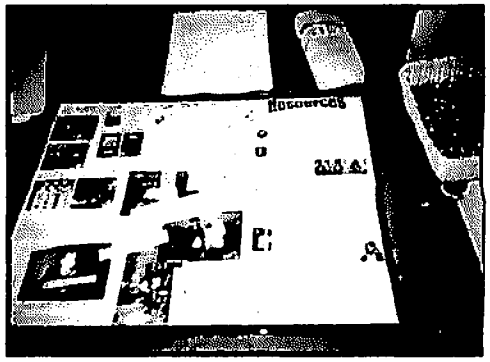
increased numbers. Some legislative aides told us that they have been hearing from more family members this year, so it appears the message is getting through.

Families with Loved Ones in Prison (*FLIP*), and Florida Prison Legal Perspectives (*FPLP*), the organizations that created the *FPAN* network focused on family visitation, legislative advocacy, and brutality inside the prison walls. An award was presented to Glen M. Boecher, who could not be present due to scheduling conflicts. Nadine Anderson and Teresa Burns explained that this Award of Merit was given in gratitude and appreciation of Mr. Boecher's strong support and encouragement of the efforts of *FPAN*, *FLIP*, *FPLP*, and other activist groups while he was the Executive Director of Florida Institutional Legal Services, Inc. The Freedom Project was very well represented by the advocates of parole reform who came from all over the state to meet with each other and their legislators. Bernie DeCastro spoke on behalf of the project and provided statistics, which support the economic benefits to the public as well as the families of this parole-eligible population. The Battered Woman Clemency Project (BWCP) was present and founder Jim Dunn described the bill, which is now searching for an amendment sponsor in the Florida Senate. The bill regarding prison and jail rape has been well received by the legislature this year, so it looks as though all of the hard work done by Cassandra Collins, founder of FAIR-SIRA, over the past few years, will have a positive result this year. In response to the recent restrictions on visits (non-contact) to prisoners on death row, family members and friends formed the Florida Death Row Advocacy Group (FDRAG) and held a press conference highlighting their concerns. Representatives Trovillion and Heyman, along with Janice Figuero, Jacquelynne Perry and other FDRAG members spoke against the change. We've heard from several folks that a few moments of the press conference were seen on news programs throughout the state.



We thank Florida Legal Services, Inc., and Florida Institutional Legal Services, Inc., for their financial support (equipment and postage), as well as Shirley Spuhler's invaluable assistance so that this year's FPAN Capitol Rotunda project would be a success. We have already started to plan next year's event in the hope that, with renewed energy and resolve, we will be in a position to coordinate car pooling, housing, buses, and other practical considerations that will enable more people to attend the event and make an impression on our legislators.

We would like to remind folks that the session isn't over yet! We recommend that you make your voices heard regarding the pending rule changes in visitation at all institutions, the bill designed to take away the independence of both the Correctional Medical Authority and the Florida Corrections Commission, the Battered Woman Clemency Committee bill, the FAIR-SIRA Stop Prison and Jail Rape Bill, along with other issues of equal importance to prisoner families, their loved ones, and justice advocates everywhere. We will be starting an email alert system (it's fast, and it's free), sometime in the summer, so please send us your email address sometime in July so that we can keep you informed. Our e-mail address is: gayle@afn.net One of the memories this reporter has of that day is watching five beefy-looking men in suits walking shoulder to shoulder past the *FPAN* exhibits, which they glanced at with contempt. They all were wearing their Police Benevolent Society (PBA) pins, clearly on their way to lobby legislators on behalf of their union, which has as some of its members the state's correctional officers. Were you or your loved ones up there wearing the blue *FLIP* ribbon and the yellow BWCP ribbon on the way to see your legislators? Let's get busy people, there's a lot to be done, and you can and will make a difference! ■



PRISON LEGAL NEWS

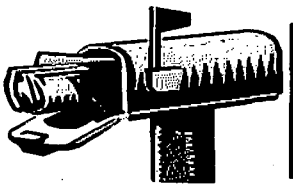
"Perhaps the most detailed journal describing the development of prison law is Prison Legal News." -- Marti Hiken, Director Prison Law Project of the National Lawyers Guild.

PLN is a 24 page, monthly magazine, published since 1990, edited by Washington state prisoners Paul Wright and Dan Pens. Each issue is packed with summaries and analysis of recent court rulings dealing with prison rights, written from a prisoner perspective. Also included in each issue are news articles dealing with prison-related struggle and activism from the U.S. and around the world.

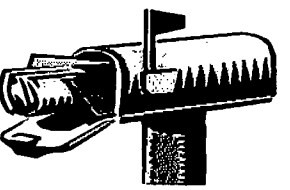
Annual subscription rates are $15 for prisoners. If you can't afford to send $15 at once, send at least $7.50 and we will pro-rate your subscription at $1.25 per issue. Please send no less than $7.50 per donation. New (Unused) U.S. postage stamps may be used as payment.

For non-incarcerated individuals, the subscription rate is $25/yr. Institutional subscriptions (for attorneys, libraries, government agencies, non-governmental organizations, etc.) are $60/yr. Sample copies are available for $1. Contact:

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



FPLP SOUND OFF



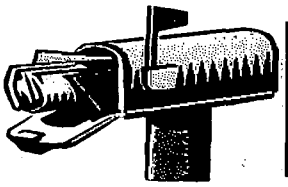
Dear *FPLP* Sound Off, I got a message here, to all prisoners, across the USA. As we know, conditions are being inflicted by an unsympathetic public. But I should think some are disserving, let us do this, why don't you people start letting it be known that doing such things like filing frivolous lawsuits just to harass prison guards and the courts, burning pen pals are unacceptable. Start acting like people who are entitled to the public's sympathy! Start showing that we have some self-respect, stop your petty animosities for each other. Wake up people! Before we get what Justice Clarence Thomas said "sedated and locked in a cell 24 hours a day" that's what he thinks is to be the answer. RE FSP

Dear Friends, Enclosed please find US stamps for my one year sub to *FPLP*. I had been reading a friends, but now it seems that if your caught with another inmates mail, it becomes contraband. So I will spring for my own so neither gets taken. I've been down 26 years straight and I've never read anything as informative as FPLP. Seems that even though I don't have a prior record, and I'm ten years DR free, with only seven in 26 years the Parole Commission seems to think I should spend the rest of my life in prison, and I've sure seen a lot of changes in the FDOC over the years. The *FPLP* keeps me up to date on a lot of things going on. I know the FDOC closed River Junction but were there any other prisons closed because of the budget cry? Thanks for a great paper I look forward to my Own first copy. God Bless you all. S ACI

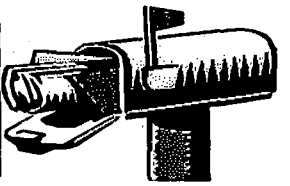
Dear Perspectives, After repeated communication with the Florida Corrections Committee and also Jeb Bush they both responded positively to my letters requesting the reactivation of weekly visits in lieu of bi-weekly ones at Everglades CI this past month, praise God and them it's happening. Course with change new problems but time hopefully will work those out.

Dear *FPLP*, I would like to thank you for the job well done. I'm pleased to know we (prisoners) have someone as *FPLP* helping us on the inside. I myself have a mental health problem with depression and am receiving help as we speak. But your so right about FDOC personnel not helping my cause, each and every day I have to deal with officers pushing me trying to make me mad. In their eyes we're all the same, just a number. Again, I thank you very much for your help. In your past booklet you said a rule was added to improve the visitation for familys well, they haven't done anything here, it seems to get worse. HH

Dear Sound Off, I am writing to express my thoughts on this latest move by DOC. I am a mentally ill inmate and I recently returned here from CMHI. I cannot believe that DOC is closing down CMHI and shipping all those inmates to ZCI. IT seems that DOC and HRS have switched possession of CMHI a few times already, between 1984 and present. ZCI can't possibly handle the severely mentally ill that are currently at CMHI. Many of those there are very suicidal and self-injuring. Use of force and restraints are a part of a daily routine there. Being a patient there myself, I can say that the staff there did not abuse the inmates while using force or restraints. Each unit has its own treatment team and doctors who work solely with the inmates assigned to that particular unit. So each inmate receives more personal time by his doctors, therapists, etc.. Why ZCI? That's the facility where an HIV positive man was beaten, harassed, then shipped off to CCI, where he died from cutting his wrist after more beatings. Nine officers were indicted for that! Hangings in JCI, murder in Starke, critical reports by so many agencies concerning negligent treatment by qualified professionals, inadequate treatment by unqualified (but DOC hired them anyway) professionals, administering mind altering drugs with out consent or correct information, brutalization. The list goes on and on. How can Governor Bush, DOC or anyone else allow this to be approved? DOC is already under many investigations for mental health deficiencies and abuses, yet they make a move that will be putting 90 people's lives at stake? Are they (DOC) crazy or just plain stupid? Or is this Florida's answer to stop crime and ease overcrowding by killing those incarcerated or making them so miserable that they kill themselves? Seems to me that Florida's sending the message to all that it's okay to abuse anyone who doesn't have the power or resources to stop it. And they wonder why today's youth are so violent and rowdy. 90% of these youngsters are the children of the inmates who are abused



FPLP SOUND OFF



by DOC. So if DOC and other authorities say they find no wrong doings by the conduct complained of how can they expect kids to be any thing less than what they're showing it's okay to do? If you condone brutalization on one level, you can't protest it on another now can you? CW BCJ

Dear Staff, I want to thank *FPLP* for the continued effort made to assist and keep prisoners informed. The reward is small for such a monumental task. The editorial by Mr. Posey (Sept./Oct.99) was enlightening. However, it is my personal opinion, that he was too reluctant in writing the real truth about certain FDOC officials. Although, I can understand his position. The part about the 'Plantation' mentality was on target, but it will continue due to inmate jealousy and greed. It is sad that inmates are more treacherous than the guards. Hopefully, *FPLP* will find some (more) time on proper medical care. I know medical care for inmates is hard to obtain from a vet!! Also, maybe you could do an exposure on the excessive salaries being provided by the inmate welfare trust fund. There is plenty 'Pork' there. Anyway, re up my subscription, and watch out for a 'Judas' You know the FDOC would love to have the FPLP staff on Q-wing with the camera off- Cheers to All.

Greetings from the Taylor Co. area. I write to you in reference to the use of force utilized in the FDOC. You are certainly aware of all the heat, which has come down on Michael Moore and the Dept. concerning the use of force. Well, "hold your breath". Recently, a three-minute video was played in our c/m unit concerning the use of force. Quiet naturally, once again, Moore has taken a measure to try to justify his staff in their brutal uses of force. He explains all the "reasons" force can be used - none different from before. I've been to six-c/m institutions in which the use of force policy has been, We use force when we want how we want where we want and to any degree we want. Basically, that's exactly what Moore says in the video only in terms attempting to disguise the truth. I'm sure you will hear more about the video. The use of force should not be the concern, but the fact that it's being "abused" by the staff of the Dept., (emphasize abused) and covered up by an ink pen of some lying big wheel with a little authority and enough pull to be able to cover up the abuse and be backed up by Moore. What a system. In conclusion I want t o compliment all of you on the dedication you all put into the *FPLP* it's an awesome publication for reference and keeps those who want to posted on what's happening around the state in these "Warehouse's for lab rat's". That's just what they think we are. LH TCI

Dear FPLP, I have seen you article on Wackenhut South Bay in which I have been here for over 2 years and have seen a whole lot of cover ups, it's a wonder SB doesn't have more suits than what they do now, from medical on up. I have a few issues to bring to light to our readers and to my fellow inmates. This is one place not to be stuck at. For one the visiting park the way officers (women) treat the visitors, by putting there hands where they are not suppose to have them. The visiting park is out of control by the officers. The classification is another joke here also, they never answer informal grievances, which is nothing new. JP SBCI

Dear FPLP, Recently the prison where I am housed has implemented a memo restricting smoking inside all department buildings being an advocate for those who profess to second hand smoke being detrimental to non-smokers health. It is a noble cause to show concern for offenders as the legislator and governmental medical personnel has shown concern for society's health regarding smoking, but instead of dwelling on a single subject health issue the department needs to focus on major concerns across the board of prisoners health as does our society. There are several areas of health related issues in which prisoners receive sub human treatment, which contradicts the great up rising issue of health via smoking. The departments utilize a menu run which consist of seventy-five percent carbohydrate, lack of any vitamin quality needed for a well-balanced meal. Knowing the basic fundamental needs of man's existence, which is elementary, food, clothing and shelter. Medical care; conditions which are chronic in nature are not recognized as such requiring offenders to thread through the red tape of "sick call" and apathy to get to a physician. Those are selective per the department and given doctors recommendation the institution decides if that particular treatment is necessary. Issuing their interpretation for what was recommended. Medical care could be administered quickly, effectively and less costly if the institution would employ adequate amount of health care providers, attend to the problem in an expeditious fashion instead of delaying treatment until it becomes overwhelming and employ procedure and treatment as required because prisoners who are to be in the custody of the department for any length of time will be less of a problem if treatment is provided immediately instead of delay and the need multiplying thus the cost does the same. Multiply. PW DCI

NOTABLE CASES

by Brian Morris and Oscar Hanson

Gain Time Game Continues DOC 2573 - Prisoner 0

The Florida Supreme Court has ruled against Florida prisoner James Eldridge in the state's latest gain time game.

Eldridge petitioned the high court for habeas relief based on the DOC's forfeiture of 2573 days of earned gain time following a revocation of probation.

Eldridge initially entered the DOC with a true split sentence totaling twelve years in prison followed by three years probation for offenses that occurred in 1990.

Eldridge served 1807 days (approximately five years) in the DOC and earned 2573 days (approximately seven years) of gain time. Eldridge essentially satisfied the twelve-year sentence and was released to begin service of his probation in 1995.

Unfortunately, Eldridge violated the terms of his probation and at the revocation hearing he was resentenced to a new sentence of fifteen years with credit for all unforfeited gain time. The Court later reduced the sentence to five years in prison.

As a result of the revocation of probation, the DOC forfeited 764 days of Eldridge's earned gain time. Not satisfied with that number, the DOC imposed a second forfeiture totaling 2573 days of earned gain time.

Because the 2573 days exceeded the five year sentence imposed by the Court, the DOC added the remaining days to the back of Eldridge's sentence. The DOC reasoned that it had to employ this procedure to recoup the total forfeiture penalty imposed on Eldridge.

So, instead of 1825 days (minus applicable future gain time awards) needed to be served on the new sentence, Eldridge must now serve 4398 days (minus applicable future gain time awards). In other words, Eldridge's sentence went from five years to twelve years at the stroke of a keyboard - a DOC keyboard.

The Supreme Court rejected Eldridge's argument and applied, with approval, the Fifth District Court of Appeal's decision in *Singletary v. Whittaker*, 739 So.2d 1183 (Fla. 5th DCA 1999).

In *Whittaker*, the Fifth District, in a superseded opinion, held that the retention of gain time is statutorily conditional upon satisfactory behavior both while in prison and while on probation. As such, the DOC may forfeit all gain time, regardless of whether the trial court had decided not to do so.

The Court further reasoned that the Legislature had provided for the award in the first place and had made the retention of that gain time conditional upon the satisfactory completion of the prisoner's supervision. See section 944. 28 (1), Fla. Stat. (1989-1999).

The Court stated that when a prisoner fails to satisfactorily complete his supervision and it is revoked, the DOC, as part of the executive branch, merely executes or fulfills the legislative mandate that the previously awarded gain time be forfeited; thus the prisoner must serve out his prior incarceration as a penalty for the revocation of probation. In reaching this decision, the Court concluded that upon resentencing in either a probationary split sentence or a true split sentence, regardless of whether the trial court resentenced the prisoner to a lesser sentence, the DOC's statutory authority to forfeit all gain time upon a revocation of probation should not be lessened.

In other words, the actual length of the new sentence imposed after probation revocation is irrelevant to any forfeiture penalty exacted from the gain time awarded during the prior incarceration. See: *Eldridge v. Moore*, 25 Fla. L. Weekly S269 (April 13, 2000).

[Comment: Aside from my position as a staff writer for *FPLP*, I had the benefit of assisting James Eldridge with this matter while assigned as a law clerk at Madison C.I. While obviously disappointed with the Court's decision, I am more disappointed that the Court tacitly approved of the DOC's practice of multiple forfeitures based on a single revocation of probation.

Prior to the initiation of the petition to the Supreme Court, the DOC had exercised its authority to forfeit 764 days of Eldridge's earned gain time. Once the DOC realized that Eldridge was challenging their authority, the DOC imposed a second forfeiture taking every single day Eldridge earned, 2573 days. It is my personal opinion that the second forfeiture was purely punitive. Nevertheless, the DOC does not have the statutory authority to apply a second forfeiture based upon the plain reading of the statute.

Section 944.28(1) states, that the department "may, without notice or hearing, declare a forfeiture of all gain time earned...." As used in context with the statute, the indefinite article "a" precedes the noun "forfeiture".

Applying the rules of statutory construction, words not defined in the statute can be defined by use of a common dictionary. Webster's II New College Dictionary (1995) defines "a" as an indefinite article that is used before nouns and noun phrases that denote a single, but unspecified thing; in this case, a single forfeiture.

Again, using the rules of statutory construction it becomes manifestly apparent that the DOC can impose only a single forfeiture. In other words, once the DOC imposes a penalty to forfeit earned gain time and adjusts the prisoner s tentative release date (which moves according to the applicable awards of gain time), the DOC is precluded from imposing a second forfeiture based on the single revocation of probation.

Another point worth mentioning is that the Court stated in their opinion that the DOC, when forfeiting gain time, merely executes or fulfills the legislative mandate that the previously awarded gain time be forfeited. This assertion is erroneous. The statute does not mandate that a forfeiture occur, it merely grants the DOC discretion to forfeit gain time. This contention is supported by the auxiliary verb "may" (as in "may" declare a forfeiture of all gain time).

Hopefully we have not seen the last of this case. A rehearing will undoubtedly be requested. Stay tuned for future developments. — oh]

Civil Restitution Lien And Crime Victims' Remedy Act Does Not Violate Ex Post Facto Prohibition

Florida prisoner Ollie James Goad, who has been incarcerated within the Department of Corrections since February 1991, initiated a

civil action against the DOC in 1995. The action stemmed from injuries he received when another inmate attacked him.

In response to this action, the DOC filed a motion for summary judgment and a counterclaim under sections 960.293 and 960.297, Florida Statutes, (Supp. 1994) to recover the costs of Goad's incarceration.

Section 960.293 provides that a defendant who is incarcerated for an offense that is neither a capital offense nor a life felony offense is liable to the state in the amount of $50 per day for the costs of incarceration. By the terms of section 960.297, the state may recover these costs for the portion of the offenders remaining sentence after July 1, 1994, the effective date of the law.

The trial court granted the DOC's motion for summary judgment on the cause of action, and Goad then filed a motion for judgment on the pleadings as to the counterclaim. He argued that the application of section 960.297 would violate the ex post facto clauses of the state and federal constitutions, because the statute was not in effect at the time he committed the criminal offenses resulting in his incarceration.

The trial court agreed and held that section 960.297 could not be applied retroactively. The DOC appealed.

Sections 960.293 and 960.297 are part of the Civil Restitution Lien and Crime Victims' Remedy Act. The Act has already withstood due process and equal protection challenges. See) *Ilkanic v. City of Fort Lauderdale*, 705 So. 2d 1371 (Fla. 1998).

The First District Court of Appeal held that the prohibition against ex post facto laws of both the United States and the state of Florida Constitutions couldn't be applied to a civil statute that is entirely remedial. The DCA reasoned that a law is not punitive merely because it can be applied in the context of a criminal case. The DCA relied on United States Supreme Court precedent that held the constitutional prohibition against ex post facto laws pertain exclusively to penal statutes, *Kansas v. Hendricks* 521 U.S. 346 (1997).

The DCA in an effort to align its decision with Supreme Court precedent, attempted to establish a line of demarcation between civil law and criminal law.

In the end, the First District Court of Appeal concluded that sections 960.293 and 960.297 Florida Statutes afford civil remedies that are not the equivalent of criminal punishment. Therefore, these statutes can be applied retroactively without violating the constitutional prohibition against ex post facto laws. *Department of Corrections v. Goad*, 25 Fla. L. Weekly D682 (Fla. 1st DCA 2000).

[Comment: It is important to note that the Fourth District Court of Appeal has decided that the Civil Restitution Lien and Crime Victims' Remedy Act cannot be applied retroactively. See: *Gary v. State*, 669 So. 2d 1087 (Fla. 4th DCA 1996). It is logical to reason that the Second District Court of Appeal has also suggested that the Act cannot be applied retroactively by its decision in *Alberts v. State*, 711 So.2d 635 (Fla. 2d DCA 1998). The First District Court recognized this conflict and certified the conflict to the Florida Supreme Court.-oh]

Mandamus Does Not Lie To Regulate A General Course Of Conduct For An Indefinite Period Of Time.

Florida prisoner Francis Stone, who happens to be a charter member of the Hells Angels Motorcycle Club, sought mandamus relief directed to officials at Avon Park Correctional Institution.

Family and friends of Stone were sending letters, cards, and pictures adorned with the Hells Angels logo. Avon Park's Warden authorized mailroom staff to return the mail to senders.

Stone exhausted administrative remedies in an attempt to overturn the Warden's instructions. Relief was denied because officials determined that the Hells Angels posed a threat to Avon Park's security.

In the mandamus action, Stone requested the trial court to order Avon Park to deliver his mail containing the Hells Angels logo. The trial court denied his petition and the District Court of Appeal affirmed on appeal.

The DCA reasoned that Florida law is well settled that mandamus is not appropriate to control or regulate a general course of conduct for an unspecified period of time. See, *Town of Manalapan v. Rechler*, 674 So.2d 789, 790 (Fla. 4th DCA 1996).

Because Stone's petition sought to regulate a general course of conduct for an indefinite period of time, i.e. to direct officials to deliver future correspondence adorned with the Hells Angels logo, the DCA affirmed the trial court's finding that mandamus was not the proper remedy. *Stone v. Ward*, 25 Fla. L. Weekly D536 (Fla. 2d DCA 2000).

Untimely Petition For Certiorari Review, If Involuntary, Is Not Without Remedial Relief.

Florida prisoner Larry Beamon petitioned the First District Court of Appeal for certiorari review of an order denying his petition for relief, in which he challenged a disciplinary proceeding. Unfortunately, Beamon' s petition was untimely.

In response to an order to show cause, Beamon alleged that the delay in filing was the inability to obtain timely notary services. Although the DOC contested this assertion, the DCA found it unnecessary to resolve this factual dispute in order to reach a decision.

The DCA reasoned that because Beamon's petition was untimely, Florida law does not authorize district courts to grant belated appellate review in proceedings that are civil in nature.

However, Beamon was not without remedy. The DCA informed the prisoner that he could petition the trial court for relief pursuant to Florida Rules of Civil Procedure 1.540, citing: *Powell v. Florida Department of Corrections*, 727 So.2d 1103 (Fla. 1st DCA 1999); *Beamon v. FDOC*, 25 Fla. L. Weekly D537 (Fla. 1st DCA 2000).

DCA Quashes Circuit Court Determination That Petitioner's Petition Was Frivolous

The First District Court of Appeal concluded that the circuit court did not depart from the essential requirements of law when it denied a prisoner's petition for mandamus relief.

However, the DCA quashed a portion of the circuit court's order that determined the petition to be frivolous and subjected the prisoner to disciplinary action.

The DCA did not agree with the circuit court's finding that the claim was so facially devoid of merit as to be frivolous, citing: *Jones v. Johnson*, 738 So.2d 530 (Fla. 1st DCA 1999); *Hay v. Moore*, 728 So.2d 806 (Fla. 1st DCA 1999).
See: *Jones v. Decker*, 25 Fla. L. Weekly D547 (Fla. 1st DCA 2000).

Qualified Immunity Is Not Available To Prison Officials Who unnecessarily Censor and Prevent A Prisoner's Letter From Being Mailed.

Florida prisoner Mark Osterback filed a civil rights complaint against multiple defendants at two correctional institutions.

The complaint alleged that personal letters to a former prisoner were confiscated by mailroom personnel at Gulf Correctional Institution and that he was issued two disciplinary reports for comments made in the letters.

The DRs charged that Osterback was disrespectful to officials by the words expressed in the letters. Osterback was found guilty by the disciplinary hearing team and was punished with the loss of gain-time and disciplinary confinement.

Osterback was transferred to Washington Correctional Institution where he initiated an appeal to the Warden for relief. The appeals were denied at the institutional level but reversed by the Secretary's office.

Upon discovery of the reversals, the warden at Gulf C.I. directed that a DR be rewritten for Osterback's statements made in the first letter. However, the new DR charged a different violation that the one originally

charged.

At the subsequent disciplinary hearing, held at Washington C.I., Osterback was found guilty as charged and sentenced to a loss of gain-time and disciplinary confinement.

Osterback again appealed, but was denied at the institutional level. And as before, the Secretary overturned the conviction.

As a result of this chain of events, Osterback argued that the consequences of his receiving unwarranted DRs included being transferred from Gulf C.I., to Washington C.I.; being qualified for review for placement on Close Management status and being assigned to such status for seventeen months; having to serve a "significant portion of his disciplinary confinement sentences; being exposed to noxious fumes and unsanitary conditions at the institutions to which he was transferred; suffering severe physical and mental problems; and being prevented from earning gain-time credits."

Osterback argued that these actions violated his rights under the First Amendment and sought as relief compensatory and punitive damages.

The defendants responded to the complaint by asserting that Osterback's rights were not violated. Further, they argued that Osterback could not show a liberty interest in the time he was required to spend in confinement. In addition, Osterback was not assigned to Close Management status as a result of the DR, but rather because of his past record of 18 disciplinary infractions.

And finally, the defendants asserted that they were entitled to Qualified Immunity and Eleventh Amendment (Sovereign) Immunity.

After an exchange in legal theories and positions between Osterback and the defendants, the Court issued a lengthy opinion and legal analysis of the issues before it.

With respect to the defendant's contention that they were entitled to Eleventh Amendment immunity, the Court recognized that none of the defendant's were being sued in their official capacity. Therefore, they were not entitled to Eleventh Amendment immunity.

The Court further opined that none of the defendants were entitled to Qualified Immunity with respect to their conduct in preventing Osterback from mailing his letters and punishing him for the contents of his letters.

Because no genuine issue of material fact remained with respect to Defendant's liability in their individual capacities, the Court determined that summary judgment in favor of Osterback was equitable.

The Court adopted the Magistrate Judge's Report and Recommendation that granted Osterback summary judgment, but denied compensatory and punitive damages because he could not show more than de minimis (trifling) physical injury.

The Court did award nominal damages of $1.00. *Osterback v. Ingram*, 13 Fla. L. (Fed.) Weekly (D)133 (U.S. Dist. Ct., Jan. 12, 2000).

1995 Sentencing Guidelines Struck Down as Unconstitutional (Sample Pleading)

On February 17, 2000, the Florida Supreme Court entered its decision in *Heggs v. State*, 25 FLW 5317 (Fla. 2-17-00), striking down Chapter 95-184 for violating the single subject rule of the Florida Constitution.

In entering its decision, the Court refused to resolve the conflict between the district courts as to who actually has standing to challenge their sentence based on the date of their offense. The Second and Third DCA's have expressly held that individuals whose offenses were committed between October 1, 1995, and May 24, 1997, could have standing, see *Heggs v. State*, 718 So.2d 263 (Fla. 2d DCA 1998), and *Diaz v. State*, 25 FLW P318 (Fla. 3d DCA 3-1-00); however, in *Bortel v. State*, 743 So.2d 595 (Fla. 4th DCA 1999), the Fourth DCA held that the window is from October 1, 1995, to October 1, 1996..

The Supreme Court did agree with the Second DCA's finding that "the window period for challenging chapter 95-184 on single subject rule grounds opened on October 1, 1995.... [for] persons such as Heggs who claim their guidelines are invalid due to the changes in the guidelines...." Id., citing Heggs, 718 So.2d at 264 n.1. However, the Supreme Court also noted that, "depending on which section of chapter 95-184 impacts the person challenging that chapter law on single subject rule grounds, the applicable window period could open on June 8, 1995, or on October 1, 1995." Id. at S140 n.3. The closing of the "window period," either October 1, 1996, or May 24, 1997, is unsettled, but the question has been certified.

Because of the large number of prisoners effected by the *Heggs* decision, *FPLP* offers the following "sample pleading" to assist those who find they have standing to challenge their sentence as being illegal:

MOTION TO CORRECT ILLEGAL SENTENCE

The Defendant, _____, pursuant to Florida Rule of Criminal Procedure 3.800(a), respectfully moves this Honorable Court for entry of an order correcting the illegal sentence in this cause, and as grounds therefore would show:

1. On (DATE), this Court sentenced the Defendant to a _____ month prison term for a felony offense that occurred on (DATE), in _____ County, Florida.

2. The record reflects that, in imposing the sentence, this Court utilized the 1995 version of the sentencing guidelines that had been enacted by the legislature in chapter 95-184.

3. On February 17, 2000, the Florida Supreme Court entered its decision in *Heggs v. State*, 25 Fla. L. Weekly S317 (Fla. February 17, 2000), striking down chapter 95-184 as unconstitutional because it violated the single subject rule contained in Article III Section 6 of the Florida Constitution.

4. Utilizing the 1995 guidelines, Defendant's guidelines were calculated as being _____ months to _____ months; however, under the 1994 sentencing guidelines the Defendant's sentencing range would be _____ to _____ state prison months.

5. The unconstitutional version of the 1995 sentencing guidelines resulted in a more severe punishment for many offenses, such as Defendant's; therefore, the Defendant should be resentenced pursuant to a corrected score sheet utilizing the predecessor 1994 guidelines.

6. Because the offense date in this case is DATE, the Defendant falls within the "window period" for challenging Chapter 95-184.

Wherefore, the Defendant requests this Honorable Court to enter an order correcting the illegal sentence and imposing a sentence utilizing the 1994 sentencing guidelines. The Defendant also requests any such other and further relief the Court deems just and proper.

* * * * *

This is only a model form *FPLP* is providing to assist those individuals who have standing to challenge their sentence based on the decision entered in *Heggs*. Each case is different and it cannot be emphasized enough that, before filing any pleading with the courts, the litigant should make every effort available to thoroughly familiarize himself or herself with the laws and rules applicable to their particular issue. In the alternative, speak with an attorney or someone knowledgeable in the law.

Some prisoners have elected to include an additional paragraph arguing:

7. To maintain uniformity in sentencing in compliance with the legislative intent of the 1994 sentencing guidelines, upon resentencing in this case, the Court should enter a separate order directing the Florida Department of Corrections to apply the gain time laws applicable to the 1994 sentencing guidelines.

* * * * * *

This gain time argument has a major hurdle to overcome. Chapter 95-294 created the "Stop Turning Out Prisoners Act." The "S.T.O.P." act applies to offenses committed on or after October 1, 1995, and prohibits the FDOC from awarding gain time that would result in a prisoner being released prior to serving 85% of the sentence imposed. In other words, although the inclusion of an argument for gain tine applicable the 1994 sentencing guidelines may offer a glimmer of hope, there is no such thing as a winner until and unless it wins.

Perjured Testimony And Unauthorized Consecutive Mand. Mm. Sentences May Warrant Rule 3.850 Relief

Benjamin Fannin appealed the Pinellas County Trial Court's order denying his postconviction motion filed under Rule 3.850, Fla.R. Crim.P. A couple of Fannin's claims were that the State violated his due process rights by utilizing perjured testimony to obtain a conviction against him and that the trial court erred by imposing consecutive mandatory minimum sentences under the sentencing guidelines.

Fannin was convicted of " count of violating the Florida Racketeering Influenced and Corrupt Organization Act ("RICO"), one count of RICO conspiracy, and numerous counts of trafficking and conspiracy to traffic in cocaine over 400 grams."

Pinellas County Circuit Court Judge Brandt C. Downey, without providing written reasons for departing from the permitted guidelines sentencing range of five and one-half to twelve years incarceration, sentenced Fannin to 3 consecutive 15-year mandatory minimum sentences for an overall sentence of 45-years incarceration. Initially, Fannin 's two co-defendant's had also received consecutive minimum mandatory sentences exceeding the guidelines permitted range.

Although Fannin had, to no avail, previously raised his sentencing issue in his direct appeal, the Second DCA had affirmed, per curiam ("PCA"), without a written opinion, Fannin successfully raised the issue again in his Rule 3.850 motion. Since, in their direct appeals, both of Fannin's co-defendants prevailed on the same guidelines departure issue Fannin had lost on, the DCA found it would be fundamentally unfair to deprive Fannin relief on the same issue.

Upon recognizing its own error in affirming the sentence in Fannin's plenary appeal, the Second DCA, *citing Benedit v. State*, 610 So.2d 699 (Pla. 3d DCA 1992), and *Wright v. State*, 604 So.2d 1248 (Fla. 4th DCA 1992), for the proposition that postconviction relief may be warranted to remedy a fundamentally unfair affirmance of the direct appeal, reversed the trial court's denial of Fannin's Rule 3.850 motion. Stated simply the DCA found that even though Fannin had previously raised the illegal guidelines departure issue in his direct appeal, under the circumstances, he could successfully raise the issue again under Rule 3.850, Fla.R. Crim.P. The *Fannin* Court, *quoting Brannam v. State*, found that:

Unless upward or downward departures are justified by valid written reasons, a trial judge may not depart from the guidelines recommendation. Since uniformity in the sentencing process is the goal, all sentences should reflect, or attempt to reflect, the guidelines as closely as possible unless valid reasons for departure are found. Thus, in those instances where the statutory minimums or maximums preclude sentencing within the guidelines recommendation, the trial judge must impose either concurrent or consecutive sentences, as the case may be, in order to come as close as possible to the guidelines scoresheet recommendation. 554 So.2d 512, 514 (Fla.1990) (emphasis added in opinion),

As for the denial of Fannin's perjured testimony claim, the DCA found Fannin presented a "facially sufficient" claim under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), which if proven could warrant relief under Rule 3.850, Fla.R. Crim.P.

See: *Fannin v. State*, ___ So.2d ___, 25 FLW D336 (Fla. 2d DCA, February 4, 2000).

Potential Relief Found in 1993 Reduction of Capacity Statute

Effective June 17, 1993, the mandatory dictates of the original "Reduction of Capacity" statute, Ch. 93-406, § 39, at 2286, Laws of Florida, codified at s. 944.0231, *Florida Statutes* (1993), established that:

When the population of the state correctional system reaches 99 percent of its lawful capacity, the Governor, pursuant to s. 252.36, shall use his emergency powers to reduce the capacity of the state correctional system as follows: The Governor shall inform any federal jurisdiction which has a concurrent or consecutive sentence or any active detainer placed on any inmate in the state correctional system of his intention to transfer custody to that jurisdiction within 30 days. No prisoner shall be so transferred who is convicted of a capital felony in this state nor shall any transfer take place to any county or municipal jurisdiction within this state.

This law remained in effect until 4/25/94, when the Florida Legislature amended it by changing "reaches 99 percent" to "exceeds 100 percent" and inserted the words "and remains in excess of 100 percent of lawful capacity for 21 days." Ch. 94-111, § 2, at 107, *Laws of Fla.* It was not until 6/10/95, through Ch. 95-251, § 2, at 1761, *Laws of Fla.*, that the legislature "made use over the Governor's emergency powers optional in lieu of mandatory. ... Historical and Statutory Notes at *24 Fla.Stat.Ann.* 472 (Supp.1996).

Recently, in *Gomez v. Singletary*, the Florida Supreme Court found that, "prison overcrowding *did exceed the relevant threshold levels* in 1993 and onward for a number of years." 733 So.2d 499, at 506 (Fla.1998) (emphasis supplied in opinion). According to the prison population level charts submitted by the FDOC in *Gomez*, it appears the population of the state correctional system actually exceeded 99 percent of its lawful capacity on numerous occasions, including but not limited to 4/22/94.

Under the U.S. Supreme Court decision entered in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), it's only reasonable to believe that the original "Reduction of Capacity" statute may have created a liberty interest for numerous prisoners who were in the custody of the state correctional system between 6/17/93, and 4/25/94. For those prisoners, provided they actually had an active federal detainer placed against them and had not been convicted of a capital felony in this state, this 1993 statute appears to offer potential. "If that statute does provide the inmate with a liberty interest, that interest may only be taken 'with due process.'" *Meola v. FDOC*, 732 So.2d 1029 (Fla.1998). Since the failure to tender qualified prisoners for transfer could "inevitably affect the duration of [their] sentence, Sandin, 515 U.S. at 487, 115 S.Ct. at 2302, resulting in an "atypical and significant hardship .. . in relation to the ordinary incidents of prison life," *id.* at 484, 115 S.Ct. at 2300, it's only reasonable to believe his state-created right rose to the level of a federally protected liberty interest. See *Isreal v. Marshall*, 125 F.3d 837 (9th Cir.1997) (assuming, without deciding, that the state-created "right to be *tendered* ... for transfer" is a protected liberty interest).

Although the current" reduction of capacity statute is discretionary, the original 1993 version was mandatory. In *Div. of Workers' Comp. Etc. v. Brevda*, 420 So.2d 887 (Fla. 1st DCA 1982), the First DCA found that the legislature, in amending or repealing a statute, may not divest the holder of vested rights that accrued while the original statute was in effect. See also, § 11.2425, *F.S.A.; Bitterman v. Bitterman*, 714 So.2d 356, at 363 (Fla.1998) ("Substantive rights cannot be adversely affected by the enactment of legislation once those rights have vested."); Meola, at 1035 ("due process ... calls for such procedural protections as the particular situation demands.").

If successfully challenged, it's possible this statute could benefit numerous prisoners, including but not limited to prisoners who were in FDOC custody between 6/17/93, and 4/25/94, with detainers placed against them by INS. One such challenge, *Morris v. Bush*, Case No. PC 99-05917, involving a concurrent federal sentence is pending before the Honorable Nikki Clark, Judge of the Leon County Circuit Court. In that case, among other things, Morris, *citing Byrd v. Hasty*, 142 F.3d 1395 (11th Cir.1998), claims the Governor's noncompliance with the 1993 reduction of capacity statute has deprived him of his eligibility under s. 18 U.S.C. § 3621(e)(2)(B) to earn a one—year reduction on his concurrent, but longer, federal sentence. Good or bad, the outcome of this case will be mentioned in *FPLP*'s Notable Cases. ■

RHOTON & HAYMAN, P.A.

LOREN D. RHOTON
Attorney At Law

STEPHEN D. HAYMAN
Attorney At Law

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FDOC FAMILY OMBUDSMAN

The FDOC has created a new position in the central office to address complaints and provide assistance to prisoner's families and friends. Sylvia Williams is the FDOC employee appointed as the "Family Ombudsman." According to Ms. Williams, "The Ombudsman works as a mediator between families, inmates, and the department to reach the most effective resolution." The FDOC Family Services Hotline is toll-free: 1-888-558-6488.

FDOC SPANISH HELPLINE

The FDOC has also created a help line to assist Spanish-speaking citizens obtain information from the department. Tina Hinton is the FDOC employee in this position. Contact: 1-800-410-4248.

[Please inform FPLP if you have any problems with using the above services]

Florida Corrections Commission
2601 Blair Stone Rd.
Tallahassee FL 32399-2500
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Fax (850)413-9141
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Web Site: www.dos.state.fl.us/fgils/agencies/fcc

The Florida Corrections Commission is composed of eight citizens appointed by the governor to oversee the Florida Department of Corrections, advise the governor and legislature on correctional issues, and promote public education about the correctional system in Florida. The Commission holds regular meetings around the state which the public may attend to provide input on issues and problems affecting the correctional system in Florida. Prisoners families and friends are encouraged to contact the Commission to advise them of problem areas. The Commission is independent of the FDOC and is interested in public participation and comments concerning the oversight of the FDOC.

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Office of Executive Clemency
2601 Blair Stone Rd.
Bldg. C, Room 229
Tallahassee FL 32399-2450
(850)488-2952
Coordinator: Janet Keels

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2601 Blair Stone Rd., Bldg C
Tallahassee FL 32399-2450
(850) 488-1655

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P.O. Box 1489
Tallahassee FL 32302
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Web Site: www.fdle.state.fl.us

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1110-C NW 8th Ave.
Gainesville FL 32601
(352)955-2260
Fax: (352)955-2189
EMail: fils@afn.org
Web Site: www.afn.org/fils/

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Daytona Bch FL 32114
(904)254-8453
EMail: flip@afn.org
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