Florida Prison Legal Perspectives

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FDOC HAZARDOUS TO PRISONERS HEALTH

By Mark Sherwood and Bob Posey

■ Thirty percent of the 129 doctors who provide medical care to prisoners incarcerated in the Florida Department of Corrections (FDOC) have marks on their records ranging from malpractice to fraud. The FDOC rarely fires or disciplines doctors it hires, even in cases where negligence causes prisoners to die.

■ Dozens of Florida prisoners have died since 1994 after receiving inadequate health care.

■ Recent state and federal legislation have made it almost impossible for prisoners to successfully sue the Department of Corrections when subjected to medical malpractice, even when it results in disfigurement or life-threatening complications. Even if legal action was successful, prison doctors are shielded from personal liability and taxpayers are required to cover any legal judgments against the doctors.

■ At least one in every nine Florida prisoners suffers from severe mental illness which prison guards are not trained or equipped to deal with.

The above are just a few of the findings of a special investigative report conducted by the *St. Petersburg Times* recently. In a three part series that made headlines in that Central Florida newspaper during the month of September, facts and statistics were revealed about the Florida prison system that had been concealed from the public.

While prisoners in Florida, and their families, have been very aware that the quality of medical care has been going downhill for several years, and while taxpayers have been paying more and more, the Department of Corrections has been able to keep the true state of affairs from public scrutiny.

The special report by the *Times*, which ran from September 26th through the 28th, shows that the DOC has been a dumping ground for troubled physicians. Doctors who have repeatedly lost malpractice claims, been found guilty of sexually abusing their patients, been found guilty of fraud, and who only have temporary or restricted licenses, or who have been disciplined by the State Board of Medicine, are a bargain for the DOC. And that appears to be the real incentive for the DOC, which is constitutionally required to provide at least some health care for the 68,000 prisoners in its custody.

Life and Death Cost-Cutting

The average doctor straight out of medical school averages $120,000 a year. The DOC pays far less, with salaries for the doctors it hires to treat prisoners running from $72,000 to $86,000 a year. With prison doctors being fully indemnified by the state, the prison system

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offers a safe haven for troubled doctors by allowing them to avoid malpractice insurance that increases when a doctor has problems.

David Thomas, the DOC's chief doctor, admits that economics is a factor in the quality of doctors hired by the department. But that does not trouble him. "Clearly, you would prefer people that don't have any problems," Thomas said. "But I do think there is a place for well-trained people who have made a mistake, and we may be well-placed to do that because we have a degree of control over our doctors that the outside world does not ."

The *Times* reported in the first of its investigative series that dozens of prisoners had unnecessarily died after receiving inadequate medical treatment since 1994. Some critics question the reasons why the DOC is so willing to hire doctors with questionable histories and put them in charge of a $225-million health care system, and the lives of prisoners.

"Those numbers are pretty atrocious", said Randall Berg, a lawyer with the Florida Justice Institute in Miami. "it shows they really don't care what level of **care** is provided - they're operating on the cheap."

Shady Physicians

The *Times* investigation discovered that of the 129 doctors employed by the DCC sixteen have had to pay off previous medical malpractice claims in Florida, some more than once.

Fourteen prison doctors - or 11 percent - have disciplinary records with the state medical boards, a relatively rare distinction where last year less than half of 1 percent of the nation's doctors were disciplined by a medical board.

Seven of the DCC doctors have been disciplined more than once by medical boards and nine are listed in a book entitled Questionable Doctors that is put out by a national consumer group.

Three of the DOC's doctors have a history of sexual misconduct with patients.

Fifteen of the DOC's doctors are practicing on temporary or restricted licenses. Because of an exception in Florida's law, doctors who have restricted licenses or have not passed either the Florida or national medical exam, but are licensed in another state, may work in Florida's prisons.

Overall, only one-third of all the DOC's doctors are certified in a specialty, a requirement generally necessary to work at a hospital or for an HMO.

Between 1996 and 1998 the DOC admits it only reported three doctors to the state medical board. Two of those doctors, Abigail Rosario-Rivera and Frederick Vontz, are still employed by the DOC even after being reported to the medical board for negligently allowing prisoners in their care to die.

The department is even willing to hire and place in positions of authority doctors who commit crimes. Dr. Robert Briggs, the chief medical executive at Charlotte Correctional Institution, plead guilty in federal court in 1981 to filing fraudulent Medicare payment invoices.

Other examples of questionable doctors noted in the *Times* report include Dr. Effong Andem. He was disciplined in 1994 by the army on charges that included "lack of attention to detail, failure to assume responsibility for patients, failure to admit or recognize errors, and failure to learn from mistakes." The next year, he was hired by the DOC.

Dr. Mireya Francis was disciplined by the Florida Board of Medicine in 1993 for dispensing drugs to mentally ill patients without first performing psychiatric evaluations. In 1995 she was again disciplined for lying in her application about being de-

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nied from practicing medicine in Ohio. The DOC hired her despite those marks on her record.

Dr. Arnold Azcuy is a medical executive at North Florida Reception Center. He is in charge of reviewing prisoners' medical cases statewide and makes cost-control decisions about when to deny care. Dr. Azcuy paid out on three medical malpractice suits before coming to work for the DOC. Two of his claims, both in 1993, involved the deaths of his patients.

Another DOC doctor, Stanley Dratler, lost his medical license for three years in 1986 for fondling female patients. Before coming to the DOC, Dr. Jose Gonzalez was disciplined by the medical board after giving the wrong medicine to a pregnant woman causing her uterus to rupture and the fetus to die.

Dying by the Dozens

The DOC maintains that the medical care being provided to prisoners is as good as one can get on the outside. But then they never thought anyone would care enough to look closer, or that DOC Secretary Moore would unintentionally open up Pandora's box.

Earlier this year Moore proposed to Gov. Jeb Bush that money could be saved if three oversight committees, the Florida Corrections Commission (FCC), the Correctional Medical Authority (CMA), and the Correctional Privatization Commission (CPC), were done away with. Moore told Bush that those entities (that provide a measure of oversight of the DOC's operations) are unnecessary, that the department can supervise itself.

That proposal ruffled a few feathers and focused attention on just what those committees do, ironically they are very seldom ever heard from or mentioned in the news.

The members of the CMA, a group set up by the legislature to audit prison medical care in 1993, apparently did not appreciate Moore's proposal to do away with them and in September they struck back with a news release that prompted widespread media coverage.

According to the CMA, since January 1994 at least 56 Florida prisoners have died from inadequate medical treatment. That's almost one in eight of the 463 death records that the CMA reviewed for that period. "These deaths could have been prevented," said Linda Keen, executive director of the CMA. Instead, for years, CMA records indicate, Florida prisoners have been dying by the dozens as a result of substandard or simply negligent medical care.

The CMA has been doing the job it was authorized to do. It pays consulting fees to private doctors with no ties to the DOC to review a sampling of deaths at the state's prison hospitals. Every few weeks the CMA sends a report on the findings of those doctors to the governor, the legislature, and the DOC. But the CMA cannot tell the DCC to do anything, their power is strictly limited by law.

Kay Harris, who is in charge of preparing the CMA reports, said she feels that despite the obvious problems exampled in the reports that nothing ever changes. "The average John Q. Citizen doesn't care about inmate health care," Harris said.

The chief administrator of the DOC's health care system, John Burke, disputes that the department is at fault. Despite the CMA's assertions, the department's record is a good one, he claims. "A percentage of people are going to die no matter what you do, and I don't think our percentage is inordinately high considering the population we take care of," Thomas said.

Thomas also noted that there are an additional 820 prisoner deaths since 1994 that the CMA hasn't reviewed, and knowing that they don't have the funds, he disingenuously asked why they didn't review them too. "We're not perfect," Thomas defensively said, "People make mistakes, and other people suffer for it."

Bedlam in the Sun

The *St. Petersburg Times* report did not stop by just looking at the medical hell that Florida Prisoners are increasingly being subjected to. The third part of the Times' series explored the care that the increasing number of mentally ill prisoners receive while in Florida's prisons.

According to a recent study by the U.S. Justice Department, an estimated 284,000 prisoners - 16 percent of the U.S. prison and jail population - suffer from severe mental illness. (See: *FPLP*, Vol. 5, Iss. 5, "Mentally Ill Prisoners") Many experts say that the Justice Department's study confirms the belief that prisons have become the nation's new mental hospitals.

With the wholesale closings of public mental hospitals in the 1960's and the prison-building boom of the past two decades, prison often becomes the only option available to mentally ill persons unable to cope with the pressures of society. From a high of 559,000 in 1955, the number of patients in state hospitals nationwide dropped to just 69,000 in 1995. At the same time, the number of jail and prison beds has quadrupled in the last 25 years, with over 1.8 million Americans now behind bars.

Florida is not an exception. As noted in the *Times* report, with the state prison population over 68,000, at least one of every nine prisoners in Florida suffers from severe mental illness.

For some of the incarcerated mentally ill, prison offers access to psychotropic drugs and treatment that they might not receive on the outside. But for others, prison often exacerbates their illnesses as they struggle to deal with officers unable or unwilling to distinguish between mental symptoms and willful unruliness. Punishment and discipline against mentally ill prisoners is common and on average results in considerably

longer time behind bars, the Justice Department study found.

"A prison is absolutely the worst place for somebody with severe mental illness, and absolutely certain to exacerbate their symptoms," said Ron Honberg, legal director for the National Alliance for the Mentally Ill.

John Burk, deputy director for the Florida DOC's health care system, said, "Once these guys are put in prison they've got to function in a structured environment - a very structured environment - and some of them can't. But that's not a correctional officer's fault."

Many experts feel that without it being necessary to assign just who is at "fault," it is obvious that the Florida DOC is doing a poor job of dealing with a growing *crisis* within the prison system as concerns the mentally ill. Mental health staff in the prisons are often overwhelmed by their case loads and operate in an atmosphere where guards and administrators view mental health staff as coddlers who are easily manipulated by prisoners.

"Often its security who wants to make the call that inmates (fake mental health problems], so that it's okay not to provide treatment for them. There's an attitude that all inmates are (faking]," said Helen Cunningham, who quit the DOC in August as Baker Correctional Institution's senior psychologist. Cunningham said she often had to wait days before guards would bring prisoners requesting mental health care to her. She said she was treated worse by prison guards if she wrote up reports on allegations that prisoners had been abused, as she was often required to do.

The DOC spends over $46 million a year on mental health, but still is falling behind. In the last two years at least 65 mental health staff positions have been cut. The increasing numbers of mentally ill entering the system and the rising costs of psychotropic drugs is growing faster than the DOC budget.

"It's being tightened down as tight as we can get it," said DOC's John Burke. "(But) we think we're still providing care that meets the constitutional standard." Not so, says others, even former DOC employees.

Destructive Solution

"As they cut mental health services, which is what they're doing, you are going to have more and more inmates who are unmanageable because of mental illness," said Connie Schenk, a former DOC psychologist who quit in frustration during August. (See: This issue, "Beatings, Corruption, Cover-ups Detailed to Senate by Prison Psychologist.") "The way (the DOC] deals with mentally ill inmates who can be problematic is just to put them into close management (sensory depriving confinement], where they don't get near the access to help that they used to," said Schenk.

According to Terry Kupers, a forensic psychologist who wrote a book about the devastating impact that confinement can have, prisoners left with little contact with others often become psychotic and filled with rage.

Social science and clinical literature have consistently reported that when even mentally normal human beings are subjected to social isolation and reduced environmental stimulation; they may deteriorate mentally and in cases actually develop psychiatric disorders. The effects of such isolated confinement almost certainly creates more problems for those already suffering from mental illness.

"It becomes a vicious circle — especially if the mentally ill inmate hurts an officer," commented Kupers. "Rather than providing any therapeutic treatment, the guards can get more and more brutal, and then the inmates become even more violent and disruptive. It just escalates."

Kay Jamison, a professor of psychiatry at the John Hopkins School of Medicine, notes that, "The incarceration of the mentally ill is a disastrous, horrible social issue." Subjecting the mentally ill to isolated confinement situations "can exacerbate their hallucinations or delusions," Jamison said.

Yet, despite the wealth of evidence showing the destructive and damaging effects of isolated confinement on the mentally ill, the Florida DOC has actually increased its use, and plans to increase it even further without consideration of the long term effects or the eventual cost to society or taxpayers. (See: *FPLP*, last issue, "The Return to Draconian Days in FDOC).

Decades of Neglect

Allegations and evidence that the medical care available to Florida prisoners is far below recognized standards, and that unnecessary deaths result from same, are nothing new. For 20 years, between 1973 and 1993, Florida's prison system was under the control of federal courts in a case that started out challenging the poor quality of medical care provided to state prisoners.

Throughout that case court-appointed medical teams found that prison officials were providing below-standard medical care time after time. After costly improvements, and pressure from the federal court, that case was finally settled in 1993, with the state promising to provide medical and mental health treatment equivalent to the community's standard of care.

Bill Sheppard, the lawyer who represented prisoners in that federal case, said that the problem today is the same as it was two decades ago: Lack of money.

"Every damn death I've seen is a sad story," Sheppard said. "And the legislature is the .. .damn cause of it."

Another lawyer, Randall Berg of the Florida Justice Institute, said medical care did improve in the prisons up through the lawsuit in 1993.

"Things got measurably better. But it didn't take long for it to get back where it was.... And it's getting progressively worse." Berg commented.

It has become so bad and problems are so rampant that even Florida's normally prison-myopic legislators have had to take notice. According to Sen. Skip Campbell, D-Tamaric, vice chairman of the Senate Criminal Justice Committee, "I can assure you I get a letter a month from inmates saying, "I'm not getting proper care.' I'm starting to believe now that maybe they aren't getting the treatment [they need]."

[Source: *St Petersburg Times*. 9/26-28i99 *Orlando Sentinel*/11/99]

FPLP NEEDS YOUR SUPPORT

Teresa Burns, Publisher

The publication of this newsletter and the projects taken on to benefit Florida prisoners and their families is made possible through those who support this valuable resource by subscription and supplemental donations.

In the past year the organization has worked hard to address the concerns of its members and has achieved numerous successes through those efforts. FPLP staff and members successfully had the FDOC reconsider its plans to restrict mail to and from prisoners and prohibit stamps from coming through the mail. FPLP staff successfully assisted in having new visitation laws adopted that will result in improved visitation for families with an incarcerated loved one. The staff has met with and provided information to state legislators, news reporters and law enforcement agencies concerning the conditions of confinement that prisoners are being subjected to. And FPLP has worked by itself and with other organizations to correct problems at several institutions over the past year, and recently *FPLP* staff have been working to have something done to reduce the exorbitant phone rates being charged family members and friends of Florida prisoners.

It is reality that it takes money for the organization to operate. Subscription donations cover the costs of publication and distribution of the newsletter, but leave little left over to finance the other efforts that are so necessary if change is to be had.

As veteran supporters of *FPLP* know, during the last two legislative sessions in Tallahassee, *FPLP* has been one of the primary sponsors of day-long rallies held in the Capitol Rotunda to educate lawmakers about problems within the Department of Corrections. Once again *FPLP* will be in Tallahassee working for prisoners and their families in April 2000, only a few short months from now. Your donations are needed to make this upcoming Rotunda Rally the biggest and most successful yet. Money is needed for displays, brochures, rental of tables and chairs, rental of a PA system, and hopefully to allow some transportation to be rented so people can attend from the middle and southern portions of the state.

Now is the time your support is needed. If you have not made a donation to *FPLP* recently, please show your support by making a donation, large or small - every little bit will help to allow *FPLP* to continue being effective in the coming months and year.

FPLP is your voice, speaking out and taking action. If you believe in the purpose and goals of *FPLP* then don't delay - send in your contribution today. All donations are tax deductible.

Together, we have made and will continue to make changes. ■

GRAND JURY CONVENED IN VALDES' MURDER

GAINESVILLE — Alachua County grand jurors convened 9/29/99 to begin a review of the suspected beating murder of former death row prisoner Frank Valdes by prison guards at Florida State Prison (FSP) on July 17, 1999.

The grand jury is expected to meet several times, up until January 10th, to examine the facts surrounding Valdes' death and to question witnesses. Eleven people were subpoenaed before the grand jury on the first day in what was described as a scene—setting meeting to familiarize the grand jury with this case that has rocked the Florida Department of Corrections.

Among those who appeared the first day were James Crosby, warden of FSP; William Hamilton, Alachua County Medical examiner; Jimmie Burger, a nurse who examined Valdes at the prison and who later resigned from the DOC; a prison medical records employee and nursing supervisor for the DOC; and, two Bradford Co. paramedics.

Earlier in September, Chief Circuit Judge Robert Cates granted State Attorney Rod Smith's motion to change venue of where the grand jury would convene from Bradford Co., where FSP is located, to Alachua County. Smith had argued that a grand jury in Bradford Co., would be "improperly comprised" since FSP is the largest employer in the small rural county.

Several prisoners who were in cells in the immediate vicinity of where Valdes was allegedly brutally beaten and stomped to death, resulting in every rib being broken and his testicles crushed with boot prints covering his body, are expected to be testifying before the grand jury at some point.

Nine officers are suspected of involvement in Valdes death. This scandal has opened the DOC up to intense media scrutiny in almost every area and lead to almost continuous revelations of gross mismanagement, abuse of prisoners and corruption in the DOC since Valdes death.

In a preliminary move, on October 29 the grand jury issued a sealed indictment against one of the nine guards, Montrez Lucas, charging him

with aggravated battery, battery on an inmate and coercion to alter reports. Those charges stemmed from an incident the day before Frank Valdes was beat to death. According to authorities, Lucas had beat Valdes on July 16, and then altered reports to hide his actions. Lucas turned himself in to police on Nov.3 and was released on a $50,000 bond.

A prosecutor in Gainesville said the 21 member grand jury will continue its investigation and murder charges are expected to be filed in the Valdes' death.

On Nov.4 eight of the nine suspended guards suspected in Valdes' murder appeared at a 90-minute closed door meeting in Gainesville called by State Attorney Rod Smith. A source stated the meeting was called to discuss whether the guards will have attorneys represent them as individuals or as a group.

[Source: *Gainesville Sun*; 9/29-30/99; *Florida Times Union*, 11/3,4,5/99] ■

VAN POYCK TRANSFERED TO VIRGINIA

One of Florida's most knowledgeable and effective prison litigators, William Van Poyck, 45, became the first prisoner on Florida's death row to ever be transferred to another state through the interstate compact system.

The transfer allegedly stemmed from prison officials' concerns about Bill's (as he is known to his friends)-safety, and the safety of correctional officers, following the suspected beating—murder of Bill's co—defendant, Frank Valdez, by guards at Florida State Prison (FSP) on July 17th.

Bill and Frank were both on death row for the killing of prison guard Fred Griffis in 1987. Bill and Frank were allegedly attempting to free prisoner James O'Brien as he was being transported to an outside doctor, when Griffis refused to give up the transport van's keys and subsequently was shot three times in the head. Bill has steadfastly maintained that he did not pull the trigger, but he still ended up with a death sentence in 1990.

Under a deal made with Virginia during August, Bill was sent to that state's death row early in October, and a Virginia prisoner, probably not from death row, will be sent to Florida in exchange.

"To the best of our knowledge, we have never transferred a death row (prisoner) before, but because of the unique circumstances surrounding Van Poyck. . .we have decided he will be in the Virginia system indefinitely," said FDOC spokesman C.J. Drake.

Bill is expected to be a witness as the investigation continues into Frank's death. In the two weeks before Frank was killed, Bill had been writing numerous letters, including one to a Federal judge and various reporters, warning that guards at FSP were "out of control" and routinely beating prisoners on the now infamous X-Wing. After Frank was killed he continued to write to whoever he thought might listen, detailing how guard beat Frank to death and how both he and Frank had been threatened by guards throughout their incarceration at FSP.

Prison officials claim they did not transfer Bill to keep him quite or to censor him.

Bill Van Poyck was not just another condemned prisoner on Florida's death row. He was known throughout the prison system, by prisoners and officials, as one of Florida's foremost jailhouse lawyers. From his death row cell, he legally challenged his and other's often inhumane or unconstitutional conditions of confinement. Bill's criminal attorney Gerald Bettman said he has a sharp legal mind, a fact the DOC well knows where several cases filed by Bill, or on which he assisted, established significant changes throughout the department.

When requested to sign the paperwork for his transfer to Virginia, Bill reluctantly agreed because in his own words, "Nothing can be worse than Florida."

[Source: *St Petersburg Times*, 10/5/99; Bill Van Poyck] ■

A SYSTEM OF JUSTICE?

Drew Hanson

When a just cause reaches its flood tide... whatever stands in the way must fall before its overwhelming power.
Carrie Chapman Catt

In the wake of new allegations of corruption within the Department of Corrections (DOC) following the death of an inmate at Florida State Prison (FSP), there has been a flood of questions regarding the competency of the majority of DOC 's workforce.

Following the murder of death row prisoner Frank Valdez, fellow correctional officers built a flood gate to circumvent the flood tide of inquiries from law enforcement officers seeking inculpatory evidence against the officers involved. Not even the death of a human being could make a crack in the floodgate that would create a break in this wall of silence. Even the *Bradford County Telegraph*, which happens to be the local newspaper for Bradford County where FSP is located was indifferent to the murder that occurred in its county. The paper' s editor, John Miller was quoted as saying: "It's not a hot priority news issue to us " [*Miami Herald*, 7/23/99]. Mr. Miller 's comment said it all. Injustices to inmates are not a hot priority.

This code of silence is indicative of the mentality of the correctional staff, and there are two schools of thought as to why the correctional industry has produced this breed of officer.

First and foremost, silence - as to injustices of inmates - is as old as the institution of penal systems itself. from the inception of prisons, prison guards have established and maintained a unique idiosyncrasy. Usually officers of rank will indoctrinate subordinates as to how to conduct themselves in front of other staff as well as

the prison population. This indoctrination is broad in nature and requires strict compliance. Those who do not comply, find themselves out of a job.

Second, the reason it's easy for the higher echelon to indoctrinate the subordinates is because of the caliber of individual the prison industry hires. DOC has always sought employees who can demonstrate "an indifferent attitude" towards prisoners. The ideal officer is one who is not prisoner friendly.

A recent report has disclosed that more than 1 in 6 Florida guards have criminal records. A background check on Florida State Prison located at Starke revealed that out of the 511 guards employed by FSP, 89 have arrest records. Out of the 89 guards with arrest records, 11 faced court-ordered punishment for violent crimes, and two are repeat offenders. [Source: *St. Petersburg Times*; *Associated Press*, *The Times Union*, 8/23/99]. Unlike other law enforcement agencies, the DOC does not require psychological or polygraph tests to weed out undesirable applicants.

Many experts question whether it is reasonable to expect guards who can't behave themselves on the outside to use force judiciously on the inside. Thomas J. Archambault, head of the TJA Training Resource Group, a Vermont company that trains prison guards, said, "if you have a person that has been convicted of assaultive behavior, obviously they are out of control". Archambault continued that it follows that we don't need out-of-control officers in a position of controlling people.

Corrections statistics show that 1,560 of Florida's nearly 16,000 guards have been charged with a crime in the past five years. Records from the state's Criminal Justice Standards and Training Commission show that Florida's state prison guards are more than twice as likely as police officers to violate state standards of conduct. From January 1998 to June 1999, over 750 officers were brought up on disciplinary charges ranging from sexual assault to shoplifting to use of excessive force on a prisoner. The Standards and Training Commission's 19-member panel suspended or revoked the certification of 263 guards and issued another 144 letters of reprimand.

Standards and Training Commission Chairman Richard Coffey stated that DOC is more interested in getting a quantity of people rather than quality. Coffey went on to say that he has seen enough. He believes the problem stems from the lack of formal education that these officers bring when they entered the DOC workforce. Surveys conducted by the Commission show that correctional officers are much less likely to have attended college compared to more than 50% of the state's police force who have at least two years of college. This, according to Coffey is why a person with no college is five times more likely to end up with a disciplinary case. This discrepancy between correctional officers and the state's police force is very much known to David Murrell, executive director of the Florida Police Benevolent Association, the union that represents state corrections officers. Murrell said, "I don't know if corrections officials are more vigilant or corrections officers just tend to get in more trouble, but we are aware of it".

An interesting twist to the disciplinary process that Coffey finds problematic is that not all cases actually reach the Commission. Coffey stated that the Commission is at a disadvantage because it hears only cases that are referred by a police or corrections officers' agency. When allegations are made, the agency does the initial investigation and then passes it along. Obviously not all cases that should reach the Commission actually do.

State Representative Allen Trovillion who is the chairman of the *House* Corrections Committee would like to see all law enforcement candidates face tougher education requirements. Rep. Trovillion recognized that with a higher standard comes a low candidate pool. While a low candidate pool may factor into the equation when raising the standards, this alone should not deter a higher standard. Higher education produces less disciplinary actions against correctional officers and provides the DOC with competent, stable officers to manage the 63,000 plus state prisoners in Florida.

A just cause has reached the flood tide, we need more accountability for the type of officer DOC hires to control the prison population; it's time for the bureaucratic wall to fall before the overwhelming tide of fair and equal justice. ■

WORK RELEASE ELIGIBILITY ISSUE

According to information received by *FPLP* staff, approximately five months ago prisoners at many institutions started being told by classification officers that a memo had been received from FDOC central office reducing the time frames for work release consideration. (See also: FPLP, Vol. 5, Iss. 5, "Sound Off" letter from TF).

An inquiry to the Joint Administrative Procedures Committee (which oversees all state agencies' rule making in Florida) resulted in the following response from the Committee's chief attorney William H. Harold: "I have received your letter and the attachments provided regarding Rule 33-9.023 (6)(b), F.A.C. Based upon the information in your letter I contacted the Florida Department Of Corrections regarding 36 month versus 18 months. Based upon my research of the rule and statements in the letter

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from the Department of Corrections (copy attached) the 36 month time frame is what the rule provides for the specific circumstances listed in the rule, and it has not been changed to 18 months." That response was dated September 9, 1999.

In the "attached letter" referenced in that response, dated September 3, 1999, to Wm. Harold from Perri K. Dale of the FDOC, was stated: "Rule 33-601.602 (formerly 33-9.023) has not been amended to change the time frames for eligibility for consideration for community release programs."

Therefore, the FDOC central office is denying that there has been any change in the time frame eligibility requirements for work release.

If any FPLP reader has a copy of the memo that was allegedly sent from the central office directing such a time frame change, please send our staff a copy of it. ■

FDOC SECRETARY MAY CUT ADMINISTRATIVE POSITIONS SO MORE GUARDS CAN BE HIRED

In September 1999, Department of Corrections Secretary Michael Moore announced that he is looking at ways to hire more prison guards by cutting a beneficial program designed to divert nonviolent offenders from the prison system and by reducing DOC administrative staff, including the elimination of all librarian positions at institutions statewide. These cuts will generate the money necessary to hire more prison guards.

In response to Governor Bush's budget cuts, administrative agencies have been advised that if they wish to add something in the next fiscal year they will have to suggest ways to pay for it without state dollars. Moore made several suggestions. One suggestion was to cut the pretrial intervention program operated by the DOC and to use that money to hire up to 567 new prison guards.

Another suggestion made by Moore was to reduce the DOC's administrative staff by 287 positions, which would include all librarian positions throughout the state.

Critics of Moore's proposals, including members of the Florida Corrections Commission, Public Defenders and State Attorneys, note that his suggestions would cost more in the long run because it would cost more to incarcerate a individual than to place him in a pretrial intervention program.

State legislatures will have the final say on the pretrial program when they put the budget together during next spring's legislative session.
[Source: *Orlando Sentinel*, 9/23/99]

AIDS, HIV RATES HIGHER IN PRISON

A report released during Sept. 1999, that was funded by the Centers for Disease Control and Prevention (CDC) and the National Commission on Correctional Health Care, shows that prisoners and those newly released from prison are much more likely to have AIDS and other infectious diseases than people in the general population.

This study was the first national estimate of infectious disease rates among prisoners, and found, in part, that the prevalence of AIDS is five times higher among prisoners than in the general population. And significantly, the number of prisoners infected with HIV is eight to ten times that of the general population.

Lead researcher Theodore Hammett of Abt Associates, a Cambridge, Mass., think tank, said, "The vast majority of prisoners return to the community. Treatment (while incarcerated] will not only benefit prisoners, their families and their sex partners, but public health."

Other findings of the report include: Up to 17 percent of the 229,000 Americans with AIDS went through jail or prison during 1997; Up to 19 percent of the 700,000 people with HIV in 1997 spent time behind bars; and, up to 32 percent of the 300,000 Americans with hepatitis C went through a correctional facility in 1997.
[Source: *USA TODAY, 9/1/99]* ■

BEATINGS, CORRUPTION, COVERUPS DETAILED TO SENATE BY PRISON PSYCHOLOGIST

In a letter to the Florida Senate Criminal Justice Committee, dated Sept. 13, a prison psychologist *said* she quit her job in frustration after trying for three years to warn prison administrators of abuse of prisoners by guards at two North Florida prisons.

Connie Schenk 53, who holds a doctorate in forensic psychology, quit working for the Department of Corrections Aug. 31, after what she claims was retaliation was taken against her for her repeated attempts to report prisoner abuse.

Schenk told senators that prison administrators at both Taylor and Liberty Correctional Institutions had met her attempts with defensiveness, hostility and retaliation. Offering details, Schenk said she had frequently saw injured prisoners at the two prisons who claimed they had been beaten by guards.

In 1996, when she first started at Taylor CI, Schenk said she routinely filed reports on suspected abuse of prisoners. She said officers and supervisors either did nothing or became hostile towards her about the reports. "I went to the warden, Greg Drake, and told him abuse was going on [in the confinement units]. He just said, 'I don't think so, Dr. Schenk." "Absolutely nothing would happen," she said.

At Liberty CI, Schenk said she tried to be more diplomatic in reporting the abuse she found. She reported her concerns more informally until

last year when a prison guard came to her and told her he was being threatened by fellow guards whom he had seen beating a prisoner. She and the guard then went to the state inspector general and Florida Department of Law Enforcement (FDLE) officers were sent to investigate. The inspector general's office said the case remained open almost a year later, and was still open as of Sept. 1999. Schenck said she had been told the FDLE had "referred" the case back to the DOC to handle as it saw fit.

During July Schenk's boss at Liberty CI told her to clean out her desk, that she was being involuntarily transferred to the Corrections Mental Health Institution at Chatahoochee, Florida. She said that was in retaliation for her attempts to report abuse of prisoners at the prison.

"I can tell you firsthand that corruption is rampant, abuse of inmates and staff is routine and cover-up is an established practice (in the Florida Department of Corrections]," Schenk wrote to state senators. The DOC did not respond to reporters seeking comment on Connie Schenk's damaging allegations about the department.

(Editor: Greg Drake, the former warden of Taylor CI has now been promoted to Regional Director over all prisons in the Northern part of Florida.]

[Source: *Miami Herald*, 9/16/99] ■

FDOC SECRETARY MOVES TO RESTRICT MEDIA ACCESS

The secretary of the Florida Department of Corrections (FDOC), Michael Moore, announced during September, following a barrage of attention on the department by the mainstream news media, that a formal review will be conducted of the department's policies of media access to prisoners.

The existing policy, that has been in effect since 1985, allows the media to interview specific prisoners by submitting a written request, and if the prisoners agree to be interviewed. Moore wants to change that. In a message posted on the department's Website during September, Moore indicated that prisoners' access to the media should be restricted, implying, without stating it outright, that the media is too sympathetic to the (deplorable) conditions of confinement in Florida's prisons and too eager to publicize negative aspects of the department.

Using disingenuous spin control techniques to try to divert attention from the true purpose of the consideration to change current policies, Moore stated in the Website message that the department's job is to protect the public and crime victims, that, "with criminals committing notorious crimes, with the media eager to publicize them, and with more attention being given to the plight and rights of victims, we are obliged to review our policies."

Opponents of any change in the current media access policy note that the news media has not suddenly focused on "crimes committed by criminals" any more than it ever has been. Media reportage of crimes, even notorious crimes, occurs at the time of the crime or during trials, and before convicted offenders ever enter the DOC's control.

What Moore's true concern must be, concludes opponents, is the spotlight that the media has focused on the department in the past few months following the brutal murder of death row prisoner Frank Valdes in July, in which a gang of historically abusive prison guards are suspects. Since then reporters have dug up, in some instances based on information supplied by prisoners or prison reform groups, several very serious problem areas in the department. And Moore is no doubt concerned that even the FBI is conducting an investigation of the entire FDOC citing reports of system-wide abuse of prisoners. Moore knows the media will closely report any findings of that investigation.

The department in general, and Moore in particular, have been embarrassed and humiliated by the reports that have flowed from the media recently. Back—to-back reports detailing abuse and corruption in the department have surfaced in print and on television and radio reports all over Florida. Recent news reports have detailed how almost 10 percent of the department's employees have criminal records themselves, many with violent criminal records. Other news reports have focused on how many DOC employees only have minimal education and are not properly trained.

Moore was apparently embarrassed when Republican lawmakers in the state Senate forced him to appear before them in early September where he was placed on the hot seat trying to explain what is going to be done to correct the problems that keep coming to light through the media's attention. And members of the House have stated that Moore will also be required to do some explaining to that political body.

Michael Moore did not comment on what steps might be taken to restrict reporters access to interview prisoners about their conditions of confinement. Nor was any mention made on the Website message of the fact that prisoners may contact reporters and other media representatives through confidential mail, although it is felt that this will be the real behind-the-door focus of the review of the current policies.

According to U.S. Supreme Court decisions, prison officials may restrict personal access of the media to prisoners, as long as prisoners have alternative means to communicate with the media, a right protected by the First Amendment. The real threat to Moore and of any desire to continue the historical and planned future

abuse of Florida prisoners is not personal media interview access, it is prisoners being able to communicate with the media period, especially confidentially.

Any change in the current media policies of the FDOC will have to be done through the rulemaking process, affording review and prisoner and public comment, including a public hearing if requested. The last time the FDOC to change its rules, approximately two years ago, to restrict the media's access to death sentenced prisoners, the result was shock when several major news agencies challenged the proposed changes and the FDOC withdrew the proposal. It will be interesting to see what response Moore receives this time if the current policies are proposed for change. ■

FDOC CLASSIFICATION OFFICER SUES FOR SEXUAL HARASSMENT

During October last year Dannette Fasanella sued the Florida Department of Corrections in federal court claiming that she was sexually harassed and then retaliated against after reporting the harassment to prison administrators. The lawsuit alleges that these incidents occurred at Charlotte Correctional Institution located near Punta Gorda, Florida. The lawsuit is still pending in the Middle District Federal Court of Florida.

Fasanella stated in the lawsuit that while employed at Charlotte CI that FDOC employee Robert Hummer would come into her office and stand on the desk, pretend to be masturbating while saying things like, "I'm choking the chicken," and make comments like, "You bull dike bitch."

When Fasanella reported these acts to her supervisor, Lee Arnold, head of the Classification Department at Charlotte CI, Arnold did nothing to stop the harassment. In fact, Fasanella claims in the suit that Arnold began a campaign of retaliation against her himself, including falsifying job evaluations and placing false disciplinary reports in Fasanella's files. Fasanella also claims that she reported the sexual harassment to the Assistant Superintendent, Frank Youngblood, and to the Superintendent at that time, David Farcus, who also never took any action to stop the harassment, while Youngblood actually began harassing her himself. She claims that after she informed Youngblood of the problem on several occasions he came to her office and made comments like," You know how much I like pretty women," and "You have such beautiful skin." Despite her telling him these comments were unwelcome and inappropriate he continued making them. When Fasanella refused to give in to Youngblood's attention she claims that he began retaliating against her.

Fasanella also claimed in the suit that other officials at the prison had sexually harassed her, including the prison investigator David Charlwood. Despite repeated complaints no action was taken by higher FDOC officials to stop the harassment or retaliation. Fasanella finally was transferred to work at the Charlotte CI Work Camp, a separate unit from the main prison.

This case is numbered 98-412-Civ-FTM-17D, and is pending in the Fort Myers Division of the U.S. Middle District Court of Florida. ■

PREDICTING DEATH AT FSP

In a twenty page lawsuit filed by a prisoner at Florida State Prison to the Florida Supreme Court on June 1, 1999, only six weeks before death row prisoner Frank Valdes was beaten to death by suspected prison guards, was details of FSP prisoners being "routinely--as recreational sport--systematically assaulted, battered, jumped on and beaten unprovoked."

The lawsuit filed by Douglas Jackson, a prisoner sentenced to life in prison for murder, told the court that, "No more lives need to be lost before corrective action from the court is granted. Whole lives and safety are in grave danger of being violently attacked at any moment, to be severely injured or, worse yet, killed by staff."

Jackson claimed in the suit that beatings have been covered up for years at FSP and that prisoners are not given medical care because "that creates a paper trial." He also claimed that internal grievances are not investigated by central office staff and that a "good ol' boy ... code of silence" prevents complaints from reaching the outside the prison.

Jackson's lawsuit was given short shift by the Florida Supreme Court, which sent it to a lower court to review, a lower court that Jackson had been barred from filing lawsuits in previously. Jackson had earned a reputation for filing "frivolous lawsuits" with the courts, having filed 143 according to a DOC spokesman, since his incarceration in 1990. Jackson was number three on Fla. Attorney General Bob Butterworth's list of the 10 most frequent filers that he used to lobby Congress to pass the 1996 Prison Litigation Reform Act to almost totally obstructs prisoners' access to the courts.

In an article by *Miami Herald* reporter, Lesley Clark, on Sept. 12, 1999, detailing Jackson's most recent lawsuit, it was commented that Jackson's suit, though prophetic, was "a case of crying wolf once too often." ■

CIVIL DETAINMENT OR PRISON?

by Drew Hanson

The Jimmy Ryce Act better known as the sexual predator law *faces* a judicial test in the state of Florida. Under this law those convicted of sexual offenses and who are designated a threat to society may be detained in a prison-like environment

following their release from prison. The state's answer to the question of what to do with dangerous sex offenders about to be released from prison is: keep them locked up indefinitely for treatment. The catchy phrase "civil commitment" as used by the state is anything but civil.

The Jimmy Ryce Act, named for a 9-year-old Dade County boy who was kidnapped, raped, murdered and dismembered in 1995, was crafted to protect society from dangerous sexual predators known for repeating their crimes. Under the current law, those designated to be a danger to society are detained following their release from prison and face a civil trial to determine if they should be locked up indefinitely for treatment. Since the law went into effect in January, it has prompted a flood of constitutional challenges. Most recently the law was held constitutional by a Palm Beach County court. However, the 4th District Court of Appeal has advised prosecutors that it would be a violation of due process to deny those individuals a probable cause hearing prior to detaining them pending a civil trial. This latest judicial decision has prosecutors statewide scrambling to comply with this order. Prosecutors must demonstrate to a judge that those designated a danger to society should be kept locked up.

Pinellas Public Defender Bob Dillinger claimed that this was a dramatic victory for those who his office had sought hearings for and filed an appeal with the 4th District Court to win them. Now prosecutors are working to meet the appeals court deadline: five days. The precedent-setting appeals court order on the Pinches cases could have statewide ramifications. Dillinger said that cases for the prosecutors may look good on paper but may not appear so strong in an adversarial hearing where both sides can call witnesses.

Dillinger believes that not all the men targeted are prone to re-offend and they should be freed. He argued that Florida is the only state with a law like Jimmy Ryce that didn't call for a probable cause hearing. Dillinger blames the Legislature for the immediate problem because they were the ones who drafted this law.

This is only the beginning of the problems for the Jimmy Ryce Act. In late September, Palm Beach County Judge Virginia Gay Broome upheld the law as constitutional but noted the facility designed to hold the detainees is overcrowded and lacking in privacy, adequate treatment plans and activities. The first facility was a converted county jail located next to Martin Correctional Institution in Indiantown, Florida. The Martin Treatment Center is home to more than 100 convicted sex offenders brought there following the completion of their prison sentences. Instead of being free, these men now sleep on gray metal bunks and eat prison food. They remain at the Martin Center pending civil trials to determine whether they should be locked up indefinitely for treatment under the new law.

Defense lawyers allege that the prison-like conditions add fuel to their argument that the law, which is not suppose to be punishment, actually heaps more punishment on men who have already served their sentences. The men are under constant camera surveillance from a central control room staffed by Department of Corrections' prison guards. Toilet stalls are in the open with no doors for privacy. If the men need medical treatment they are taken to Martin Correctional Institution for treatment by prison doctors.

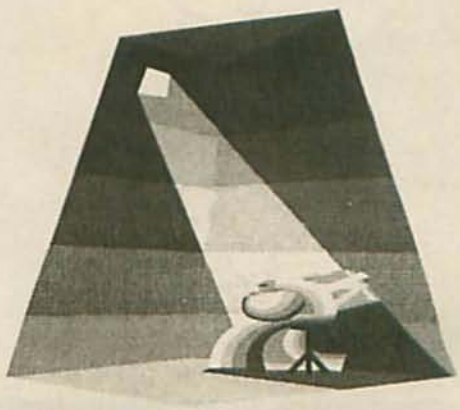
The Jimmy Ryce Act is supposed to be a civil, not criminal, action that holds the men for treatment, not punishment. However, defense lawyers say the current living conditions is not civil and they want to show that the law is punitive in order to prove that it is double jeopardy.

Hillsborough Chief Judge F. Dennis Alvarez, who presided over several Ryce cases in Tampa, said the Legislature clearly meant for treatment to occur outside a prison setting. Alvarez plans to tour the Martin facility to determine whether it is as restrictive as a prison or if it is more close to a hospital setting.

Another significant factor about the law is that only one-third or the men committed to the center have agreed to receive treatment. Many of the men have refused on the advice of their lawyers, who think that participating could be perceived as admitting to being a dangerous sex offender. More than 20 of the detainees who have declined treatment have been sent to South Bay Correctional Facility in Palm Beach County. While South Bay is privately operated, it is still a prison. So those men who have completed their prisons terms are still in prison albeit in a house of a different name. Assistant Public Defender Nellie King said that this action is potentially a life sentence for a lot of these men. The bottom line is the Legislature has set up a system to warehouse people they don't want on the streets.

Although the *United* States Supreme Court has upheld as constitutional a similar law enacted in Kansas, Public Defender Dillinger believes that the court opinion left open the argument about whether the law was improperly used as punishment, an argument which may take years to resolve.

[Source: St. *Petersburg Times*, 10/2.399] ■



SENATOR TONI JENNINGS
President

October 1, 1999

Teresa A. Burns, Chairperson
Florida Prisoners' Legal Aid Organization, Inc.
15232 East Colonial Drive
Orlando, FL 32828

Dear Ms. Burns:

Your recent correspondence outlining your concerns regarding the Florida Department of Corrections is greatly appreciated.

You raise some interesting points in your letter. I have taken the liberty of sending a copy to the Senate Criminal Justice Committee which has oversight of the regulation of the Department of Corrections (DOC). As you may be aware, the Committee has requested, and will continue to receive, information from DOC concerning the recent events a Florida State Prison. I have asked the committee staff to keep your comments in mind as they review this information.

Again, thank you for taking the time to write and share your thoughts. You and the members of FPLAO are to be commended for your efforts on behalf of Florida's prisoners.

Very truly yours,

Toni Jennings

rb

1032 Wilfred Drive
Orlando, FL 32803

NOTABLE CASES
by Sherri Johnson and Brian Morris

Erroneous Felony Reclassification Results in Illegal Sentences

Pursuant to Florida Rule of Criminal Procedure 3.800(a), Lenoris Drumwright, who is currently incarcerated at the Mayo Correctional Institution, moved the Circuit Court, in and for Orange County, Florida, to correct his habitual violent felony offender sentences.

In 1993, Drumwright was convicted and sentenced on the following offenses:

1) Aggravated assault with a firearm while wearing a mask (a third degree felony reclassified to a second-degree felony based on the use of a firearm);

2) Aggravated battery with a firearm while wearing a mask (a second degree felony reclassified to a first degree felony based on the use of a firearm); and,

3) Aggravated assault on a law enforcement officer with a firearm while wearing a mask (a second-degree felony reclassified to a first-degree felony based on the use of a firearm).

In his Rule 3.800(a) motion, Drumwright alleged that he was illegally sentenced to concurrent 15-year habitual violent felony offender sentences with a minimum mandatory of 15 years. Not surprisingly, the Honorable R. James Stoker, Circuit Court Judge, denied the motion, which forced Drumwright to take an appeal to obtain his warranted relief. On appeal, the Fifth DCA found numerous sentencing errors committed by the trial court.

First, the DCA found that it was error for the trial court to reclassify the third degree felony of aggravated assault with a firearm while wearing a mask to a second-degree felony because "the use of the firearm was an essential element of the aggravated assault." Thus, "Drumwright's aggravated assault conviction, a third degree felony, could not incur more than ten years incarceration with a minimum mandatory term of five years as an habitual violent offender."

Next, the DCA found that it was error for the trial court to reclassify the second-degree felony offense of aggravated battery with a firearm while wearing a mask to a felony of the first degree because use of the firearm was also an essential element of the aggravated battery. "Th[is] offense should have been classified as a second degree felony thereby incurring an habitual violent offender sentence of a term of incarceration not exceeding 30 years with a minimum mandatory term of 10 years."

Finally, the DCA found that the trial court also erred when it reclassified the second-degree felony of aggravated assault with a firearm while wearing a mask to a felony of the first degree because use of the firearm is also an essential element of that offense. "Again the imposition of the 15 year minimum mandatory term exceeded the 10 year maximum."

Because the sentencing errors were apparent on the face of the record, the DCA remanded for resentencing consistent with its findings. See:

Drumwright v. State, 24 FLW D2101 (Fla. 5th DCA, 9-10-99).

Seas tings

Resentencing From True Split Sentence Goes Awry!

Michael James Baker was originally sentenced by the Eleventh Judicial Circuit Court, in and for Dade County, Florida, to a twenty year "true split sentence." *See Poore v. State*, 531 So.2d 161 (Fla.1988). The sentencing scheme employed in Baker's case consisted of a twenty-year prison term suspended after the completion of ten years incarceration with the remaining balance of the sentence to be served on probation. Baker satisfied the service of the ten year incarceration portion of his split sentence and was release to begin service on the ten year period of probation. Subsequently, Baker violated the conditions of his probation and was resentenced to a prison term that exceeded the remaining balance of the withheld or suspended portion of the original true split sentence.

Pursuant to Rule 3.800(a), Fla.R. Crim.P., and under the authority of *Poore*, Baker moved the circuit court to correct his sentence. Baker's motion was denied and he appealed.

Finding Baker's entitlement to relief apparent on the face of the record, the Third DCA reversed the circuit court's order denying the Rule 3.800(a) motion. Significantly, *citing Bryant v. State*, 591 So.2d 1102 (Fla. 5th DCA 1992); and, *Ashe v. State*, 548 So.2d 291 (Fla. 4th DCA 1989), the DCA found that, in revoking Baker's probation, the circuit court illegally imposed a sentence in excess of the remaining balance of the withheld or suspended portion of the original sentence.

Although the DCA correctly found that "*Baker* was entitled to be sentenced to the balance of the withheld portion of the sentence," which appears to be ten years, the DCA nonetheless reversed and remanded "with instructions to resentence Baker to twenty years imprisonment with credit for time served."
See: *Baker v. State*, 24 FLW D1691 (Fla. 3d DCA, 7-21-99).

[Comment: Although it may appear that Baker prevailed, my review of other case law decisions pertaining to this matter has left me with a reasonable doubt. That is, I have reason to believe that *Baker* did not actually get the relief that he is entitled. See *Cook v. State*, 582 So.2d 94 (Fla. 1st DCA 1991) (sentence imposed after probation revocation on original true fifteen year split sentence, suspended after three years incarceration, could not exceed twelve year balance of withheld or suspended portion of original sentence); *Soloman v. State*, 698 So.2d 909 (Fla. 2d DCA 1997) (upon revocation of probation from original ten year true split sentence with five of the ten years suspended, maximum sentence that court could impose upon revocation was five years); *Chapman v. State*, 538 So.2d 965 (Fla. 4th DCA 1989) ("upon a violation of the probation imposed in a 'true' split sentence, the length of sentence may not exceed the length of the term of the suspended period, the limits of which were established in the initial sentence."); *Towner v. State*, 594 So.2d 351 (Fla. 5th DCA 1992) ("[h]aving received a true split sentence, the maximum sentence available upon violation of probation was the balance of the probationary period.").

In *Poore v. State*, the Florida Supreme Court stated "if [a true split sentence] is used as the original sentence, the sentencing judge in no instance may order new incarceration that exceeds the remaining balance of the withheld or suspended portion of the original sentence." 531 So.2d 161, at 164 (Fla.1988) (emphasis added).

Lonnie Poore was originally sentenced to four-and-one-half years incarceration. However, the sentencing court ordered Poore to spend two-and-one-half years incarcerated with the remainder of the sentence suspended. Poore was to be on probation during the two year suspended portion of the sentence. When Poore's probation was revoked, utilizing the sentencing guidelines, the trial court resentenced him to four-and-one-half years incarceration with credit for time served. On appeal to the Fifth DCA, the DCA held that Poore could only be incarcerated for the remainder of the original split sentence, which was two years. The Florida Supreme Court granted review because of expressed and direct conflicts between the district courts of appeal. On review, noting that Poore was originally "sentenced to a true split sentence totaling four—and—one—half years, with two years of the total sentence suspended," 531 So.2d, at 165, the Florida Supreme Court agreed with the DCA's determination that Poore's four-and-one-half year VOP sentence had to be vacated. The supreme court held that, "[u]pon remand, the trial court shall not be permitted to order [Poore's] incarceration for any period exceeding either the guidelines recommendation or the remainder of the original split sentence, whichever is less." *Id.* (emphasis added).

Another case supporting my position that Baker did not get all the relief he is entitled is *Ashe v. State*, 548 So.2d 291 (Fla. 4th DCA 1989), which is actually cited by the DCA in its decision entered in Baker's case. Christopher Ashe was originally sentenced to a term of six years with four years to be served in prison and the remaining two years on probation. After Ashe violated his probation, the DCA found that "the trial court erred in sentencing him to a prison sentence greater than the suspended portion of his original split sentence, that is, greater than two years." *Id.*, at 292 (emphasis added).

In my opinion, the other case cited by the *Baker* Court, *Bryant v. State*, 591 So.2d 1102 (Fla. 5th DCA 1992), should not have even been cited. Unlike Baker, Robert Bryant's entire sentence was suspended. See *State v. Powell*, 703 So.2d 444 (Fla.1997) (trial court may impose true split sentence in which entire period of incarceration is suspended); *see also*, *Sconiers v. State*, 651 So.2d 758 (Fla. 1st DCA 1995) (sentence imposed upon revocation could not exceed initial ten year sentence, all of which was suspended).

My frustration with the *Baker* case came from the DCA's instruction for the sentencing court to impose a sentence of twenty years with credit for time served. In my opinion, this conflicts with, among other things, the mandate entered in *Poore*. I firmly believe Baker should not be sentenced to a prison term that exceeds the ten-year remaining balance that was initially withheld or suspended. Additionally, on the maximum ten year VOP sentence that could be imposed, I believe that Baker should be awarded credit for all time served and unforfeited gain time earned from the incarceration portion of is original split sentence. This, in my opinion, would be consistent with the spirit of the sentencing guidelines.

Unfortunately, there is a case that really muddies my opinion: *Frazier v. State*, 559 So.2d 1121 (Fla.1990). In 1980, Johnnie Frazier was originally sentenced to ten

years in prison, to be suspended after the completion of the first five years incarceration with the five-year balance to be served on probation. Frazier was later convicted of DUI manslaughter, which was committed on November 6, 1986. Pursuant to a guidelines range of seventeen to twenty—two years' incarceration, Frazier was sentenced on the DUI manslaughter offense to the statutory maximum of fifteen years in prison. The trial court also revoked the five year probationary period in Frazier's 1980 ten year true split sentence and imposed a new ten year prison term with an award for the full five years as credit for time served. The problem is, the Florida Supreme Court found that "[h]is resentencing on the 1980 conviction [was] consistent with *Poore* because the court did not 'order new incarceration that exceeded the remaining balance of the withheld or suspended portion of the original sentence." *Id.*, at 1122; *quoting Poore.*

Through extensive research, I have found that Baker is just one of many whom Florida courts have allowed to be sentenced to prison terms exceeding the suspended portion of a true split sentence. For example, Herman Hobbs was originally sentenced to concurrent twenty and fifteen year prison terms, suspended after the completion of five years incarceration. After Hobbs violated his probation, rather than sentencing him to concurrent fifteen and ten year terms with credit for time served, the trial court resentenced him to concurrent twenty and fifteen year prison terms with credit for time served. On appeal, the Second DCA, *citing Frazier*, held that "[t]his is the proper method to impose the remainder of the true split sentence, so long as the defendant receives credit for his prior time in prison." *Hobbs v. State*, 702 So.2d 560 (Fla. 2d DCA 1997).

Finally, Henry F. Johnson was sentenced on December 12, 1988, to six concurrent six-year prison terms, suspended after service of three years incarceration. However, rather than placing Johnson on probation for the remaining three years, the trial court illegally placed him on community control for one year, followed by a five year period of probation. After Johnson violated his probation, the trial court imposed six concurrent six-year prison terms. The court awarded 350 days as jail credit, but no credit for the time Johnson previously spent in prison. The Second DCA found that the maximum prison term that could be imposed upon Johnson's revocation of probation was the three years initially suspended. Interestingly, notwithstanding the fact that Frazier's offenses were committed in 1980 and 1986, the DCA noted:

For cases prior to the effective date of section 948.06(6), Florida Statutes (1989), there appear to be two correct methods of imposing the remaining sentence after a violation of probation on a true split sentence. First the remaining sentence can be imposed with no credit for time previously served, indicating that the sentence is the remainder of a true split sentence. See Owens v. State, 557 So.2d 199 (Fla. 2d DCA 1990). In the alternative, the entire sentence can be imposed with full credit for the length of the initial sentence. Frazier v. State, 559 So.2d 1121 (Fla.), cert. denied, 498 U.S. 834, 111 S.Ct. 102, 112 L.Ed.2d 73 (1990).

Johnson v. State, 641 So.2d 970, at 971—72 n.2 (Fla. 2d DCA 1994).

Over the last several years, I have seen numerous prisoners convince the circuit courts that any sentence that exceeds the remaining balance of the suspended portion of what was initially a true split sentence is illegal. In each of those instances, the circuit courts also awarded credit for time served and unforfeited gain time pursuant to the decision entered in *State v. Green*, 547 So.2d 925 (Fla.1989). I believe the majority, if not all, of those successes came from not only arguing what the Supreme Court said in Poore, but also what the Supreme Court did (it agreed with the DCA that Poore could not be sentenced to a term exceeding the two years initially suspended). Ultimately, for each of the prisoners who <u>really</u> prevailed, I believe that effective writing contributed heavily toward their success.—bm|

TRIAL COURT MUST PROVIDE A LITIGANT NOTICE AND A REASONABLE OPPORTUNITY TO RESPOND BEFORE PROHIBITING FURTHER PRO SE ATTACKS

The Florida Supreme Court on certified conflict review has held that court's must first provide a pro se litigant notice and reasonable opportunity to respond before prohibiting further pro se attacks on his or her sentence as a sanction for prior repeated and frivolous motions.

The Court recognized the important constitutional right of access to the court but determined that a balance was needed to curb the abuse of a select few. The Court achieved what it determined to be the best balance by directing the lower courts to first provide litigants notice and an opportunity to respond through the issuance of an order to show cause. The Court stated that this method would generate a more complete record for appellate courts. If the litigant is denied further pro se access to the courts, the appellate courts will have an enhanced ability to determine whether the denial of access is an appropriate sanction under the circumstances. In reaching this opinion the Supreme Court approved *Spencer v. State*, 717 So.2d 95 (Fla. 1st DCA 1998); and disapproved *Huffman v State*, 693 So.2d 570 (Fla.2d DCA 1996). *State v. Spencer*, 24 Fla. L. Weekly (S)433 (Fla. S.Ct. September 23, 1999).

ELEVENTH CIRCUIT NARROWLY DEFINES IMMINENT DANGER OF SERIOUS PHYSICAL INJURY PROVISION OF PLRA

On an issue of first impression, the 11th Circuit Court of Appeals has adopted the strictest possible interpretation of 28 U.S.C. section 1915 (g), which provides that a prisoner who has had three or more previous lawsuits dismissed as frivolous, malicious or for failure to state a claim upon which relief may be granted. In order to proceed with a new action in forma pauperis the litigant must allege that he/she is in imminent danger of serious physical danger.

Florida prisoner Daniel Medberry filed a 42 U.S.C. section 1983 civil rights action claiming that when he arrived at Everglades Correctional Institution in 1996, he informed prison officials that because of his sexual battery offense he was in fear for his safety should he be placed in open population. Prison officials ignored his plea and placed Medherry in open population. Medberry claimed in his petition that his fear became reality and that he was both verbally and physically assaulted by other prisoners. Medberry informed prison officials of the assaults one of which included a "blade". Medberry was placed in administrative confinement. Medberry exhausted available administrative remedies prior to filing his 1983 suit in federal court alleging an 8th amendment violation for the prison officials deliberate indifference to his safety.

Medberry filed to proceed in forma pauperis, which the district court denied because Medberry had three previous suits dismissed as frivolous or malicious and because he failed to allege that he was in imminent danger of serious physical injury.

Medberry appealed to the 11th Circuit and raised two issues: (1) whether the "three strikes" in forma pauperis provision of 28 U.S.C. section 1915 (g) violates ex post facto prohibitions; and (2) what showing must be made to allow a prisoner with three strikes to proceed in forma pauperis because he is in imminent danger of serious physical injury - a question of first impression for the 11th Circuit Court of Appeals.

On the first issue, the Court rejected Medberry's ex post facto argument. The Court noted that it had previously addressed this issue and that the language of 28 U.S.C. section 1915 (g) makes it clear that the three strikes rule applies to claims dismissed prior to that section being adopted as part of the Prison Litigation Reform Act (PLRA) of 1996.
On the second issue, the Court rejected Medberry's claim that be is in imminent danger of serious physical injury because he is not presently in open population where he claimed the threat existed at the time he filed the complaint. The Court sided with two other circuits on this issue which had held that the "imminent danger" must exist at the time the suit is filed or the application is made to proceed in forma pauperis in the case.

The Court also noted that Medberry could not amend his complaint to correct the "imminent danger" deficiency as he has since been transferred from Everglades C.I. Based on these facts the 11th Circuit Court AFFIRMED the district court's denial of Medberry's in forma pauperis (indigency) status pursuant to 28 U.S. C. 1915 (g).

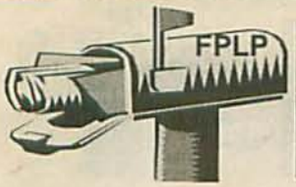
See: *Medberry v. Butler*, et al., F__.3d___, 12 Fla.L. Weekly Federal (C)1226 (11th Cir.8/23/99).

FOURTH DCA HOLDS THAT SECTION 947.1745 FLA.STAT. IS CONSTITUTIONAL BUT POSES A QUESTION OF WHEN IS A JUDGE A JUDGE?

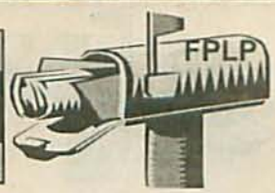
Prisoner Jerry Gaines petitioned the Fourth District Court of Appeal for a writ of certiorari seeking review of the trial court's order dismissing his petition for writ of mandamus.

Gaines filed a petition for writ

(Continued on page 20)



FPLP SOUND OFF



Dear Editor,

The prison system in Florida is at the least corrupt and a money laundering operation. The focus by the big wigs of the D.O.C. is so much on "process" that they disregard the "outcome". What is the outcome you ask? Well, to subject inmates to severe punishment, bad examples, unreachable laws, and constant bribery, extortion and even slavery... Then the outcome is that the "SYSTEM" is churning out monsters back into society. These people don't even know how to spell rehabilitation, let alone being that. And then as the cahin reaction proceeds, these hate-filled rebellious people vent their frustration on non-authoritative people; the workers and builders of society. So that means more victims of crime, innocent people hurt, some killed, and these same people end up back inside the "SYSTEM'. And along the way, they have influenced others. Such as their sons, daughters or just neighborhood kids who look up to them.

So now, what does the politicians do when society cries out about crime? They give them a big tax bill and build more prisons. It's beyond me or any normal thinking, caring human being that the answers to crime is to create stiffer sentences and build more prisons; all this does is makes the mass of people pay more taxes, and gives other potential crime offenders more opportunities to step up and take over where the ones who are locked up left off.

Study shows evidence that a higher incarceration rate creates a steady crime rate. It isn't higher, or lower. According to NCPA Policy report No. *219. Sept. 1998*", true enough, crime rate is on the decline. What they fail to tell you is that Florida and California account for one in four inmates in the whole country. And each state spends billions of dollars to contend with this each year. Is this the answer? Yeah right! Take the money out of the criminal's hands and place your money in the hands of the politicians, and big wigs who run the show!

I challenge you people to make demands to your politicians. If they want your vote, then get some solutions. Instead of building these massive money-operating warehouses, we call prisons and institutions, make them overhaul the criminal justice system. The legal process *is in* terrible shape and needs all new systems to bring fresh ideals and solutions aboard.

Focus more on law and not procedure or costs. Instead of saying "What kind of laws can we create to gain retribution and ones to hurt him/her. Lets make a more restorative process of law. Where the victim and the offender can gain in a bad situation. We need education emphasis. How can a smart well, educated person fall prey to crime when alternatives are there to prevent that? The law we live under since the 1700's, brought over here by people that came over from England and there-abouts, has to be changed and modified in order for a more grounded, "victim-offender" type of operative. Until this happens, the prison expansion will reach the highest highs, and our income will reach the lowest lows, and the big-wigs will get more and more corrupt and the institutions will get richer. Leaving every one from victim to offender to the hard workers of our society with a bad feeling and no where to turn. Why are not the lawyers and/or law professionals, judges, legislature, etc., championing these flawed laws, you ask? I ask you, have you ever seen a poor lawyer, or poor judge or poor senator, etc...? I think you know why now.

I challenge each and every one who reads this to spread the word, and let's instill thoughts to others to seek a restorative justice system and to do away with the now money-mongling-retributive laws.

And I encourage all of you to voice this to the ones whom you vote for. After all, why would you vote into office a person who will not want to better our laws and help fight crime a more productive and restorative way? You have to get involved and make your word count. The prison system is in state of chaos and needs help. If we don't want to create monsters, turn them loose to our societies, and want a better more educational type of system, to enable those being released to fit back into our communities and be an asset and not a detriment. Then we all better wake up and start voicing your opinions to the Bigwigs before it is too late!

Thank-you for printing this article! DN,FSP

Dear FPLP, Greetings. I do hope this letter finds you in the best of health, now first and foremost I must express to you how wonderful I think your publication is.

I am presently incarcerated in the Florida prison system, and a friend let me read a few of his *FPLP's*. July/August "99" issue, regarding Teresa Burns article and I must say you did a wonderful job. We are now entering the 2lst century and I am grateful that *FPLP* and the staff are standing in the gap. I for one do not have any outside help. I have been wanting to subscribe to *FPLP* for years I now finally have the funds to subscribe. I don't have much but moral support so thanks for standing strong so in closing thank you in advance for all you are doing keep up the struggle. AJ BCI

Dear FPLP,

I write to offer my highest praise for your publication. Yours is hands down the finest state prison publication I have ever seen. I mail my copy each month to prison activists in other states or to the few other fledgling rag-tag newsletters with a note to the effect: "check out this FPLP and see what is possible. They're doing this in Fl. Why not in your state? You can do it—if these people can, then you can, too."

I honestly wish there was an "FPLP" in all *50* states. By the way y'all keep getting better too. Keep up the ~ work! In the Struggle, Dan Pens, News Editor, PLN

Dear Friends, Just a note to give you an update on Everglades CI in Miami. I don't know what you know about ECI and what you don't know, so in that light I will just touch on the important issues which seem to things addressed in my *FPLP* news paper. First in response to the new visiting law, there is no where for our families to get away from foul weather out front on visiting days here. Nothing for the children and we eat out of the vending machines here. The canteen which is in the VP is for the staff only. Also, we are paying higher prices

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

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in our canteen on the compound then the staff pay in theirs. Example, energizer batteries AA, advertised out in the VP for staff 50 cents a piece, we pay 94 cents a piece for ours. Same vendor, same battery! We are only allowed to get visits here every other week, 2 times a month and month's with a fifth weekend, mean no visit's. We have to alternate holidays, example- last year A-L gets Christmas visits and M-Z do not! So the special visiting days are granted according to whose letter it falls on. They claim this is due to space yet there are now 3 full dorms closed down here out of 8, for CM and confinement. They could run the visits considering max capacity for the VP and then allow people in as people leave once the max capacity is reached but they won't. Grievances are systematically denied or go unanswered here. Then if you take the next step which you can if staff doesn't' answer, you get a DR for lying to staff and they will say you never filed an informal and that you are lying and trying to abuse the grievance procedure. A better system is needed for filing, logging in informal grievances. As it is, they do not log in informal grievances and the chances of your grievance never coming back are great, especially if you have a" real issue".

Well, that's it for now. Thank you so much for all you do and I surely appreciate all you have done in helping with the new visiting law. I've been in for 19 years and its only through visits that I still have strong family ties. I write, call etc.. but the contact that comes from a visits are a part of some of my most meaningful memories that are all I have to sustain me from day to day as I slowly have lost so many family members throughout the years due to death. Its just my Dad and me now, but God bless him he still comes every other week and I am just as much support for him, as he is for me. WN ECI

Dear *FPLP*, I'm *currently* fighting my CM placement. Although the rules are clear, I'm getting next to no relief. I was put on CM 3 at Mayo CI on 3-20-98. In May '98', I received 2 DR's. I saw the Board in Sept. '98", and was put off until March '99'. In Dec. '98', I was written a third DR for having *5* stamps in my pocket while on "runaround" status. When I saw the Board again in March '99', it was *determined* that I owed *65* days of DC time (plus, they could tack on 30 more days to make me complete 13 "full" months on CM status), and that I would be continued on CM 3 until June '99', Two weeks after that hearing, I was transferred to Okeechobee and my CM 3 placement was followed. But, in May'99', I was inexplicably taken in front of the Board here at Okeechobee and upgraded to CM 2.

Chapter 33-38.006(7) specifically states that an institution receiving a CM inmate can review that inmates CM placement but cannot "upgrade" him "until continuing behavior dictates an increase in the level of CM." This connotes that my level of CM should have been determined solely on my behavior after I was transferred. Okeechobee's administration argues that my "serious disciplinary history" was grounds to upgrade me. The same disciplinary history that was in evidence for the Board at Mayo CI to consider in March'99' just prior to the transfer. What changed, other than the institution? I have had no DR's at Okeechobee, and all my monthly evaluations have been "above satisfactory". 5, where is the" continued behavior" pattern required by the rules to justify this upgrade?

Mine is just one example of widespread disregard for rules when it comes to placing or keeping inmates in CM I'm fighting this placement tooth and nail. I encourage everyone to document every legitimate wrong incurred them on CM. United we stand Divided we fall (and fail). MT OCI

Dear Friends, Your legal information is the life blood to the judicial system. Our access to the courts through the law libraries are a big joke. The only thing is, we're not laughing. Keep up the good work. Those of us on CM 2 really appreciate your hard work. The staff at FPLP are in our thoughts and prayers.
RT BCI

Dear FPLP, I'm on CM at Washington CI and it is pure hell. We are treated very badly in every aspect. Every time we leave our cells for recreation, showers, anything, they tear our room apart. Medical is almost non-existent. We never see a doctor. I cut myself and never even saw any kind of doctor period. We really need help here. This is an SOS to anyone that can give assistance. There are people here who have been on CM I for 2-3 years without DR's. They justify it by so called "write ups" on a contact card. The captains threaten to gas people at every turn. This place is torture. They put me on CM 1 for a urine test and said because I was on CM before its okay. On canteen we can't order a comb or Q-tips. From start to finish this place is a waste camp. It's hard to even care here because they subject you to so much persecution. This has to stop. These officers are crazy and really believe that their job is to punish us. We need help Bad!! AF WCI

Dear Friends: I have told people and I will continue to say it, "If a person does not have a loved one, family member or friend in the prison system, THEY HAVE ABSOLUTELY NO IDEA—NONE AT ALL. They are truly 'clueless'. Your publication helps to open our eyes. "Thank you" is not enough. AP

of mandamus against the Florida Parole Commission concerning his eligibility for parole release. Gaines was sentenced in 1977 to life in prison. Under the statutory parole system in effect at the time of sentencing a trial judge could retain jurisdiction over a defendant so that the judge's approval in connection with the parole commission's approval was necessary for the prisoner's release. Cf. 947.16 (3), Fla. Stat.(Supp.1978). It is significant to note that Gaines' judge did not retain jurisdiction over him.

After many years in prison, Gaines became eligible for parole consideration. Several presumptive parole release dates (PPRD) were set for Gaines. The Parole Commission set a presumptive parole date of September 7, 1992.

On October 1, 1986, the Florida Legislature amended section 947.1745 (4), Fla. Stat., to require the Commission to notify and seek comments from the sentencing court when an inmate was within 90 days of his or her effective parole release date [EPRD] interview. The statute was further amended and codified as section 947.1745(6). An added caveat required notice to the chief judge in the event the sentencing judge was no longer serving. The chief judge was then permitted to designate any circuit judge within the circuit to act in the place of the sentencing judge.

Pursuant to the 1986 statute, the Commission notified Chief Judge Leonard Rivkind of Gaines' parole release because the sentencing judge had retired in 1991. Chief Judge Rivkind obviously designated himself to act in the place of Gaines' sentencing judge and objected to the release. Based on the comments of the judge, the Commission extended Gaines' PPRD to September 7, 1997.

On May 12, 1997, Judge Alex Ferrer was designated to act in place of Gaines' sentencing judge and he too objected to Gaines' release. Based on Judge Ferrer's objection, the Commission extended Gaines' PPRD to September 2002. Gaines sought and was denied administrative review of the Commission's decision.

In July 1998, Gaines filed a petition for writ of mandamus alleging that section 947.1745 was unconstitutionally applied to him. His argument was predicated on an ex post facto application. He also argued that the Commission failed to comply with the statute because his sentencing judge, Judge Morphonios, still serves as a judge. Gaines contended that the Commission should have solicited comments from his sentencing judge. Ironically, Gaines' daughter contacted Judge Morphonios about the prospective parole and Judge Morphonios responded by stating "it is my position to remain silent on this issue. . ." The trial court dismissed the petition without obtaining a response from the Commission. Citing a First District Court case, *Gattis v. Florida* Parole Commission, 535 So.2d 640 (Fla. 1st DCA 1988), the trial court determined that the statute did not constitute an ex post facto law. The order further noted that Judge Morphonios was retired and that the Commission acted in accordance with the statute by sending notice to the chief judge.

Gaines sought certiorari review in the Fourth District Court of Appeal. The Fourth District Court rea-

soned that although 947.1745 are penal in nature and that it was applied retroactively to Gaines it did not disadvantage Gaines. The Court reasoned that although the sentencing judge or a designated substitute judge can negatively influence Gaines' chance for parole, the Commission retains the ultimate discretion to grant parole despite a judge's objection. The Court found the statute to be procedural instead of punitive. Thus, the ex post facto claim failed.

The Court did find some merit to Gaines' contention that his sentencing judge continues to "serve" as a judge, despite her official retirement. The Court noted that several recent cases show that Judge Morphonios is actively serving as a judge. The Court stated that if the sentencing judge is still available for comment because she is still "serving", albeit as a senior judge, then it is appropriate to obtain her input, as opposed to that of a judge who did not participate in the original case.

While the Court did not decide whether Judge Morphonios was "serving" or not, the Court did quash the order dismissing the complaint and remanded for the trial court to issue an order requiring the Commission to respond to the petition on the claim that it failed to secure comment from the sentencing judge. *Gaines v. Florida Parole Commission*, 24 Fla. L. Weekly (D) 2210 (Fla.4th DCA September 22, 1999).

(Comment: It is axiomatic that retired judges often go in and out of retirement as needed by either the circuit they operate from or the district One day a judge may be retired, one day he may not. There does not appear to be a semi-retired status as compared to a actual retired status. To eliminate this type of scenario from occurring again perhaps more thought should be given to the term retired and its meaning with respect to the above statute. It is disadvantageous for a prisoner to place his fate into the hands of a judge who has no knowledge of the original case. The substitute judge will not be able to recall the facts of the case. Those facts may have left some doubt as to the defendant's guilt which could be a factor in considering parole.-oh]

RULE 1.070(j), F.R.CIV.P., DOES NOT APPLY TO PETITIONS FILED PURSUANT TO RULE 9.100 (c)(4), F.R. APP.P.

Prisoner James Frankenberry filed a Petition for Writ of Mandamus pursuant to Rule 9.100(c)(4), F.R.App.P., in the 17th Jud. Circuit Court challenging a DOC disciplinary proceeding. The circuit court sent a notice to someone other than Frankenberry, but intended for Frankenberry, instructing the filing of a statement of good cause" why a copy of the petition had not been served on the respondent. Since Frankenberry never received the notice he did not respond to it. After 120 days had expired the circuit court dismissed the action pursuant to a rule governing the service of initial pleadings in regular civil actions, i.e. 1.070(j), F.R.Civ.P.

Frankenberry appealed and the appeal court found that he "was deprived of his due process rights to notice and opportunity to be heard prior to dismissal of his petition because the circuit court mailed the notice to the wrong person."

Additionally, the appeal court clarified that the 120-day service requirement of Rule 1.070(j) does not apply to mandamus petitions filed pursuant to 9.100(c) (4).

The appeal court QUASHED the circuit court's dismissal and returned the case to the lower court for further proceedings. See: *Frankenberry v. Moore*, ___So.2d ___ 24 FLW D1970 (Fla. 4th DCA 8/25/99).

[Comment: Normally, pro se prisoner petitioners do not serve the respondent with a copy of the petition. Usually, once the petition is filed with the court the court will review the petition and if it states a prima facie case (cause of action on its face), then the court will issue a show cause order that either incorporates the facts stated in the petition or accompanies a copy of the petition directed to the respondent. The court usually serves the respondent with a copy of the petition with the show cause order, not the petitioner. A court may direct a petitioner to serve a copy of the petition on the respondent, but only after a show cause order has been issued. For further understanding of this subject, see: *Fla. Jur.* 2d, Mandamus, sections 162-171-sj]

FIRST DCA REVISES OPINION REMOVING RECOGNITION OF "MAIL/ FILED WITH AGENCY CLERK'" PROVISION OF RULE 33-29.009(8)(a), F.A.C.

In the last issue of *FPLP*, in the Notable Cases section, the case of *Ortiz v. Moore*, 24 FLW D1497 (Fla. 1st DCA 6/22/99), was noted. The DCA has now revised that opinion following a motion for rehearing/clarification filed by the FDOC, to completely remove the

recognition of Rule 33-29.009 (8) (a) which provides that responses to grievances or administrative appeals to the DOC central office are "deemed filed with the agency clerk" as reflected by a stamp on the grievance stating "mailed/filed with agency clerk" along with the date.

This revised opinion completely eviscerates the first decision and leaves the DOC with wide latitude to argue "when" a final response has actually been given to a grievance for purposes of computing when the time began to run to file judicial challenges to denials of administrative grievances or appeals.

That date is most crucial when challenging denial of disciplinary appeals where judicial remedies must be sought within 30 days of the response denying the administrative appeal, per 9.100(c) (4), F.R.App.P.

See revised opinion: *Ortiz v. Moore*, 24 Fla. L.Weekly (D) 1997 (Fla.lst DCA 8/25/99).

DENIAL OF ADMINISTRATIVE GRIEVANCES NOT APPEALABLE DIRECTLY TO THE DCA

Prisoner Anthony Whitehurst filed an appeal directly to the DCA following the denial of an administrative grievance by DOC officials.

The DCA noted that Whitehurst has done this before and that denial of prisoner administrative grievances is not appealable to the DCA pursuant to section 120.68, Fla. Stat.

The only appeals that may be filed directly to the DCA by prisoners are those stated in section 120.81 (3) (a), Fla. Stat.

The DCA DISMISSED Whitehurst's latest appeal and advised him if he continues to institute such appeals the court will consider sanctions to ensure his frivolous filings do not further disrupt the court.

See: *Whitehurst v. DOC*, et al., ___So.2d____, 24 Fla. L.Weekly (D) 2048 (Fla. 1st DCA *9/1/99).*

[Comment: In practice, only denials of petitions to initiate rulemaking filed by prisoners to the DOC pursuant to section 120.54 (7), Fla. Stat., are directly appealable to the DCA per the provisions of section 120.68,Fla. Stat. —sj]

PRISONERS MUST FULLY EXHAUST ADMINISTRATIVE REMEDIES UNDER PLRA

Georgia prisoner Charles Harper filed a section 1983 civil rights complaint alleging cruel and unusual punishment for prison officials' refusal to provide medical treatment. The district court dismissed the case without prejudice because Harper had not fully exhausted the available internal administrative grievance process of the GA prison system. Harper appealed to the 11th Circuit Court of Appeals.

The 11th Circuit determined that Harper had filed a grievance, but that it was denied as untimely. Harper did not appeal that denial as he could have done according to GA prison regulations. Harper claimed on appeal that such an administrative appeal on the untimely issue would have been futile, and because of that he exhausted all the administrative remedies that were available, and thus, satisfied the requirements of the Prison Litigation Reform Act of 1996, 42 U.S.C. sec.1997e(a).

The appeal court disagreed with Harper's argument. The court noted that Harper could have administratively appealed the "untimely" grievance denial, and if he could show "good cause" for filing the grievance untimely, then he would have been allowed to file an out-of-time grievance (and presumably exhaust the denial of medical treatment issue).

Therefore, the appeal court AFFIRMED the district court's dismissal of the complaint without prejudice for failure to exhaust administrative remedies.

See *Harper v. Dr. Jenkin, et al.*, 179 F.3d 1311 (11th Cir. 1999).

THE STATUS OF PAROLE IS A CONSTITUTIONAL QUAGMIRE

Recently, I learned that Virginia Attorney Thomas E. Smolka of Richmond, Virginia has filed a petition for writ of habeas corpus he has filed on behalf of a Virginia inmate, who has demonstrated proof of psychological stability and concrete evidence of rehabilitation. It is my understanding that Mr. Smolka believes his client has been unfairly denied parole without having been afforded a fair determination of his eligibility for parole by a neutral and unbiased tribunal.

The petition alleges as one of its' grounds for relief, that the refusal of the Virginia Parole Board to exercise its discretion to grant parole pursuant to Va. Code Ann. Section 53.1-134 et seq., has effectively abolished parole even for an eligible prisoner who has exhibited genuine signs of rehabilitation. Smolka claims his client has been denied protection from retrospective ex post facto legislation, in that, the 1997 enactment of Va. Code Ann. Section 53.1-134 placed an insurmountable hurdle before his client in seeking parole, and resulted in punishment more severe than reasonably contemplated by statute at the time Smolka's client committed the offense. Smolka argues that when the Virginia General Assembly amended Section 53.1-134 , it placed on the Parole Board a person (a victim advocate) who invariably possessed an interest diametrically opposed to his client, an obstacle not present when his client was sentenced.

Smolka claims that when the Virginia General Assembly amended Section 53.1-134 to provide that one member of the Parole Board shall be a representative of a crime victim's organization or a victim of crime, the General Assembly effectively altered the possibility of his client to attain parole. Smolka argues that the victim advocate most certainly harbors a strong bias against persons who have committed a crime and may wholly ignore recommendations from institutional staff and independent evaluators (psychologists, sociologists, etc.) that the inmate be granted parole. Smolka argues that an impartial decision-maker is crucial to fundamental fairness, and that the placement of the victim's advocate on the Parole Board has yielded significant changes in the parole system. Mr. Smolka has alleged that parole has evolved from a consistent incentive for individual rehabilitation to a mere illusion of compliance to statutory authority by the Parole Board. As a result, Smolka argues that the punishment for his client has been rendered more onerous that the punishment contemplated at the time of the offense, which has resulted in impermissible ex post facto legislation.

Additionally, Mr. Smolka has alleged a number of other grounds for relief, including a claim that his client has been denied due process - in that, the Parole Board's actions have been arbitrary, abusive and contrary to statutory authority.

FPLP will be following the progress of this action.

FSP PRISON GUARD ARRESTED IN DRUG STING OPERATION

Steven R. Manning, 52, a prison guard with the Florida Department of Corrections (FDOC) for 10 years, and who worked at Florida State Prison in Starke was arrested September 23rd as he attempted to leave the prison with $300 in marked bills that had been given to him by a prisoner to allegedly purchase marijuana.

Prison officials said Manning's arrest was not connected with the investigation into the beating death of prisoner Frank Valdez at the same prison on July 17th.

Officials state Manning had come under suspicion back in March when Fla. Department of Law Enforcement and FDOC began investigating an escape plot. Prison guard uniforms, weapons, duct tape and other escape items were found and three prisoners were identified as plotting to escape.

One of those prisoners, whose identity was withheld by prison officials, participated in setting up a sting operation by giving Manning marked money to purchase marijuana and return it to the unidentified prisoner.

Manning was charged with possessing contraband in a correctional facility and violating prison rules that prohibit officers from accepting anything from prisoners.

Manning was immediately fired by the FDOC when arrested. Prison officials once again claim this was an isolated incident and not part of a widespread problem.

(Source: *Orlando Sentinel*, 9/25/99].

GOVERNOR BUSH ADMITS TO NEGLECT IN PRISONS

Governor Jeb Bush has openly admitted that the state's prison system suffers from years of neglect and that the Department of Corrections "erred" in failing to provide adequate medical health care to a St. Petersburg woman who died in a prison last year.

In a written response to a series of articles published in the *St. Petersburg Times*, Bush pledged that improvements are coming to the 1 .7 billion dollar a year prison system.

Bush provided no details as to what would be done to improve the system. Bush requested Corrections Secretary Michael Moore to recommend a plan of action that will ensure a change in the culture of a department that has suffered from years of neglect and lack of leadership.

(Source: *St Petersburg Times*, October 2, 1999] ■

ATTENTION LAW CLERKS

If you have suffered retaliation at the hands of FDOC officials as a result of the performance of your law clerk duties or in response to your personal grievances or litigation activities, send the details to:

Juristic Legal Aid Org.
Post Office Box 24923
Oakland Park, FL 33307

Include copies of any grievances.

Florida Department of Corrections
2601 Blair Stone Rd.
Tallahassee FL 32399-2500
(850) 488-5021
Web Site: www.dc.state.fl.us

FDOC FAMILY OMBUDSMAN

The FDOC has allegedly 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: 1-800-558-6488.

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 of you have any problems with using the above services]

Florida Corrections Commission
2601 Blair Stone Rd.
Tallahassee FL 32399-2500
(850)413-9330
Fax (850)413-9141
EMail: fcorcom@mail.dc.state.fl.us
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.

Office of the Governor
PL 05 The Capitol
Tallahassee FL 32399-0001
(850) 488-2272

Chief Inspector General.....922-4637
Citizen's Assistance Admin.....488-7146
Commission/Government Accountability
to the People.....922-6907

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

Florida Parole/Probation Commission
2601 Blair Stone Rd., Bldg C
Tallahassee FL 32399-2450
(850) 488-1655

Department of Law Enforcement
P.O. Box 1489
Tallahassee FL 32302
(850)488-7880
Web Site: www.fdle.state.fl.us

Florida Resource Organizations

Florida Institutional Legal Services
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/

Families with Loved
ones In Prison
710 Flanders Ave.
Daytona Bch FL 32114
(904)254-8453
EMail: flip@afn.org
Web Site: www.afn.org/ flip

Restorative Justice Ministry Network
P.O. Box 819
Ocala. FL 34478
(352) 369-5055
Web: www.rjmn.net
Email: Bernie@rjmn.net

FLORIDA PRISON LEGAL PERSPECTIVES

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