FLORIDA PRISON LEGAL

Perspectives

VOLUME 10 ISSUE 5 ISSN# 1091-8094 SEPT/OCT 2004

The Show Must Go On: Florida Prisoners Lose Important Case

by Oscar Hanson

More than 30 years ago, Florida prisoners challenged in federal court the adequacy of prison law libraries pursuant to federal constitutional law. The case, *Hooks v. Moore*, ultimately terminated in December 2000 when the United States District Court approved a plan by the Florida Department of Corrections. Once the dust settled, the FDOC began dismantling prison law libraries throughout the state, not withstanding the agreed upon plan to maintain the law libraries in their pre-approval condition. First, the FDOC began removing certain texts from the shelves in concert with other significant policy changes, including the removal of word processing equipment purchased with funds from the Inmate Welfare Trust Fund.

Shortly after implementation of the policy regarding word processors, several prisoners filed an action against the FDOC seeking to represent all persons who, now, or in the future, will be incarcerated as inmates within the FDOC who have legal needs and who have no means to acquire professional representation.

They ultimately claimed that they had been deprived of their right of access to courts pursuant to Article I, Section 21, of the Florida Constitution as a result of the following actions of the FDOC: (1) removal of reference books and form pleadings from the state's prison law libraries; (2) limitation of access to legal materials through inter-library loans; (3) restriction on the hours and means of access to prison law libraries and restrictions on the use of those libraries for drafting legal pleadings and legal mail; (4) elimination of access to computers, word processors and typewriters for preparation of legal pleadings and legal mail; (5) reduction on the availability of inmate law clerks to assist prisoners; (6) undue interference with inmates attempting to assist other inmates with their legal proceedings; (7) limitation on the storage of legal materials within an institution; and (8) improper review of prisoners' legal mail and legal documents designated for photocopying. The prisoners sought declaratory and injunctive relief. The trial court granted their motion for class certification.

The parties eventually filed cross-motions for summary judgment and memoranda of law, in which they argued that there were no disputed issues as to material facts, and that they were entitled to judgment in their favor as a matter of law. They also filed an extensive "joint stipulation of facts." Following a hearing, the trial court entered an order concluding that, based on the stipulated facts, the challenged actions of the FDOC did not violate Article I, Section 21, of the Florida Constitution. An appeal to the First District Court of Appeal followed.

In summary, the First DCA held that Article I, Section 21, of Florida Constitution (the "access-to-courts" provision) does not require the FDOC to provide more affirmative assistance to inmates in the preparation and filing of litigation papers than does the federal

ON THE INSIDE

FLORIDA PRISON LEGAL PERSPECTIVES
P.O. BOX 660-387
CHULUOTA, FLORIDA 32766
Publishing Division of:
FLORIDA PRISONERS' LEGAL AID ORGANIZATION, INC.

A 501 (c) (3) Non-profit Organization
Fax (407) 568-0200
E-mail: fplp@aol.com
Website: www.fplao.org

Florida Prisoners' Legal Aid Organization, Inc., P.O. Box 660-387, Chuluota, FL 32766, publishes FLORIDA PRISON LEGAL PERSPECTIVES (FPLP) up to six times a year. FPLP is a non-profit publication focusing on the Florida prison and criminal justice systems. FPLP provides a vehicle for news, information, and resources affecting prisoners, their families, friends, loved ones, and the general public of Florida. Reduction of crime and recidivism, maintenance of family ties, civil rights, improving conditions of confinement, promoting skilled court access for prisoners, and promoting accountability of prison officials are all issues FPLP is designed to address. FPLP's non-attorney volunteer staff cannot respond to requests for legal advice. Due to the volume of mail that is received and volunteer staff limitations, all correspondence that is received cannot be responded to, but all mail will receive individual attention. Permission is granted to reprint material appearing in FPLP that does not indicate it is copyrighted provided that FPLP and any indicated author are identified in the reprint and a copy of the publication in which the material is published is provided to the FPLP publisher. This publication is not meant to be a substitute for legal or other professional advice. The material in FPLP should not be relied upon as authoritative and may Not contain sufficient information to deal with a legal problem. FPLP is automatically sent to all members of FPLAO, Inc., as a membership benefit. Membership dues for FPLAO, Inc., operate yearly and are $9 for prisoners, $15 for family members and other private individuals, $30 for attorneys, and $60 for agencies, libraries, and institutions. Family members or loved ones of prisoners who are unable to afford the basic membership dues may receive membership for any size donation they can afford. Prisoners may pay membership dues with new unused postage stamps. Prisoners on death row or CM who cannot afford the membership dues may request a waiver of the dues, which we will grant as resources permit.

Constitution. It requires that the FDOC provide affirmative assistance as to all types of claims that might be filed in Florida's courts (including those based on federal law), rather than merely as to claims challenging convictions, sentences or conditions of confinement, or seeking to vindicate a fundamental constitutional right; and that the FDOC's justification for its action or inaction satisfy the strict-scrutiny test when such action or inaction results in a significant impediment to inmate's access to the courts. The Court further concluded that the trial court applied the wrong test to determine that the prisoners were not entitled to relief. Nevertheless, the trial court's decision was upheld because that as a matter of law, either individually or collectively, the actions complained of do no constitute significant impediments to the prisoners' right of access to Florida courts.

Those prisoners interested in reading the details and legal reasoning of this case may do so (for the time being) at your local law library. But do so quickly, because what is here today may be gone tomorrow. See: *Henderson v. Crosby*, 29 Fla.L.Weekly D1937 (Fla. 1st DCA 8/24/04).

[Note: *FPLP* has covered developments in this case from the beginning. Past articles can be found in *FPLP*, Volume 9, Iss. 4, pages 25-29; Vol. 10, Issue. 2, pages 5-7. If there are further developments, *FPLP* will carry them.- editor] ■

Report Faults Vermont Policies in Prisoners' Deaths: Retaliation Preceded *FPLP* Advisor's Suicide

by David M Reutter

An independent investigation into the deaths of seven prisoners concluded that Vermont Department of Corrections (VDOC) policies were partly to blame for some of the deaths. The deaths occurred between November 25, 2002, and October 7, 2003. After the suicide death of *FPLP* advisor James Quigley, the Vermont Agency of Human Services retained Michael Marks, a Vermont lawyer, and Philip McLaughlin, a former New Hampshire attorney general, to address the issues those deaths appeared to implicate. Those issues included the provision of medical service, mental health service, and the grievance process.

The VDOC can accommodate up to 1,000 prisoners, but is expected to reach 1,900 in the next three years. The report found the VDOC system is rife with communication problems and is under "tremendous stress" from budget cuts and the increased population. The report examined in great depth the circumstances of each prisoner's death and the conclusions to be drawn from those facts. Recommendations for change were included for administrative and legislative action. (See:

FPLP, Volume 9, Issue 16, page 23, "Florida Prisoner's Death in Vermont Sparks Legislative Investigation".)

James Quigley

The bulk of the investigative report addressed the events that preceded the suicide death of *FPLP* advisor James Quigley. On February 11, 2001, after serving 21 years on a life sentence, Quigley was transferred, via Interstate Prisoner Compact, from Florida prison to Vermont. That transfer was part of the terms of the terms of a settlement in a lawsuit against officials of the Florida Department of Corrections, alleging retaliation against Quigley, and law clerks in general, for filing grievances and lawsuits.

That transfer did not extinguish Quigley's activist spirit, for between September 13, 2001, and his departure from NSCF on July 17, 2003, he filed 36 grievances. His vote against Superintendent Kathy Lanman's proposal to buy flowers with canteen proceeds resulted in Quigley's removal from the "inmate recreation committee" in June 2003.

On June 10, 2003, Quigley had a parole hearing with the Florida Parole Commission, who established parole would not be considered for another ten years. Simultaneously, Northern State Correctional Facility Deputy Superintendent received information from an informant that Quigley had a "back-up plan" to parole. Quigley was promptly placed in administrative segregation as an escape risk. Five days later, the Deputy searched Quigley's property and found maps of all Vermont counties, which were cut from a local newspaper. Also found were Florida maps the Deputy learned Quigley had received a year earlier. While those maps were not problematic then, they now constituted support for the "back-up plan."

The Deputy recommended Quigley be put in SMU on open status. Lanman, however, noted that Quigley is "a pain in the butt" who "likes to write tons of grievances over petty issues." Lanman disapproved the recommendation, ordering the "legal paper pusher" Quigley to continue in ad seg until review in 15 days. Lanman then took action to have the VDOC send Quigley back to Florida.

Quigley appealed the ad seg decision. The appeal officer, John Murphy, concluded the hearing record was inadequate to support there was an escape risk because there was improper reliance on a confidential informant and consideration of material outside the record. On July 1, a new officer again concluded Quigley was an escape risk.

While an appeal of that decision was pending, Murphy suggested to Lanman that Quigley be transferred to the St. Albans Facility, which is VDOC's most secure prison, because he was considered an escape risk and he had significant grievances with Lanman.

Under VDOC policy, ad seg decisions are to be reviewed every 15 days, and if there is no evidence to support the decision the prisoner is to be returned to his previous status. On July 17, 2003, Quigley received such a review, which stated: "Facility has no new evidence to present. Recommended remove from ad seg status," Lanman approved that recommendation, but she overrode Quigley's status to close custody, and approved a transfer to St. Albans. Normally, transfers must be approved by VDOC's Director of Classification. No such approval was received here.

Upon arrival at St. Albans, Quigley was placed on D-Wing. Prisoners in D-Wing occupy solitary cells and they do not have access to standard items such as dental floss of standard tooth brushes. Quigley did not have access or standard writing implements with his full legal file even though he had a pending post-conviction relief motion. He was also denied access to outside recreation or exercise.

Quigley described D-Wing conditions as "the worse I've ever seen." With 40 degree temperatures, his cell window would not close. Quigley wrote his mother, Claire Quigley, and said, "There is nothing to do but retreat under the covers and tremble because they won't provide us adequate clothing of allow us to have our own."

VDOC policy directs that Quigley's classification, Close Management Level I, was designed to be a short term of 30 days in duration. Quigley was on D-Wing for 82 days. During that period his regular descriptions were: "quiet" and "no issues."

When a close management prisoner demonstrates progress and movement towards self-risk management, he is to be placed on a "movement list," in order of priority, for removal from D-Wing. Despite receiving no disciplinary actions and being "quiet," Quigley was never placed on the movement list. Instead, the D-Wing management team had an *understanding* that "Quigley would stay in D-wing until a transfer to Florida" and "He would stay there indefinitely regardless of his good behavior."

On September 11, John Murphy met with Quigley regarding the accumulation of appeals questioning his D-wing placement and the confinement conditions. After Murphy expressed to his supervisor that it was credible Quigley's placement was retaliatory, the supervisor ordered him to look into the reliability of the assertion Quigley was an escape risk.

During that investigation, Murphy was told by NSCF's Deputy Superintendent that, "The only reason that guy [Quigley] is in ad seg is he pissed off the superintendent." Lanman denied she was angry at Quigley. Nevertheless, Murphy concluded there was "more evidence Quigley was retaliated against than he was an escape risk."

Murphy's conclusion was part of an October 6 telephonic conference between various VDOC lawyers and officials and lawyers acting on Quigley's behalf, who agreed Quigley, would be removed from D-wing. This decision was never communicated to Quigley.

In the early morning hours of October 7, Quigley tied a bed sheet to a grate in the ceiling and hanged himself. He died on the 118th day of confinement in administrative segregation on close custody.

The investigation report concluded the system failed in Quigley's case. The initial decision to remove him from open population was justified. A reasonable investigation, such as Murphy conducted in one day, would have disclosed Quigley did not pose an unusual or heightened risk of escape. His confinement to D-wing was not justified. If the system had worked, Quigley would have been removed from D-wing long before his death.

"Distinguishing which individuals were consciously retaliating from those who were indifferent or ineffective would not affect our ultimate conclusion: Vermont's correctional system treated Mr. Quigley differently because he filed grievances and objected to institutional practices. We can discern no good reason for the different treatment," said the report.

Superintendents Denoted

Following the release of the report from the independent investigation in March 2004, the Vermont DOC conducted its own investigation and in August 2004 the two prison superintendents involved in the retaliation were reassigned to other state jobs. Kathleen Lanman, who was in charge of Northern State Correctional Facility, was reassigned to be a supervisor in the Morrisville office of the Department of Children and Family Services. Lanman had earned $58,593 as a prison superintendent; her new job pays less and carries less rank.

Charles Hatin, who was the superintendent of Northwest Correctional Facility in St. Albans, where Quigley died, is on suspension and still discussing his next position. Hatin has been a state employee since 1985 and earned $56,700 as a prison superintendent. It is not expected he will be placed in any supervisory position over prisoners.

Death Creates Opportunity For Changes

The investigative reports authors did a commendable job of establishing the facts and conclusions in an impartial manner. They recommended changes on issues related to these prisoner's deaths.

In the mental health area, there needs to be a quality assessment system to grade the services rendered to prisoners. The grievance procedure should assure a prisoner's complaint is acted upon or rejected in a timely manner. The authors also suggested that the state of VDOC provide more funding for the Prisoner's Rights Office of the Vermont Defender General because it may provide quicker and more reliable adjustment of VDOC errors.

In his last letter, Quigley said, "They're all full of crap. Spin is everything to these prison officials. It's all a front." The report's authors agreed when they lambasted VDOC's written reports into the deaths of Bessette, Quigley, Palmer, and LaBounty. Those reports did not address in depth the circumstances surrounding the deaths, and they provide no basis for assessing or improving VDOC practices. Instead, they emphasize facts that would be favorable to the VDOC in subsequent litigation while ignoring potential errors that warrant correction.

On August 10, 2004, a panel of Vermont state legislators heard firsthand from prisoners about problems with the prison system. The committee is charged with identifying problems in the system and recommending changes in the law to remedy the problems. One primary problem that six prisoners, male and female, raised was finding housing on the outside when released from prison. The prisoners' concerns were supported by Vermont DOC Commissioner Steve Gold. Lawmakers promised nothing, but expressed that changes are needed in several areas concerning prisoners and the prison system. It's just a damn shame it took so many deaths to reach this point.

[Note: *FPLP* Editor Bob Posey contributed to this article.]

[Sources: "Investigative Report in the Deaths of Seven Vermont Inmates and Related Issues," 3/04; *Brattleboro Reformer; New York Times; St. Albans Messenger*, 8/11/04.] ■

Speak To Me: Delayed Miranda Warnings

In a rare decision by the United States Supreme Court, a police interrogation tactic designed to induce suspects to give incriminating statements after purposely delaying Miranda warnings has been declared unconstitutional.

The tactic, taught in police training courses, has been growing in popularity. The 5-4 ruling against the strategy was apparently the product of a prolonged struggle inside the court. This case and another Miranda case announced simultaneously by a 5-4 vote in favor of the prosecution were the oldest undecided cases on the docket. In neither case did the five justices in the majority fully agree on a single rationale.

Under the tactic the court invalidated in the case above, the police first question a suspect while withholding the advice required by the Miranda decision of the right to remain silent and to consult with an attorney before answering questions. In not giving the warnings, the police know that any incriminating statements elicited

in this phase of the questioning will be inadmissible in court.

The officers then give the suspect a short break before resuming the interrogation, this time with the warnings. Typically, suspects will waive their Miranda rights and then repeat what they had said prompted by the officers' leading questions and by the sense that it is now too late to turn back.

The issue for the Supreme Court was whether the answers from that second phase of questioning could be used in court. The majority's answer was no. Justice Souter said the facts of this case by any objective measure revealed a police strategy adapted to undermine the Miranda warnings. He said the police had created a situation for the defendant, a woman suspected of murder, in which it would have been unnatural to refuse to repeat at the second stage what had been said before.

The case, *Missouri v. Seibert*, No. 02-1371, was a variant of a case the court decided in 1985 called *Oregon v. Elstad*. In that case, the police went to a young suspect's home to tell his mother that they were arresting him on a burglary charge. Without receiving any Miranda warnings, the suspect gave an incriminating statement. He was then taken to the police station where he received the warnings and gave a full confession. In deciding that the evidence was admissible, the court treated the initial failure to give the warnings as inadvertent rather than strategic, based on confusion about whether the suspect was formally in custody at the time.

The defendant in the Missouri case, Patrice Seibert, was interrogated after a fire in her family's mobile home killed a young man who was staying there and caring for her disabled son. Both before and after receiving Miranda warnings, Ms. Seibert admitted her role in setting the fire. The Missouri trial court suppressed the first admissions but allowed the prosecution to introduce the statements she made after receiving the warnings. Ms. Seibert was convicted of murder. The Missouri Supreme Court overturned the conviction and the state sought certiorari review.

Justice Souter's opinion was joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen G. Breyer. Justice Anthony M. Kennedy wrote separately in agreement with the result, proposing a test under which fewer statements would be likely to be excluded than under the majority's approach.

In a dissenting opinion, Justice Sandra Day O'Connor said the court's decision devours *Oregon v. Elstad*, a precedent she described as requiring the opposite result. Justice O'Conner said the subjective intent of the officers should make no difference, because a suspect could not know what was in an officer's mind.

Rather, she said, the test should be the voluntariness of the second statements. If the statements were voluntary, they should be admitted.

The lineup in the second Miranda case was the same with the exception of Justice Kennedy, who voted on the prosecution side. The question in *United States v. Patane*, No. 02-1183, was whether physical evidence, a gun in this case, found as the result of statements obtained without Miranda warnings, could be admitted in court. The court's answer was yes.

Federal firearms agents went to Samuel F. Patane's home in Colorado Springs to question him about a report that he had a gun. Before the agents could finish reading Mr. Patane his Miranda rights, he interrupted them, saying that he knew his rights. He then directed them to the gun in his bedroom.

Interpreting the *Oregon v. Elstad* precedent, the federal appeals court in Denver said the gun could not be introduced as evidence. The Supreme Court overturned that ruling holding that the Miranda rule could not be violated unless statements were actually introduced in court. See: *Missouri v. Seibert*, 17 Fla.L.Weekly Fed., S476 (6/28/04); *U.S. v. Patane*, 17 Fla.L.Weekly Fed., S482 (6/28/04). ■

Uncomfortably Numb: Excessive Heat on Death Row Constitutional

Recently the United States Circuit Court of Appeals found the temperatures on Florida's death row to be hot but not excessive enough to be viewed as cruel and unusual punishment.

Four years ago a class-action lawsuit was filed and claimed summer temperatures on death row regularly top 100 degrees and sometimes reach 110, forcing condemned prisoners to stand in toilets, drape themselves in wet towels, and sleep naked on concrete floors.

While the case was pending in the United States District Court, Judge Ralph Nimmons toured the prison and interviewed some of the 300 inmates housed on death row. He later ruled that the heat was not excessive. The Court's ruling, according to Peter Siegel, an attorney with the Florida Justice Institute in Miami who represented the prisoners, recognized that it was hot, but so what!

On appeal the 11th Circuit Court of Appeals found that the heat is not unconstitutionally excessive; the prison is equipped with a ventilation system that manages air circulation and humidity, the court said, that gives prisoners a break from the heat.

We're extremely pleased with the ruling, said Sterling Ivey, a spokeswoman for the Department of Corrections. While Hannah Floyd, director of the Florida Death Row Advocacy called the ruling inhumane.

The Court's decision can be read in its entirety in the case of *Chandler v. Kelley*, 17 Fla.L.Weekly Fed. C891 (U.S.C.A. 11th Cir. 8/6/04). ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Over the past several years I have had the pleasure of working on the case of State v. Alan Yurko. Mr. Yurko is a man who was wrongfully accused of shaking his baby son to death. The conviction resulted due to several factors including ineffectiveness of trial counsel and what has been referred to by some as corruption within the medical examiner's office. On August 27, 2004, the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, vacated Mr. Yurko's Judgment and Sentence. Due to the concerted efforts of many Mr. Yurko is now a free man. I write this article not to brag about my involvement but instead to perhaps help others with convictions out of Orange or Osceola Counties.

Earlier this year the medical examiner of the Ninth Judicial Circuit, Dr. Shashi Gore was disciplined by the Florida Medical Examiner's commission for his sloppy autopsy work on Alan Yurko's case. Dr. Gore received the harshest sanctions ever doled out by the Medical Examiner's Commission. Because of his negligence (and what some have described as corruption) Dr. Gore has been suspended from performing any further autopsies and was essentially relegated to an administrator of his office for the short remainder of his term. The probable cause committee for the commission stated that if Dr. Gore had not been willing to retire this past June, he probably would have been removed from office.

Dr. Gore's "mistakes" on the autopsy in Mr. Yurko's case were substantial and numerous, including:

1. the fact that the decedent's head circumference was reported by Dr. Gore to be 22 centimeters, whereas the actual head circumference at birth was 32.5 centimeters, and, just prior to the autopsy the head circumference was 37.5 centimeters;

2. Dr. Gore's autopsy report provided a detailed description of the decedent's inner heart muscle tissue despite the fact that the decedent's heart was donated prior to the autopsy, and, thus, was not present and available for inspection at the time of the time of the autopsy;

3. Dr. Gore's report noted a contusion on the left lateral surface of the chest but later in the same report noted that the skin did not show any subcutaneous contusions on the buttocks, chest, or abdomen;

4. Dr. Gore altered his autopsy report to state the decedent's correct race (white instead of black) after trial and without notice to the court or parties;

5. Dr. Gore testified that neither he nor anyone from his office obtained the medical history/records of the decedent. Said records were necessary for the

diagnosis of Shaken Baby Syndrome. Dr. Gore admitted that this was necessary to make the diagnosis, yet he made the diagnosis anyway;

6. Dr. Gore testified at trial that he noted Diffuse Axonal Injury in the decedent, but, the autopsy report made no mention of Diffuse Axonal Injury; and, at trial Dr. Gore gave an improper definition of Diffuse Axonal Injury to the jury;

7. Dr. Gore did not describe the microscopic appearance of the meninges or the presence of Diffuse Axonal Injury in the brain or spinal cord; and,

8. Dr. Gore presented slides and testified about the old callous of the 5th, 6th , and 10th ribs, which were unrelated to the cause of death, as there were no new callouses, and he noted the 7th rib as well in his autopsy report; and,

9. Dr. Gore testified that he didn't test the cerebrospinal fluid because it was mixed with blood, but, his autopsy report noted that the cerebrospinal fluid was clear.

The Florida Medical Examiner Commission found Dr. Gore to have made twelve errors, including those listed above, in his autopsy. The panel investigating Dr. Gore found that Gore committed at least five major errors while conducting the Autopsy on Baby Alan.

The judge on Mr. Yurko's case, the Honorable Alan Lawson, found that Dr. Gore's autopsy in Mr. Yurko's case was problematic and that there was a substantial likelihood that the outcome of Mr. Yurko's trial would have been different had the jury known about Dr. Gore's sloppy autopsy and recent suspension in relation thereto. Judge Lawson also found that Dr. Gore's recent suspension was newly discovered evidence under applicable law in Florida. See, Jones v. State, 709 So.2d 512 (Fla. 1998). At the evidentiary hearing on Mr. Yurko's postconviction motion, the State argued that if the court were to overturn Mr. Yurko's conviction based upon Dr. Gore's suspension, the trial court would be flooded with like petitions attacking Dr. Gore's performance in other cases. Therein lies the purpose of this article. Dr. Gore was a public official who's duties included making determinations as to whether someone should be charged with a crime such as murder. Dr. Gore abused this public trust and, as a result, at least one innocent person was convicted of murder. Due to Gore's sloppy practices, Mr. Yurko almost ended up wrongfully serving a life term in prison.

If any of my readers or their friends, relatives, etc., have been convicted of a crime due to an investigation or a cause of death determination by Dr. Shashi Gore, I recommend investigating the possibility of filing a Florida Rule of Criminal Procedure 3.850 Motion for postconviction Relief alleging the newly discovered evidence of Dr. Gore's recent suspension.

As already mentioned, Judge Lawson has determined that Dr. Gore's suspension was newly discovered evidence in Mr. Yurko's case. As such, Judge Lawson set the precedent for all other cases in Orange and Osceola Counties in which Dr. Gore was involved. For a copy of Judge Lawson's written order in Mr. Yurko's case, one can contact the Orange County Clerk of Court and ask for the Order, or any other documents from the case. The address for the Clerk of Court is 425 North Orange Avenue, Orlando, Florida 32801. The Clerk of Court's phone number is (407)836-2050. Mr. Yurko's case number is Orange County Case #CR 98-1730.

Additionally, in preparing a 3.850 motion based upon Dr. Gore's misdeeds, one should also obtain relevant documents from the Florida Medical Examiner's Commission. Documents relating to Dr. Gore's disciplinary proceedings can be obtained via a public records request pursuant to Florida Statutes Section 119. The commission can be contacted at Florida Department of Law Enforcement, Medical Examiner's Commission, P.O. Box 1489, Tallahassee, Florida 32302. The Medical Examiner's Commission is a branch of the Florida Department of

Law Enforcement. Any questions about a public records request can be addressed to FDLE at the above listed address or by phone at (850)410-8600. I would recommend at least obtaining a copy of the Order imposing the sanctions on Dr. Gore. Said Order should be an attachment to any 3.850 attacking a case based upon Dr. Gore's involvement in the case.

In filing a 3.850 based upon newly discovered evidence it is important to be aware of the standard for a newly discovered evidence claim. In order to be considered newly discovered evidence, for the purpose of setting aside a conviction, the evidence must have been unknown by the trial court, the defendant, or by defense counsel at time of trial. Jones v. State, 709 So.2d 512 (Fla. 1998). Furthermore, it must appear that the defendant or his counsel could not have known of the evidence by use of due diligence. Id. And, finally, the evidence must be of such nature that it would probably produce acquittal on retrial. Id. . It should be argued to the court that each one of the elements of the newly discovered evidence test is satisfied, as per the facts of each individual case. Once again a review of Judge Lawson's Order may be helpful in formulating such an argument.

In closing, if your conviction is a result of Dr. Shashi Gore's involvement in your case, you have recently been handed strong ammunition for attacking your conviction. Please be aware that a two year period of limitations applies to all newly discovered evidence claims. Therefore, if you intend to use the information provided in this article, I would recommend that you begin as soon as possible. After the two year period of limitations lapses, no cases can be overturned on the basis of Dr. Gore's involvement. Dr. Gore has abused the public trust. Do not let any more bogus convictions stand as a result of his abuse of our trust.

Loren Rhoton is a member in good standing with the Florida Bar *and a member of the Florida Bar Appellate Practice Section. Mr. Rhoton practices almost exclusively in the postconviction/appellate area of the law, both at the State and Federal Level. He has assisted hundreds of incarcerated persons with their cases and has numerous written appellate opinions.* ■

Diseases Incubate Behind Bars

by Randy Sherrell

In local jails and prisons an outbreak of staph infections poses great risk not only to prisoners housed in such facilities, but also to the public once they are released. These infections are especially dangerous to people with compromised immune systems.

The Centers for Disease Control and Prevention has cited several penal facilities for an outbreak of drug-resistant strains of staph, which are especially difficult to treat. Staph can be part contained by giving inmates access to soap and hot water and making sure that their laundry is thoroughly washed and dried. But facilities that cannot organize themselves well enough to provide clean linen stand little chance of success against the heavyweight infectious diseases that have become endemic behind bars today. Among them are HIV, tuberculosis, and hepatitis C. Complications from hepatitis kill 25,000 people each year.

The diseases that incubate behind bars don't just stay there. They come rushing back to the general population – and to the overburdened public health system – with the nearly 12 million local and state prisoners released each year.

Some states have responded to the danger of prison epidemics by gearing up to test, treat, and counsel inmates. But most of the system is not so forward looking. Faced with tight budgets, many jails and prisons have backed away from testing inmates for fear that they will be required to pay for treatment.

This approach was shown to be penny wise but pound foolish when the country experienced an epidemic of drug-resistant tuberculosis–driven mainly by former prison inmates – during the 1990s. Though expensive, testing and treatment for TB cases behind bars are more efficient and cost-effective than mounting a full-scale assault on the disease once it hits the streets. A similar pattern has emerged with AIDS as infected inmates leave prison and infect people outside, who then turn to the public health system.

In the late 1990s, Congress held hearings and instructed the Justice Department to perform the country's first nationwide study of the health environment of jails and prisons. The study, "The Health Status of Soon-to-be-Released Inmates," is available on the website of the National Commission on Correctional Health Care, which worked with the government on the project. It offers a sobering view of the corrections system, which has clearly become a major conduit for infectious disease. The rate of transmission for sexually transmittable disease behind bars is roughly 10 times that in the world outside. In any given year, 17 percent of people with AIDS, 35 percent of people with tuberculosis, and nearly a third of those with hepatitis C pass through the corrections system.

This system represents a gaping hole in the public health network, thanks in part to the fact that prisoners become ineligible for Medicaid assistance while they are behind bars. Inmates who have the misfortune of being housed in jails and prisons without serious medical programs often have no choice but to cease treatment, which means that they get sicker and continue to pose an infection risk to others. Once released, those same inmates spend months trying to re-enroll in the Medicaid program and get care.

The United States would experience less infectious disease if the public health apparatus were fully extended into the jails and prisons. The health status report argues convincingly for a rigorous program of testing, treating, and counseling that would slow the spread of disease and alert inmates to illnesses before they reached the crisis stage and became prohibitively expensive to handle.

These ideas are perfectly consistent with what we know about the importance of preventative medicine. But applying them to prison inmates will be difficult until we begin to see them not as outcasts who deserve to be cut off from the public largesse, but as fellow citizens with whom we will eventually share a common fate. ■

A Peek at the Patriot Act

by Oscar Hanson

George W. Bush calls it "vital legislation " that protects us from the threat of terrorism; John Kerry says, "there are good parts to it and bad parts to it"; the ACLU claims it threatens "the very rights and freedoms that we are struggling to protect." The Patriot Act has been condemned by historians and city councils from Los Angeles to Philadelphia. But how does the law affect everyday citizens? Below, a brief description shows how a (particularly unlucky) U.S. citizen might run afoul of the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001."

Section 213: Changes standards for search warrants to allow "sneak and peek" searches in any investigation. Instead of serving the warrant in person, a federal agent can now snoop first and let you know later – often much later.

Section 218: Extends an exception to the Fourth Amendment, allowing secret U.S. courts to authorize secret searches if the government can allege a foreign intelligence rationale. Any evidence discovered can now be used in court.

Section 206: Permits "roving wiretaps," which allow the government to tap all phones or computers a suspect *might* use–including those at a neighborhood pool hall or Internet Café. Unconnected third parties can easily

be swept into this wider net. Along with Section 220, it curtails judicial oversight of such wiretaps.

Section 214: By claiming relevance to a terrorism investigation, the government can track your incoming and outgoing calls without a warrant or probable cause.

Section 216: Allows, with a judge's approval, Internet wiretaps to be used in any criminal investigation. Authorities are supposed to be limited to collecting address information, not "content." But privacy advocates note that web addresses provide a direct path to the content.

Section 215: Without demonstrating probable cause, the FBI can obtain a subpoena to search your personal records held by a library, bookstore, church, bank, video store, etc. The subpoena cannot be challenged in court, and it includes a "gag order" to keep you from ever knowing it was served.

Section 505: Just like 215, but there's no judge required. Anyone from John Ashcroft down to an FBI field officer can demand the same kinds of records simply by issuing a "national security letter." The agent has only to satisfy himself that the information might be "relevant" to an ongoing terror investigation.

Section 802: Defines the new crime of "domestic terrorism" as illegal acts "dangerous to human life" that "appear to be intended" to influence government policy by "intimidation or coercion." The vague wording has activists ranging from environmentalists to anti-abortionists worried that their civil disobedience might be reclassified as terror.

Section 806: Allows the Justice Department – without a hearing – to seize the assets of alleged domestic terrorists and their supporters.

Incidentally, *Section 805(a)(2)(b):* Banned giving "expert advice or assistance" to government-designated "foreign terrorist organizations." However, a federal judge tossed out this provision as unconstitutionally vague because it could encompass "pure speech and advocacy protected by the First Amendment."

Like it or not, or nation has began its odyssey toward a total police nation with no hope of a return to the days of freedom as we once knew it. ■

Setting the Clock

by Richard Geffken

Known as the AEDPA, the Antiterrorism and Effective Death Penalty Act created a one-year statute of limitations on criminal defendants seeking a federal writ of habeas corpus in challenge of their convictions or sentences.

Some confusion remains over the 1-year *plus* 90 days permitted to file for federal habeas corpus relief. The 1-year part is directly from the AEDPA's 28 USC § 2244(d) provisions. The extra 90 days comes from the right to seek U.S. Supreme Court certiorari.

Many U.S. Circuit Courts of Appeals were not recognizing the extra 90 days. The U.S. 11th Circuit, with jurisdiction over Florida, Georgia and Alabama, was not a leader among the circuits to recognize the extra 90 days, but eventually it had to.

When the U.S. Supreme Court decided *Clay v. United States*, 123 S.Ct. 1072 (2003), the extra 90 days became the rule in all federal jurisdictions. Although the case dealt with whether federal prisoners were entitled to an extra 90 days on top of the 1-year AEDPA filing period, it equally applies to state-prisoners who are also entitled to (potentially) seek certiorari review from the U.S. Supreme Court after exhausting all available lower court remedies.

Some confusion arises, however, because the Court in *Clay* failed to make a succinct bright-line rule. The Court held the date is 90 days after entry of judgment, or, since in the federal courts mandate issues 21 days after entry of judgment, it is "69 days after the issuance of the court's mandate." *Id.* At 1075.

However, when does the time begin to run for state prisoners, where there is no set time for issuance of the state court's mandate?

Fortunately, for judicial economy, the *Clay* Court rejected use of the mandate issuance to start the clock before including the 69-day federal court mandate issuance dicta. Therefore, for state prisoners who cannot rely on the federal 21-day rule, the extra 90 days begins when the state appeal court rules. For most Florida prisoners that's the date on the PCA (Per Curium Affirm). The only confusion that remains is in cases using the state mandate date instead. That is clearly a risk, and a wary litigant would be advised to count from the PCA date instead. ■

Felon Voter Rights on Hold

Efforts to have a referendum placed on the November election ballot to automatically restore felons' voter rights upon their release from prison will likely fall short of the required number of signatures needed to make the ballot. However, the American Civil Liberties Union vows to have the referendum on the ballot by 2006.

The goal is to have automatic restoration of civil and voting rights for felons once they have completed their prison sentences.

Florida is among a half dozen states nationally that do not automatically restore voting rights of felons. Under Florida Law, former felons lose their right to vote

unless they request to have it reinstated by the governor and clemency board.

The purge of some supposed felons from Florida voter rolls before the 2000 presidential election sparked a lawsuit filed by the NAACP, the ACLU and three other groups on behalf of black voters. The federal class-action lawsuit charged that minority voters were widely denied voting rights in several counties.

The state settled the lawsuit in July and agreed to help restore voting rights to nearly 125,000 convicted felons who did not get enough advice on how to regain their rights when they walked free.

Even as that lawsuit was being settled, however, steps were being taken to purge more supposed felons from the voter rolls before November 2. In May '04 state officials sent a list of more than 47,000 potential felon voters to county election supervisors with instructions to remove the names from voter rolls. The state refused to make the list public, however, resulting in a lawsuit by CNN to force the list's disclosure.

On July 1, '04, a Tallahassee judge ordered the list to be made public. Once the list was examined and numerous errors in it began being publicized, nine days later Gov. Bush ordered the list to be scrapped, saying it was too flawed to be trusted. Some of the errors noted in the list included it containing the names of more than 28,000 registered Democrats and less than 10,000 registered Republicans; the list also had less than one tenth of 1 percent Hispanic names on it, this in a state where nearly 1 in 5 residents are Hispanic. Many Hispanic voters vote Republican.

Despite getting rid of the list, Gov. Jeb Bush still refuses to admit there are problems with the ex-felon civil rights restoration process in Florida. He maintains the clemency process is better than automatic restoration, causing critics to question his motives. "It's a very partisan issue," said incoming state Senate President Tom Lee, R-Brandon. "The perception out there among Republicans is that most felons are Democrats." ■

Another Brick In The Wall: Resurrection of an Expired Sentence

by Oscar Hanson

Recently, the Florida Supreme Court accepted jurisdiction in yet another gain time related case where a certified question was sent by the First District Court of Appeal. I've followed this case with interest since I was the culprit who litigated the *Eldridge v. Moore* case where the supreme court issued its ugly opinion that held upon revocation of community control or probation imposed as part of a true or probationary split sentence for a single offense, both the trial court and the DOC have the authority to forfeit gain time.

This recent case involves an issue of statutory interpretation tempered by the constitutional prohibition on double jeopardy. The DOC claimed statutory authority to declare a forfeiture of gain time from a sentence *that* was already served and to then apply it to another sentence imposed upon revocation of probation.

In order to understand the dynamics of the court's opinion it is necessary to get a brief overview of the facts and history of this case.

Facts and Procedural History

Thomas Gibson was convicted of committing numerous felonies on various dates in 1993. All of the offenses were included in a single guidelines scoresheet because the cases were pending sentencing at the same time. The trial court sentenced Gibson to consecutive terms of five years incarceration in cases 93-216 and 93-297 for a total of ten years followed by consecutive periods of five years probation in case 93-360 where Gibson had two counts of third degree felonies. The sanctions in cases 93-216 and 93-297 had no probationary terms, and, as originally imposed, the sanctions in case 93-360 contained no incarceration.

Gibson completed his cumulative ten-year sentence in cases 93-216 and 93-297 through a combination of time actually served and accrued gain time. Upon his release form prison in April 1998, Gibson began service of his probation in case 93-360. He subsequently violated the terms of his probation and the trial court revoked the probation and sentenced Gibson to consecutive terms of four and three years in prison for a total of seven years of incarceration. The trial court granted credit pursuant to *Tripp v. State*, 622 So.2d 941 (Fla.1993), of 1681 days time served from the completed sentences in case 93-216 and 93-297 against the overall seven-year sentence in 93-360.

While serving his sentence the DOC declared a forfeiture of the 1969 days of previously un-forfeited gain time from the sentence in cases 93-216 and 93-297, and applied the forfeiture to the sentences imposed upon revocation of probation in case 93-360. (The 1969 days included both basic and incentive gain time.) Thus, the combination of the credit for 1681 days actually served on the expired sentences and the DOC's forfeiture of the 1969 days of unforfeited gain time actually increased Gibson's seven-year sentence by 288 days.

Gibson challenged the DOC's authority to forfeit the gain time from the completed sentences, which the trial court denied. Ultimately the First DCA affirmed but certified a question of great public importance:

> Does the forfeiture penalty enunciated in *Eldridge v. Moore*, 760 So.2d 888 (Fla. 2000), apply where a defendant receives a sentence of incarceration for one offense followed by a sentence of probation for another offense, where both crimes were scored on a single scoresheet and the trial

court awards prison credit pursuant to *Tripp v. State*, 622 So.2d 941 (Fla. 1993), upon violation of probation for the second offense?

The core issue in this case is whether the DOC may apply the forfeiture penalty of section 944.28(1) across offenses to the guidelines sentence imposed upon violation of probation for a crime that was originally included in the same guidelines scoresheet as the offense on which the gain time was accrued.

The Tripp

Tripp, the case essentially relied upon by the DOC and the First DCA as legitimizing the imposition of a forfeiture penalty in Gibson's case, involved credit for time served on a completed sentence when a defendant is sentenced on a different offense to a term of incarceration upon revocation of probation. In *Tripp*, the Court rejected the contention that because convictions for two separate crimes result in two separate sentences, the offender is not eligible for time served credit. Consequently, the Court determined that where a term of incarceration on one offence is followed by a term of probation on another, credit for time served on the first offense must be awarded on the guidelines sentence imposed after revocation of probation on the second offense.

In subsequent decisions based on *Tripp*, the Supreme Court continued to emphasize that several sentences imposed in a single sentencing scheme based on a single scoresheet were to be treated as a single unit upon revocation of probation or community control. In *Hodgdon v. State*, 789 So.2d 958 (Fla. 2001), the issue was whether the defendant was entitled to have *Tripp* credit applied individually to the sentence for each offense on which he violated probation. The supreme court held that *Tripp*'s requirement of credit for time previously served applied to the overall sentence imposed upon violation of probation rather than against each individual count on which probation is revoked.

The apparent driving force behind *Hodgdon*, as in *Tripp*, was fairness. As reasoned by the Supreme Court, to have applied credit against the sentence on each individual count rather than against the overall sentence would have circumvented the guidelines by providing a sentencing boon or windfall to defendants upon violations of probation. In *Hodgdon*, a per-count credit would have resulted in the defendant serving no time in prison--a result that was deemed contrary to the trial court's intent.

Enter Eldridge

As previously stated, the Supreme Court construed the statutory provision applicable in Gibson's case that involved true split sentences of prison and probation, and held that pursuant to section 944.28(1), the DOC may forfeit the gain time even if the trial court chooses to retain it.

The Court recognized in *Eldridge* that actual time served and gain time are not the same when it comes to awarding credit to a defendant upon revocation of probation. While the award of gain time reduces and inmate's release date, just as actual time spent imprisoned, it is clearly not synonymous with actual time served. As the DOC explained, and the Court bought into, the authority to award and forfeit gain time (as opposed to the trial court's authority to award credit for time served) is used to encourage good behavior in prison and on supervision. The Court further reasoned that it was the Legislature that provided for the award of gain time and made the retention of that gain time conditional upon the satisfactory completion of the inmate's supervision.

Thus, under *Eldridge*, when a defendant is sentenced to a prison term upon revocation of probation imposed as part of a split sentence for a single offense, the DOC has the complete authority to forfeit all gain time previously awarded. The effect of this forfeiture was designed to require the offender to serve out the remainder of the prior incarceration in addition to the sentence imposed upon revocation of probation.

At issue in Gibson's case was the Fist DCA's determination that the sanction initially received by Gibson was a probationary split sentence within the meaning of *Eldridge*. In a separate concurring opinion, Judge Lewis expounded and opined that even though Gibson had been convicted of multiple offenses, he received only one sentence because the offenses were scored on a single scoresheet and considered together in forming his sentence. Since Gibson received only one sentence for his three cases, his initial sentence constituted a probationary split sentence. Thus, pursuant to *Eldridge*, the DOC had the authority to forfeit any accrued gain time.

The Supreme Court agreed that Judge Lewis' analysis correctly applied their precedent in this area of law. The Court held that the DOC's application of section 944.28(1) to the single-unit sentence structure first addressed in *Tripp* is consistent with their prior case law in which they have recognized the continuing relationship among guidelines sentences that were originally imposed in relation to one another. In reaching this conclusion the Court held that extending an interrelationship of single-unit guidelines sentences to gain time forfeiture does not violate the requirements of section 775.021(4) Fla.Stat., and Rule 3.701(d)(12), Fla.R.Crim.P., that the offender receive a sentence for each offense.

The Court further reasoned that an offender sentenced for multiple offenses receives a separate sentence for each offense, even though the sentences for offenses scored on a single scoresheet are viewed as a single unit out of concern for fairness and uniformity in sentencing. So long as each sentence remains within the

statutory and guidelines maximums, the application of the gain time forfeiture does not turn separate sentences into an unauthorized general sentence.

As the Court correctly recognized, the DOC's application of section 944.28(1) to single-unit sentences will nullify *Tripp* credit for most if not all sentences imposed for offenses committed before October 1, 1995, which is the effective date of the enactment that requires prisoners to serve 85 percent of their sentences. Nevertheless, as the Court explained in their opinion, the forfeiture penalty may not be applied so as to affect an overall increase in the sentence upon revocation of probation, resulting in a "*Tripp* penalty."

Double Jeopardy Issue

Gibson argued that the forfeiture of his gain time from an expired sentence violated the constitutional probation on double jeopardy, because in effect the forfeiture of gain time resurrects a sentence that has been fully served. As Judge Benton stated in his dissenting opinion from the DCA, a prison sentence without a probationary component cannot be revived once the sentence had expired, which was consistent with Gibson's argument.

In the seminal case of *Ex parte Lange*, 85 U.S. (18 Wall.) 163, (1873), the United States Supreme Court held that Double Jeopardy Clause of the nation's constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it. The Court in *Lange* held that once a defendant had paid a court imposed fine or the incarcerate term the trial court could not vacate the judgment and impose a new sanction beyond the original. The Court stated that to do so is to punish him twice for the same offense.

The Florida Supreme Court applied those double jeopardy principles in Lange to a multiple-offense sentence scenario in *Fasenmyer v. State*, 457 So.2d 1361 (Fla. 1984). There the defendant, originally sentenced on several counts, successfully challenged one of the convictions on appeal, requiring reduction to a lesser included offense and a shorter sentence. On remand, the trial court ordered that the five-year sentence on count two. which had been concurrent with the sentence on count one that was vacated on appeal, run consecutive to the new sentence imposed on count one. On appeal the DCA affirmed the new sentences and held that the change in the sentence that had not been disturbed on appeal allowed the Court to achieve its original sentencing plan based on the aggregate of the convictions.

The Supreme Court of Florida quashed the DCA's decision and stated by changing the sentence from concurrent to consecutive and not pursuant to any challenge by appellant to the previous sentence of the underlying conviction, the court nullified the service of those five years he had served and violated the Double Jeopardy Clauses of the United States and Florida constitutions.

Like the sentences imposed in *Fasenmyer*, a single-unit sentence for multiple offenses imposed under the guidelines is sentencing based on the aggregate of the convictions. This is the foundation for the holding in *Tripp* that the sentences must continue to be treated in relation to one another. Thus, the question is whether revocation of gain time from an expired sentence and application of that forfeiture to a sentence for a different offense under section 944.28(1) constitutes an unconstitutional increase in a "fully satisfied" sentence for that offense.

In addressing this question the Court noted that the requirement of *Tripp* credit has the inverse effect of a forfeiture of gain time from and expired sentence. *Tripp* gives credit for time actually served while section 944.28(1) takes away credit for gain time. Where *Tripp* credit is equal to or less than the amount of gain time forfeited, the two cancel each other out.

To determine whether this is constitutionally permissible the Court re-examined the basis for *Tripp* credit and concluded that the gain time forfeiture penalty for violation of probation authorized by section 944.28(1) may be applied in a multiple-case, split-sentence scenario so long as the number of days of gain time forfeited does not exceed the credit for time actually served that has been granted under *Tripp*.

In resolving the certified question in this case as to whether the forfeiture penalty authorized by the Court's interpretation of the statute in *Eldridge* also applies to the type of sentence imposed in *Tripp*, the Court concluded that section 944.28(1) authorizes the DOC to declare a forfeiture of any eligible *Tripp* credit for a completed guidelines sentence so long as the penalty does not increase the length of the sentence imposed by the trial court on the second offence after violation of probation. In other words, the gain time forfeiture penalty from an expired sentence cannot exceed the credit for time actually served from that same sentence. See: *Gibson v. FDOC*, 29 Fla.L.Weekly S356 (Fla. 7/8/04.) ■

Yet Another Brick In The Wall: The Closure of *Tripp* and its Progeny

by Oscar Hanson

In 1993 the Florida Supreme Court was faced with a question certified to be of great public importance: If a trial court imposes a term of probation on one offense consecutive to a sentence of incarceration on another offense, can jail credit from the first offense be denied on a sentence imposed after revocation of probation on the second offense?

In *Tripp*,[1] the defendant pled guilty to two felony charges, burglary and grand theft. He was sentenced to four years imprisonment on the burglary charge, and four

years probation, to be served consecutive to the prison sentence, on the grand theft charge. After serving his prison time Tripp was released to probation. Shortly thereafter he violated his probation. The judge then sentenced him to four and one-half years imprisonment on grand theft charge, but gave him four years credit for the time previously served on the burglary charge. The district court reversed Tripp's sentence, and held that he was not entitled to credit for time served on the burglary charge.

On review the Florida Supreme Court agreed with the sentence imposed by the trial court. The reasoning applied by the Supreme Court focused on the purpose of the sentencing guidelines, i.e., to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process so as to eliminate unwarranted variation in sentencing. In achieving this objective, one guidelines scoresheet must be utilized for all offenses pending before the court for sentencing. A sentence must be imposed for each separate offense, but the total sentence cannot exceed the permitted range of the applicable guidelines scoresheet unless a written reason is given. And finally, sentences imposed after revocation of probation must be within the recommended guidelines range and a one-cell bump.

The focus of the *Tripp* decision was to ensure that the intent and purpose behind the sentencing guidelines not be violated. When *Tripp* was originally sentenced the trial court used one scoresheet and the maximum jail time he could have received for the two counts was four and one-half years. Upon a violation of probation, the maximum sentence would have been five and one-half years. However, without credit for time served, *Tripp*'s total sentence after the violation of probation would have been eight and one-half years, three years more than permitted by the original sentencing guidelines. The Court recognized that a failure to grant credit for time served would allow trial judges to easily circumvent the guidelines.

One year after *Tripp* was decided the Florida Supreme Court addressed a more complicated factual situation, which varied somewhat from that presented in *Tripp*. In *Cook*,[2] the defendant was initially convicted of several offenses in 1989. He was placed on probation for those offenses. In 1990, he was convicted of several new offenses, and admitted that he had violated his probation for the 1989 offenses. He was sentenced to four and one-half years for the new 1990 offenses, and was again placed on probation for the 1989 offenses, to be served consecutive to his prison sentence for the 1990 offenses. After serving his prison sentences for the 1990 offenses, the defendant was released and began serving his probation for the 1989 offenses. *Cook* once again violated his probation and the trial court sentenced him to an incarcerative sentence of three and one-half years, but refused to give credit for time served on the 1990 offenses. Because the decision in *Tripp* had not yet been rendered, the district court affirmed *Cook*'s sentence. Following the decision in *Tripp*, the Supreme Court quashed the district court's decision in *Cook*, and remanded for further proceedings consistent with *Tripp*.

On remand, the district court again affirmed the sentence imposed by the trial court and noted that to allow *Cook* 4.5 years credit for time served the 1990 offenses, would result in no sanction for his multiple violations of probation. The DCA reasoned that surely the sentencing guidelines did not intend such a result. The DCA concluded that *Tripp* was not intended to apply in every situation in which probation for a second, separate offense was imposed consecutive to a sentence of imprisonment for another offense.

The Florida Supreme Court once again quashed the decision of the district court and held that their ruling in *Tripp* requires credit for *Cook*'s four and one-half years' imprisonment he served for the 1990 offenses when he was resentenced on the 1989 violation offenses. The State argued that *Cook*'s case differed from *Tripp* because his 1990 sentence of four and one-half years' imprisonment for the 1990 offenses to be followed by three years' probation for the 1989 offenses was a re-sentencing for the 1989 offenses. The Court rejected this argument and held it was irrelevant that *Cook* had been resentenced in 1990 to probation for the 1989 offenses after his first violation of probation. In 1990, one scoresheet was utilized when *Cook* was sentenced to prison for the 1990 offenses to be followed by probation for the 1989 offenses and, therefore, *Tripp* was applicable.

The next instance in which the Florida Supreme Court was presented with circumstances to address a *Tripp* issue was in *Hodgdon*.[3] There, the defendant had been sentenced to numerous counts in 1989 to fifteen years in prison (fifteen years for one count, five for another, to be served concurrently) to be followed by twenty years' probation for four separate charges (two ten-year concurrent probationary terms to be followed by two consecutive terms of five-year sentences, all sentences to run consecutive). The court credited the fifteen years *Hodgdon* had previously served against the entire forty-year sentence, rather than each individual sentence. On appeal, the DCA affirmed.

On review the Supreme Court approved the sentence and noted that, in contrast to *Tripp*, *Hodgdon* did not involve a sentence that exceeded that which was permitted under the sentencing guidelines. That fact alone, however, was not the only reason the Court distinguished *Hodgdon* from *Tripp*. In *Tripp*, the defendant had violated only one term of probation, while *Hodgdon* had violated four. The Court concluded that *Tripp* stood for the proposition that the original sentences must be treated as an interrelated unit.

Consequently, the Supreme Court announced a clarifying point in the *Tripp* holding to emphasize that a

defendant who violates probation on multiple counts imposed consecutive to a prison term is entitled to credit for the time served on the prison term as to the entire sentence imposed on the probation violation, not against each individual count on which probation was violated. Importantly, the Court further provided that the *Tripp* holding was intended to prevent the circumvention of the guidelines by treating sentences computed on one scoresheet as an interrelated unit. The Court also noted that *Tripp* was never intended to provide a sentencing boon or windfall to defendants upon violations of probation.

The final decision from the Florida Supreme Court in *Tripp* progeny was *Witherspoon*[4] where the Court declared that consistent with *Hodgdon*, the holding in *Tripp* should be applied notwithstanding the fact that the newly imposed sentence is within the guidelines.

More recently, the Florida Supreme Court was once again called upon to resolve an apparent conflict between the First and Second District Courts of Appeal. And while the First DCA did not explicitly address the specific issue regarding or implicating *Tripp*, the Second District did implicitly acknowledge whether *Tripp* and its progeny are applicable to the Criminal Punishment Code sentences, an issue never addressed by the Supreme Court. The Second District determined that with the advent of the Criminal Punishment Code the legislative broadening of permissible guidelines sentencing ranges has virtually eliminated the circumvention of the guidelines problem with which *Tripp* was concerned.

There can be no doubt that when the Legislature adopted the Criminal Punishment Code (CPC) in 1998, it substantially altered sentencing in Florida. Under the former sentencing guidelines, a narrow range of permissible sentences was determined through a strict mathematical formula. It was then within the judge's discretion to sentence the defendant within that narrow range. In contrast, under the now-applicable CPC, the permissible range for sentencing is the lowest permissible sentence as determined by the number of total sentencing points up to and including the statutory maximum. Conceptually, the CPC and the former guidelines are not synonymous.

The Florida Supreme Court recognized this concept in *Jones v. State*[5] and held that because a CPC sentence is conceptually different than a guidelines sentence, not all the rules that were applicable to guidelines sentences are applicable to CPC sentences. In establishing this difference, the Court constructed a wall to foreclose the application of *Tripp* and its progeny to CPC sentences.

The Court's analysis of CPC sentences and the relevance of *Tripp* found that since the Legislature has now specifically provided that a defendant may be sentenced up to the statutory maximum for any offense, including an offense after a violation of probation, a trial judge is not longer limited by an established guidelines maximum and a one-cell bump. Therefore, because the concerns related to guidelines sentencing are no longer present in CPC sentencing, and the courts are no longer specifically limited to a sentencing guidelines range under the CPC, there is not longer a justification for continuing to treat separate offenses as an interrelated unit after the minimum sentence is established.

In sum, *Tripp* and its progeny are no longer available to defendants who violate a consecutive term of probation and are sentenced under the Criminal Punishment Code. See: *Moore v. State*, 29 Fla.L.Weekly S432 (Fla. 8/26/04).

Endnotes

1. *Tripp v. State*, 622 So.2d 941 (Fla. 1993)
2. *Cook v. State*, 645 So.2d 436 (Fla. 1994)
3. *Hodgdon v. State*, 789 So.2d 958 (Fla. 2001)
4. *State v. Witherspoon*, 810 So.2d 871 (Fla. 2002)
5. *Jones v. State*, 813 So.2d 22 (Fla. 2002) ■

Prison Credits in Relation to Split Sentences Following Revocation of Probation

by Dana Meranda

Probation is a court ordered term of supervision under specific conditions for a specific period of time that when combined with a term of imprisonment cannot exceed the statutory maximum. *King v. State*, 681 So.2d 1136, 1140 (Fla. 1996); *Fuentes v. State*, 711 So.2d 175 (Fla. 2d DCA 1998).

A moderate number of offenders are given split sentences of prison followed by probation will end up in violation of the probation, whether a result of technical violations or from new charges filed while on probation.

Of the 26,599 prisoners released from prison during Fiscal Year 2002-03, almost 18% (4,679) were released to probation or community control. (FDOC FY 2002-03 Annual Report)

In *Tripp v. State*, 622 So.2d 941(Fla. 1993), the Supreme Court held "that if the trial court imposes a term of probation on one offense consecutive to a sentence of incarceration on another offense, credit for time served [in prison] on the first offense must be awarded on the sentence imposed after revocation of probation on the second offense." *Hodgdon v. State* 789 So.2d (Fla. 2001) (clarified the holding in *Tripp*).

It follows that upon violation of the probationary portion of a split sentence, a defendant is entitled to credit for time served on the incarcerative portion, unless a waiver of such credit is clearly evidenced in the record. *Cozza v. State*, 756 So.2d 272 (Fla. 3d DCA 2000); *Wells v. State*, 751 So.2d 703 (Fla.1st DCA 2000).

A trial court does not have to calculate the number of days, but must direct the Department of Corrections (DOC) to calculate and apply prison credit. *Newman v. State* 866 So.2d 751 (Fla. 5th DCA 2004). It is the trial court's responsibility to place a check in the appropriate box on the written sentencing documents concerning prison credit. *Andrews v. State*, 822 So.2d 540 (Fla. 2d DCA 2002); and *Forbes v Singletary*, 684 So.2d 173 (Fla. 1996) (illustrating the trial courts' responsibility).

A claim for additional prison credit may properly be raised in a Rule 3.800(a), Fla.R.Crim.P., Motion to Correct Illegal Sentence. *Scott v. State*, 872 So.2d 1011 (Fla. 5th DCA 2004); *Burnett v. State*, 745 So.2d 1043 (Fla. 2d DCA 1999).

If the DOC fails to credit a sentence with prison time awarded by the trial court, the prisoner must first exhaust the available administrative remedies pursuant to Chapter 33-103.001, Fla. Admin. Code, and then, if necessary, file a Petition for Writ of Mandamus to the circuit court, presumably the Second Judicial Circuit Court, Leon County, to seek to compel the DOC to award the credit as is its duty. *Stovall v. Cooper*, 860 So.2d 5, at 8 n. 3 (Fla. 2d DCA 2003). "Presumably", because a venue issue exists, on where it is proper to file such Mandamus petition. That issue is expected to be resolved by the Florida Supreme Court from the question certified in *Burgess v. Crosby*, 870 So.2d 217 (Fla. 1st DCA 3/24/04). *See also*, *FPLP*, Volume 10, Issue 3, pg. 17, Notable Cases.

In such a situation regarding Mandamus, court costs may possibly be avoided by filing an accompanying Affidavit of Indigency pursuant to § 57.081,Fla. Stat. *Schmidt v. Crusoe*, 28 Fla.L.Weekly S367 (Fla. 5/1/03), rehearing filed 5/21/03; *McKire v. Crosby*, 29 Fla.L.Weekly D305 (Fla. 1st DCA 1/29/04).

Offenders faced with a future term of probation or currently incarcerated due to a V.O.P. should become familiar with the applicable sentencing laws involving split sentences, as well as the consequences of revocation of probation.

[Note: It is important to note that the Florida Supreme Court has just recently held that *Tripp* and its progeny do not apply to a sentence imposed under the Criminal Punishment Code, which replaces the sentencing guidelines for offenses committed after October 1, 1998. *Moore v. State*, 29 Fla.L.Weekly S432 (Fla. 8/26/04); See also: article in this issue of *FPLP* entitled: "Yet Another Brick in the Wall: The Closure of *Tripp* and its Progeny."] ■

When a Written Sentence Fails to Comport With the Trial Court's Oral Pronouncement of Sentence

by Dana Meranda

The Florida District Courts of Appeal (DCAs) do not all agree upon raising this type of issue on a Motion to Correct Illegal Sentence pursuant to Rule 3.800(a), Fla.R.Crim.P.. Therefore, the following summary is collected for those contemplating raising the issue and to evaluate the vehicle to be used to seek relief.

Trial courts are bound to follow the decisions of their respective DCA. *Purdo v. State*, 596 So.2d 665 (Fla. 1992); *Harvey v. State*, 848 So.2d 1060, 1063 (Fla.2003). Consequently, it is essential to focus your research towards the DCA with jurisdiction over the particular trial court that imposed sentence.

Every sentence must be pronounced in open court, including, if available, the amount of jail time credit the defendant is to receive. A court's written judgment and sentence must not vary from its oral pronouncement. When a written sentencing order is inconsistent with, conflicts with, or does not comport to the trial court's oral pronouncement of sentence, the oral pronouncement controls. *State v. Williams*, 712 So.2d 762, 764 (Fla. 1998); *Ashley v. State*, 850 So.2d 1265 (Fla. 2003).

Statutorily specified conditions of probation and community control do not require oral pronouncement at the time of sentencing. However, due process requires that special conditions not statutorily authorized be orally pronounced at sentencing before they can be included in the written probation order. *State v. Hart*, 668 So.2d 589, 592 (Fla. 1996); and, *Bardo v. State*, 682 So.2d 557,558 (Fla. 1996) (striking unannounced special conditions).

Relief has been sought and achieved under Rule 3.800(a) in challenging a wide variety of oral/written sentencing discrepancy issues. For example, *Berthiaum v. State*, 864 So.2d 1257 (Fla. 5th DCA 2004) (eliminating consecutive sentencing not orally pronounced); *Spahalic v. State*, 837 So.2d 596 (Fla. 2d DCA 2003) (removing minimum mandatory term not orally pronounced); *Green v. State*, 853 So.2d 1114 (Fla. 1st DCA 2003) (striking probation not orally pronounced); *Driver v. State*, 710 So.2d 652 (Fla. 2d DCA 1998) (striking habitual offender sentence not orally pronounced); *Hurd v. State*, 807 So.2d 753 (Fla. 3d DCA 2002) (amending natural life sentence to 25 years).

Although there is some debate as to whether a sentencing discrepancy issue constitutes an illegal sentence for the purpose of Rule 3.800(a), recently generated case law now shows that all DCAs, with the exception of the Fourth, are amendable to raising this issue on a Rule 3.800(a) Motion.

For example, in *Fitzpatrick v. State*, 863 So.2d 462 (Fla. 1st DCA 2004), the First District recently held, "although this court indicated such claim was not cognizable under rule 3.800(a) in *Luckey v. State*, 811 So.2d 802 (Fla. 1st DCA 2002), we have since concluded that in light of the Supreme Court decision in *Ashley*, this is an issue implicating double jeopardy protections and an illegal sentence so as to be presentable under rule 3.800(a)." See also, *Hurt v. State*, 29 Fla.L.Weekly D790d (Fla. 1st DCA 3/31/04).

The Second District has remained firm in their holdings of a claim that the written sentence does not comport with the oral pronouncement of sentence is properly raised on a Rule 3.800(a) Motion to Correct Illegal Sentence. *Simon v. State*, 793 So.2d 980 (Fla.2d DCA 2001); *Cote v. State*, 841 So.2d 488 (Fla. 2d DCA 2003).

While case law is somewhat sparse, the Third District has permitted the sentencing discrepancy issue to be raised under Rule 3.800(a). *White v. State*, 624 So.2d 811 (Fla. 3d DCA 1993); *CArral v. State*, 670 So.2d 188 (Fla. 3d DCA 1996). Similarly, in *Hurd v. State*, 807 So.2d 753 (Fla. 3d DCA 2002), the Third DCA relied on *Ferguson v. State*, 788 So.2d 387 (Fla. 2d DCA 2001), a Second DCA case dealing with an oral/written sentencing discrepancy. By virtue of Rule 3.800(a), the Third DCA determined the defendant was entitled to have sentence amended to carry out the terms of the plea agreement, which was in essence, an oral pronouncement of parole eligibility after serving 25 years.

The Fourth District is unyielding in their rulings that a claimed discrepancy between a written sentencing order and the court's oral pronouncement of sentence *is not* cognizable on a Rule 3.800(a) Motion to Correct Illegal Sentence. *Rinderer v. State*, 857 So.2d 955 (Fla. 4th DCA 2003), citing *Campbell v. State*, 718 So.2d 886 (Fla. 4th DCA 1998), reasoning that the error was caused by noncompliance with a procedural rule and does not result in an illegal sentence.

And, the Fifth District, in *Berthiaum v. State*, 864 So.2d 1257 (Fla. 5th DCA 1/30/04), and *Pittman v. State*, 859 So.2d 555 (Fla. 5th DCA 2003), authorized the use of Rule 3.800(a) to address a discrepancy between the oral pronouncement and the written sentence.

A discrepancy between the oral pronouncement of sentence (sentencing transcripts) and the written sentencing order without question qualify under Rule 3.800(a), Fla.R.Crim.P., "...as court records demonstrate on their face an entitlement to relief."

In accordance with the Supreme Court's interpretation of an illegal sentence in *Carter v. State*, 786 So.2d 1173, 1178 (Fla. 2001), and parallel explanation by the Second DCA in *Cote*, "that a judge is never authorzed to impose a written sentence that increases the length of the sentence beyond the term orally pronounced," it seems inevitable that the Fourth DCA will eventually be persuaded to join the decisions of its sister Districts.

[Note: Keep up with the Florida Law Weekly for any future developments out of the Fourth DCA- dm] ■

From the editor...

With this issue we hopefully have made up some of the unavoidable delay in getting the last issue of *FPLP* printed and distributed. That delay was caused by hurricanes Charlie and Frances crisscrossing Florida very near to Orlando (where the *FPLP* office is located) within a month of each other. The resulting power outages, evacuations, mail delays and personal damage experienced by the *FPLP* staff and staff at our printing and mailing services threw us behind about 3 weeks and it is likely to take a couple of issues to get caught back up. Fortunately, all our staff survived the storms safely, but cleanup limited the time they had to volunteer. We know many, many others weren't so fortunate, and our hearts go out to them. In the larger scheme of things, this magazine being a little late is nothing; we will get back on schedule, however, and appreciate members' and readers' understanding, patience and loyalty.

Recently, there has been a lot of activity in the courts that we believe is, or should be, of interest to Florida prisoners. This issue is packed with news and information about some of the more important litigation activities. There have also been some significant state legislative changes this year that pro se litigants need to be aware of. The major ones are summarized in the Legislative Watch section of this issue.

It was intended to run an article in this issue concerning the interest earned on inmate accounts and the price gouging in the prison canteens in response to the FDOC-initiated Legislation authorizing a "processing fee" to be charged for inmate bank accounts. (See: *FPLP*, Volume 10, Issues 3 and 4.) When the fees, that are going to impact prisoners' families probably more than prisoners, were not immediately imposed in July when the new law went into effect prisoners suddenly became apathetic about the iniquity of the "fees" on top of all the other schemes by the FDOC to gouge money out of their families. This is NOT the time to be complacent. It may be the "fees" cannot be stopped by litigation, but there are strategies that can be implemented to lessen, or perhaps even reverse, their impact. Some of those strategies will be discussed in the next issue.

We have received quite a few letters, understandably, inquiring about the FAIR (phone rate reduction) Campaign and Parole Project recently, two projects of Florida Prisoner's Legal Aid Organization. Both of those projects have been temporarily placed on hold due to lack of funds. Both are important projects that deserve your support.

Please consider making a donation for one or both of those projects so they can be got back on track. Any amount donation will help.

Donations are also needed to keep *FPLP* and FPLAO growing. There are expenses associated with publishing *FPLP* and the activities of FPLAO to help Florida prisoners and their families and friends that the membership dues do not cover. Your support is needed so the organization can continue to to be here for you. Also, please continue to encourage others to become an FPLAO member and share your *FPLP*'s so they benefit as many people as possible.

And on a final note, the *FPLP* staff occasionally receives mail from non-prisoners directed to me or concerning my editing *FPLP*. I can be contacted directly at the below address and welcome your letters. Prisoners cannot write to other prisoners per FDOC rules--so don't send me mail from another institution and waste a stamp. Potential articles are also welcome.

As we continue our individual struggles let's not forget we are all more effective when we struggle together collectively.

Bob Posey

Write me at:
Bob Posey
046087 M-2118-L
Sumter Corr. Inst.
PO Box 667
Bushnell, Fl 33513-0147 ■

Florida Supreme Court Rules 3-Strike Law Constitutional

Tallahassee – Florida's Supreme Court, in a 4-3 ruling, held that the state's 1999 "three strikes" law that mandates longer prison sentences for repeat offenders is constitutional on Sept. 30, 2004.

The decision came to resolve a disagreement between the state's five appeals courts. Two of those courts had held the law was enacted in violation of the state's constitutional single subject requirement that legislative bills concern only one subject. The other three appeals courts had ruled the law did not violate the single subject provision.

After the first appeal court had held the law was unconstitutional, in 2002 the Legislature re-enacted the provisions of the same law in five different bills to correct the problem. Under the provisions, judges must give defendants the maximum allowed penalty for a third felony. Other provisions mandate a three-year minimum sentence for aggravated assault or battery on an elderly person, three-years for assault of a LEO, and five years for battery of a police officer.

The law also reduces the amount of marijuana necessary for a trafficking charge from 50 to 25 pounds, and increases penalties for repeat sexual batteries.

Supreme Court Justice Barbara Pariente wrote the majority opinion and was joined by Justices Charles Wells, Raoul Cantero and Kenneth Bell in upholding the law. Justice Pariente wrote that the Supreme Court rarely finds that a law violates the single subject requirement because the Legislature must be given "considerable difference." She held it wasn't necessary to look beyond the title of the law, "Three-Strike Violent Felony Offender Act," to determine that it is an act relating to sentencing and all the sections of the law are connected to the subject of sentencing. Justices Peggy Quince, Harry Lee Anstead and Fred R. Lewis disagreed and joined in a dissenting opinion.

The case in which the Sept. 30 decision came was an appeal by state prisoner Corey Franklin, 25, who was sentenced to 40 years under the 1999 version of the three-strikes law in 2000. In Franklin's case the Third District Court of Appeals had found the law was constitutional while other appeals courts had found the opposite.

On the same day the Supreme Court dismissed a legal challenge by prisoner Cedric Green to the 2002 version of the same provisions.

Franklin v. State, 29 Fla.L.Weekly S538 (Fla. 9/30/04)■

NOTABLE CASES

BY OSCAR HANSON & ANTHONY STUART

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

FLORIDA SUPREME COURT

Byrd v. State, 29 Fla.L.Weekly S379 (Fla. 7/8/04)

Originally the Florida Supreme Court accepted jurisdiction in this case on the premise that the DCA had declared invalid a state statute and construed a provision of the state constitution.

However, the court ultimately recognized that the opinion declaring the statute invalid was signed by only one judge on the DCA's three-judge panel; the other two judges concurred in the result (affirming the trial court's denial of Byrd's action) but did not join in the opinion.

Since the opinion declaring the statute invalid was not the actual decision of the entire panel, the court dismissed review for lack of jurisdiction. In other words, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) of the Florida Constitution because they are not the decision of the DCA.

DISTRICT COURTS OF APPEAL

Florida Caucus of Black State Legislators v. Crosby, 29 Fla.L.Weekly D1629 (1st DCA 7/14/04)

In 2002 the Florida legislature created section 944.293, Florida Statutes, that requires the Department of Corrections to assist inmates with the restoration of their civil rights prior to their release. Recently the Florida Caucus of Black State Legislators brought a civil suit against the Secretary of the DOC seeking mandamus, or injunctive and declaratory relief, to compel the DOC to comply with section 944.293, which states:

Initiation of restoration of civil rights—with respect to those persons convicted of a felony, the following procedure shall apply: Prior to the time an offender is discharged from supervision, an authorized agent of the department shall obtain from the Governor the necessary application and other forms required for the restoration of civil rights. The authorized agent shall assist the offender in completing these forms and shall ensure that the application and all necessary material are forwarded to the Governor before the offender is discharged from supervision.

The action was filed in the Second Judicial Circuit Court in Leon County and on July 25, 2003 the trial court entered a final judgment that granted retroactive relief for offenders who were released from prison on supervision during the period between 1992 and 2001. However, the trial court had dismissed the mandamus portion of the action thus no prospective relief was granted. On appeal the Florida Caucus argued that the trial court's order should be reversed with instructions to issue the mandamus relief compelling compliance with section 944.293.

The trial court had ruled that mandamus was not appropriate because the DOC's statutory obligations are discretionary, rather than ministerial. The district court of appeal determined that the use of the word "shall" throughout section 944.293 indicated that the DOC's obligations *are not* discretionary.

Moreover, the trial court also ruled that mandamus was not appropriate because the DOC's statutory obligations are not clearly stated in section 944.293. While the DCA agreed with the trial court that the DOC's statutory obligations are ambiguous, under controlling precedent, the DCA is to interpret an ambiguous statute and then determine it to be sufficiently "clear" for the purpose of mandamus relief.

The DCA analyzed the first requirement of section 944.293 which states: "Prior to the time an offender is discharged from supervision, an authorized agent of the department shall obtain from the Governor the necessary application and other forms required for the restoration of civil rights." A focal point at issue was whether the DOC actually gave to the offender the form in order to assist the offenders as required by the last sentence of section 944.293, which states: "The authorized agent shall assist the offender in completing these forms and shall ensure that the application and all necessary material are forwarded to the Governor before the offender is discharged from supervision." In sum, the DCA agreed that although the last sentence of section 944.293 clearly required the DOC to assist the offender, what specifically was expected of the DOC was in question.

Nevertheless, the DCA decided that a reading of those provisions together requires the DOC to provide the requisite forms to the

offenders prior to their discharge. The DCA also determined that DOC must the assist the offenders in completing the required forms as stated in the statute. The court noted that the DOC cannot force its assistance on the offenders, but must respond to a request by the inmate for assistance. *In other words, the DOC is not required to automatically assist without an inmate's request to do so.*

Drymon v. State, 29 Fla.L.Weekly D1633 (Fla. 1st DCA 7/14/04)

Florida prisoner Martin Drymon petitioned the First District Court of Appeal for a writ of certiorari seeking review of an order from the circuit court that denied his petition for mandamus relief against the State.

Drymon was originally sentenced in 1995 on two separate offenses. In one case (87-2759), Drymon was sentenced to 15 years and in case two (94-3290) was sentenced as an habitual offender to a concurrent term of 20 years, followed by 2 years of probation. Drymon subsequently filed a motion to withdraw his plea in case 94-3290, alleging that his trial counsel misadvised him that he qualified as a habitual offender. The trial court ultimately determined that Drymon did not qualify as a habitual offender. Therefore, in 1997, the trial court resentenced Drymon to a split sentence of 150 months in prison followed by 30 months probation, to be served consecutively with case 87-2759. The trial court ordered that Drymon be allowed credit for all time served on this case prior to resentencing.

The DOC recalculated Drymon's release date and because the sentences were now consecutive, the DOC awarded basic gain time and incentive gain time in case 87-2759, which was earned from the December 11, 1995 sentencing date, to arrive at an ending sentence date of February 28, 2001, when the consecutive sentence began. The DOC applied 710 days as credit for prison time served in case 94-3290 between the date of original sentence and the date of resentencing but did not include any incentive gain time Drymon earned while the sentences were concurrent.

Drymon exhausted his administrative remedies and then sought mandamus relief, which was denied by the circuit court. On certiorari review, the First DCA reversed. The appellate court found that the trial court had departed from the essential requirements of the law when Drymon was denied incentive gain time during the period of his original sentence. The Court reasoned that Drymon did serve 710 days under the original sentence (that was concurrent with 87-2759) and he earned 412 days of gain time on both sentences. Upon resentencing, the trial court specifically awarded the 710 days of credit for time served, which naturally should include any and all unforfeited gain time accrued prior to resentencing. Thus, Drymon was entitled to mandamus relief for the 412 days of unforfeited gain time.

Slater v. State, 29 Fla.L.Weekly D1855 (5th DCA 2004)

Ricky Slater's case takes a brief look into the distinction between direct and collateral consequences of a plea as well as the trial court's obligation to ensure a defendant is advised of such consequences.

After Slater's plea agreement and subsequent conviction of aggravated manslaughter of a child and aggravated child abuse involving his twin sons, he appealed. Slater argued that his plea for 15 years prison followed by 15 years probation was involuntary because he was not advised that his parental rights of the surviving twin would be terminated. He further claimed that it was a direct consequence of his plea.

The Fifth District Court of Appeals (DCA) explained that a trial judge does have an obligation to ensure a defendant understands any *direct* consequences of his plea. Those types of consequences are only the ones that effect the sentence that the trial court can impose. The trial court is under no duty to inform the defendant of the *collateral* consequences.

The question between the two types of consequences (direct or collateral) turns on whether the results of a plea represents a definite, immediate and largely automatic effect on the range of the defendant's punishment. The examples the DCA used to show where collateral consequences were involved are: sexual offender registration; being required to report to the Florida Dept. of Law Enforcement as a felon; that a conviction may be used to enhance a sentence for subsequently committed crimes; and the possibility of civil commitment under the Jimmy Ryce Act, because its not automatic minimum mandatory sentence is a direct consequence.

Slater's termination of parental rights did not effect the range of his sentence, so it was not, as he claimed, a direct consequence of his plea. The DCA also found that it was not an automatic consequence either. Slater himself, after conferring with counsel and after entering his plea entered a written agreement with the Department of Children and Families to surrender his parental rights. The agreement was accepted and executed by the dependency court.

Consequently, Slater's convictions and sentencing were affirmed. – as

Rasley v. State, 29 Fla.L.Weekly D1752 (1st DCS 7/30/04)

Kimberly D. Rasley appealed her conviction for second degree murder arguing three issues. Two of those issues involved claims that the trial court erred in denying her motion for judgment of acquittal (JOA) because: (1) the state's evidence failed to rebut Rasley's

defense of self-defense, and (2) the state's evidence was insufficient to establish Rasley acted with a depraved mind, and at most proved only the commission of manslaughter. Rasley's third argument was the trial court erred in imposing a 25-year minimum mandatory sentence for use of a firearm in the commission of the offense in addition to reclassifying her conviction from a first-degree felony to a life felony for the use of a firearm resulting in a minimum mandatory sentence constituting an improper double enhancement.

The background of this case involved a turbulent marriage. Rasley was faced with continuous abuse from her husband and then one day she found out he was seeing another woman, as described by her to detectives, was the "last straw." Rasley claimed she was at home and in the process of getting her bags to pack and leave her husband when he arrived. Following a heated shouting match between the two, the husband slammed out of the house only to return a short time later. Upon hearing her husband unlocking the door and in fear of her safety, Rasley retrieved a Colt. 357 magnum revolver. She claimed that despite her entreaties for her husband to stop, he continued his advance toward her; whereupon, in an act Rasley claimed was self-defense, shot her husband in the head at a distance of 24 to 42 inches away.

On appeal the First District Court of Appeals (DCA), regarding Rasley's self-defense theory, noted the state's evidence that was presented to the jury could reasonably infer that Rasley acted out of anger and jealousy due to the husband having an extramarital affair. Also, the record contained sufficient evidence that the jury could conclude that Rasley had other reasonable options besides deadly force to avoid the danger posed by her husband's advance, including retreat. Therefore, the DCA agreed that the trial court did not err in denying the motion for JOA.

The DCA rejected Rasley's argument that the trial court erred in denying her motion for JOA as to the offense of second-degree murder in that the state's evidence at most proved only the lesser offense of manslaughter. In explanation of their rejection the DCA showed definitions and the elements involved in the distinctions between the two offenses of second-degree murder and manslaughter. The DCA ruled that they were unable to say that the evidence is such that there was no view which the jury could have taken favorable to the state that can be lawfully sustained. In other words, once the evidence was viewed in the light most favorable to the state, the DCA was unable to conclude that a rational trier of fact could not lawfully find that the evidence proved the existence of all the elements of the crime of second-degree murder beyond a reasonable doubt. It was noted that pursuant to an agreement of counsel, the trial court instructed the jury on manslaughter by intentional act, and that if the jury concluded Rasley did not act intentionally, it could not find her guilty of the lesser included offense of manslaughter.

As to Rasley's final argument regarding her sentencing, the DCA cited and agreed with the holding in *State v. Whitehead*, 472 So.2d 730 (Fla. 1985). The Supreme Court had concluded in Whitehead that subsections (1) and (2) of section 775.087, Fla. Statutes are not mutually exclusive. Subsection (1) provides that in cases in which a person is convicted of the commission of a felony with a firearm, and the use of a firearm is not an essential element of the offense, the felony for which the person is convicted shall be reclassified upward one category. Subsection (2) provides that persons who commit certain enumerated felonies with a firearm are required to serve minimum mandatory terms. Thus, there was no double enhancement, because subsection (2) does not increase punishment, it provides for a minimum mandatory term of imprisonment. The DCA affirmed Rasley's conviction and sentencings.

Tucker v. State, 29 Fla.L.Weekly D1702 (2nd DCA 7/23/04)

Prisoner Tommy Tucker's case revolves around the issue of abuse of discretion by the trial court to refuse severance of his felon-in-possession-of-a-firearm charge from his remaining charges at trial.

It was claimed by the victim, Jason Pinion, that after a verbal argument between himself and Tucker, Tucker pulled out a handgun and fired a bullet that hit the ground beside Pinion's feet.

Subsequently, Tucker was tried and convicted of carrying a concealed firearm, aggravated assault with a firearm, and felon in-possession-of-a-firearm. Tucker appealed and argued, along with another issue, that the trial court erred in refusing to sever the offense of felon-in-possession-of-a-firearm from trial of the other offenses when requested. The Second District Court of Appeals (DCA) agreed.

Although a trial court has discretion to grant or deny a motion for severance, that discretion has been sharply curtailed when it concerns a request to sever a charge of felon-in-possession-of-a-firearm. Introducing to the jury prior convictions into evidence, which would be the case in such a charge, causes prejudice to the Defendant. Thus, as Tucker showed, the severance was a necessity in order to achieve a fair determination of his guilt or innocence of the other offenses.

Based on the findings of the DCA, Tucker's case was reversed for new trial and the trial court instructed to sever the charge of felon-in-possession-of-a-firearm from the other charges.

Nichols v. State, 29 Fla.L.Weekly D 1661 (5TH DCA 7/16/04)

Following an unsuccessful direct appeal, Kevin Nichols filed a Florida Rule of Criminal Procedure 3.850 motion maintaining that his plea was involuntary.

Because he did not file a timely post-sentencing motion to withdraw his plea, the trial court denied his motion and Nichols appealed.

The Fifth District Court of Appeals ruled that the trial court correctly denied Nichols' motion because any involuntary plea claim, when a previous motion has not been made to withdraw a plea, must be based on ineffective assistance of counsel, which Nichols failed to assert. (See: *Barnhill v. State*, 828 So.2d 405 (Fla. 5th DCA 2002).

The DCA therefore affirmed the trial court's denial of Nichol's motion. It was also noted by the DCA that the crime Nichols pled to was a first degree felony but the judgment showed a conviction of a second degree felony. The DCA further ordered a remand for the correction of the clerical error so that the judgment reflected first degree felony, not second degree felony. –as

Roth v. Crosby, 29 Fla.L.Weekly D1652 (2d DCA 7/16/04)

Joseph Henry Roth, a state prisoner at Polk Correctional Institution, sought review of the Florida Parole and Probation Commission's (FPPC) decision regarding his presumptive parole release date by filing a petition for a writ of habeas corpus in the Circuit Court for Polk County.

On appeal, the Second District Court of Appeals (DCA) specifically explained that the appropriate vehicle for challenging a presumptive parole release date is a petition for writ of mandamus directed against the FPPC. The mandamus petition must be filed in the Circuit Court of Leon County, where the FPPC is headquartered.

The DCA further ruled that the Polk County Circuit Court applied the correct law in denying Roth's petition without prejudice for Roth to file the appropriate vehicle in the appropriate court.

Roth's timely notice of appeal was treated as a petition for a writ of certiorari by the DCA and it was denied. -as

Guardiola v. State, 29 Fla.L.Weekly D1650 (2d DCA 7/16/04)

Jose Guardiola brought a petition to the Second District Court of Appeals (DCA) alleging ineffective assistance of his appellate counsel for failing to raise on direct appeal the issue of trial court's failure to instruct the jury on definitions of excusable and justifiable homicide, which constituted a fundamental error.

Guardiola was charged with attempted second-degree murder with a firearm but was convicted by jury of the lesser included offense, aggravated battery.

Regarding Guardiola's petition, the DCA looked to a prior case it had decided upon that mirrored Guardiola's, *Damoulakis v. State*, 814 So.2d 1204 (Fla. 2d DCA 2002) In *Damoulakis* the DCA held that trial courts are required to instruct the jury on excusable and justifiable homicide in all murder and manslaughter cases. The failure to do so, as was the case in *Damoulakis*, does constitute a fundamental error. Therefore, the DCA granted Guardiola entitlement to a new appeal.

It should be regarded, however, in note number 2 of Guardiola, the DCA noted that since the issuance of *Damoulakis* it created an exception to the rule of giving the instruction to the jury in all murder and manslaughter cases. In *Pena v. State*, 829 So.2d 289 (Fla. 2d DCA 2002), the DCA held that it was not fundamental error to omit the excusable or justifiable homicide instructions where the defendant was charged and convicted of drug-distribution, first-degree murder and the factual circumstances did not support any jury argument relying upon the jury instructions of excusable or justifiable homicide. The DCA further noted in Guardiola's case the portions of the trial record that were before them established Guardiola, who was in no danger nor under threat of any kind, intentionally fired, unprovoked, on the victim's car, and that Guardiola's defense at trial was that the State did not establish that he was the shooter. -as

Sigler v. State, 29 Fla.L.Weekly D1642 (4th DCA 7/14/04)

This case was back from the Fourth District Court of Appeals' (DCA) on remand from *Sigler v. State*, 805 So.2d 32 (Fla. 4th DCA 2001), review denied, 823 So.2d 126 (Fla. 2002).

Briefly, the background of this case involved Jay Junior Sigler being charged with a first-degree felony murder that took place the day after Sigler escaped from prison with the aid of his friend Michelson. While Michelson was driving a vehicle, with Sigler as passenger, coming from an overnight hotel refuge, they were seen by police who gave a chase at high speed. Subsequently, the vehicle that Michelson and Sigler were in collided with another, killing its driver. A jury convicted Sigler however, only of the lesser included offense of second-degree murder.

In his original direct appeal Sigler argued that the evidence was insufficient to convict him of second-degree murder. Sigler contended that he was not the driver or owner, and was not in control of the vehicle, so there was no evidence that he harbored any "ill will, hatred, spite, or evil intent," the meaning for the term "imminently dangerous to another and evincing a depraved mind regardless of human life." See: *Duckett v. State*, 686 So.2d 662, 663 (Fla. 2d DCA 1996). The DCA agreed and considered that Sigler could be convicted then of third-

degree felony murder. The DCA reasoned this because as an underlying felony offense, an element to the offense, he could have been found guilty as an aider and abettor in his accomplice's perpetration of the crime of harboring Sigler himself as an escapee. Sigler argued that such a theory was absurd. Still, the DCA directed the trial court on remand to enter a conviction for third-degree felony murder.

The trial court obeyed the DCA's mandated order and Sigler argued that he was entitled to a discharge on the grounds that such a conviction would be illegal. The jury had not found him guilty as an aider and abettor of harboring an escapee. Over Sigler's objection the trial court carried out the DCA's ordered instruction and convicted Sigler of third-degree felony murder and Sigler appealed, a second-time.

In the second appeal the State argued that in the first appeal the DCA directly confronted whether the conviction for third-degree felony was proper and it is the law of the case, citing *Green v. Masey,* 384 So.2d 24, 28 (Fla. 1980) ("All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case.")

Sigler however, responded with equally well known law that appellate courts have the power to correct significant mistakes in spite of the law of the case doctrine, citing *Zolache v. State*, 687 So.2d 298, 299 (Fla. 4th DCA 1997). In *Zolache* it was held that appellate courts have the power to reconsider and correct erroneous rulings, in spite of the fact that such rulings have become law of the case, where reliance on previous decisions would result in manifest injustice. Sigler contended that the conviction for a crime that is barred by law is a manifest injustice, requiring relaxation of the finality of the DCA's previous decision.

The State still maintained their contention by citing section 924.34, Florida Statutes, which authorizes an appellate court to order a conviction on a permissive, lesser included offense. Also the State cited *I. T. v. State,* where it was held that statute allowing appellate court which determines that evidence does not prove charged offense, but does support guilt of lesser included offense, to reverse judgment and direct trial court to enter judgment for lesser offense, applies to both necessary lesser included offenses and permissive lesser included offenses.

Sigler continued his argument in that not all of the statutory elements of third-degree felony murder are subsumed within the greater offense of second-degree murder because each crime has an element that the other lacks. Sigler based the illegality of the conviction on *Apprendi v. Jew Jersey,* where it was held that every fact necessary for a conviction is required, other than criminal history, to be submitted to a jury and determined by the jury beyond a reasonable doubt. Sigler aptly placed in his brief that the DCA "may have found sufficient evidence of harboring an escaped prisoner, but no jury has made such a finding." The DCA agreed that Sigler could not be convicted of third-degree felony murder.

Regarding the State's argument on the issue of state statutes, the DCA responded that state statutes do not control over United States Supreme Court decisions on matters of federal constitutional law. It's the other way around. *Apprendi*'s holding as to the meaning of the Sixth Amendment right to trial by jury in criminal cases is binding on the courts. It makes clear that criminal convictions depend on jury findings as to each element of the crime. The element of aiding and abetting the predicate crime of harboring an escapee was erroneously determined by the DCA in Sigler's first appeal. On no account can the jury's findings of guilt for second-degree murder be deemed to include any finding on that offense either.

The DCA further noted that *Apprendi* was decided after *I. T.*, and while the DCA wrote their opinions in Sigler's second appeal *Blakely v. Washington*, 17 Fla.L.Weekly Fed. S430a (6/24/04), was being released. *Blakely* makes it even more apparent the importance of a jury determination as to each element of the crime and that the judge's authority to sentence derives wholly from the jury's verdict.

The DCA stated that the later decisions make it clear beyond any doubt that section 924.34, Fla. Statutes as interpreted in *I. T.* is contrary to the Sixth Amendment. In other words, under that circumstance the DCA in *Sigler* expressly held the statute invalid under the United States Constitution.

Sigler's case was reversed and remanded for a new trial. -as

Clark v. State, 29 Fla.L.Weekly D1622 (2d DCA 7/9/04)

Shannon Clark was convicted and sentenced having the Prison Releasee Reofender Act (PRRA) applied to his case retroactively.

Clark allegedly committed a burglary and an attempted burglary on March 19, 2001. There was no evidence shown that the dwellings burglarized and attempted to be burglarized were occupied.

On appeal the Second District Court of Appeals found that the provisions the trial court used which extended the statute, section 775.082, Fla. Statutes (2002), to include burglary of unoccupied dwellings did not become effective until July 1, 2001. (Chapter 1-239, section 1, at 2192, Laws of Florida.)

The trial court erred in applying the amended version of the statute to Clark's case because it was not inacted to be applied retroactively. Therefore, the Second District reversed Clark's sentencing

and remanded his case for resentencing under the laws that were in effect at the time his offenses were committed. –as

Walker v. Fla. Parole Commissioners, 29 Fla.L.Weekly D1600 (4th DCA 7/7/04)

Donald Walker sought certiorari review of a *circuit court's* order denying his petition for writ of mandamus where he challenged decisions of the Fla. Parole Commission that suspended his presumptive parole release date. The *circuit court* denied Walker's mandamus, not on the merits of his challenges, but rather because Walker did not take a direct appeal of the Fla. Parole Commission's decisions. On certiorari review, the Fourth District Court of Appeals (DCA) ruled that the lower court failed to apply the correct law in their denial.

Jurisdiction of the district courts of appeal to entertain direct appeals by parolees and prisoners from final orders of the Parole Commission was eliminated in 1983. The proper remedy is by petition for an extraordinary writ filed in the circuit court. (Chapter 83 - 78, section 1 at 258, Laws of Florida). The DCA noted that while there is no thirty-day time limit for challenging orders by the Parole Commission in extraordinary writ petitions, the question of timeliness may be raised by the affirmative defense of laches. *Johnson v. Fla. Parole Commission*, 841 So.2d 615 (Fla. 1st DCA 2003) –as ■

IN THE NEWS

CO - On July 21, '04, prisoners rioted and set fires at a privately-operated prison in Olney Springs, Colorado. The riot, which last five hours, involved several hundred prisoners, left 13 injured, and destroyed a living area at the Crowley County Correctional Facility. The facility is run by Corrections Corp. of America (CCA) and held 1,125 prisoners, 807 from Colorado, 198 from Washington State, and 120 from Wyoming. Officials stated the riot may have been gang-related.

DE - The Associated Press reported Sept. 20, '04, that Cassandra Arnold, 27, a senior prison counselor at the Delaware Correctional Center, who was taken hostage and raped by a prisoner in July, has went public about the ordeal and is harshly criticizing the Del. DOC. Arnold, who was hostage for seven hours and released after her attacker, serial rapist Scott Miller, 45, was shot to death, lashed out at the DOC, saying it is plagued by mismanagement and inadequate, often incompetent, staffing. Arnold said three guards who were present when Miller grabbed her did nothing to stop him before he barricaded himself in her office. She also said she was raped after the warden, Thomas Carroll, repeatedly refused Miller's requests to speak to him. Instead, Carroll sent Miller a one sentence note saying he would only talk with him after Arnold was released, Arnold said this infuriated Miller who then bound and raped her saying he had "nothing to lose." Arnold told reporters at a press conference in mid-Sept that, "I felt abandoned, like no one cared at all," she said, weeping. "The way this system works needs to be stopped and changed," Arnold said. "People need to get rid of inadequate and incompetent staff and put in managers who hold people accountable, who train people properly, who are intelligent and who have respect for each other." Unfortunately, it was not reported that Arnold had done anything to expose or change the system before the reality of it so severely impacted her life.

KY – On Sept. 14, '04, nine prisoners at the private prison Lee Adjustment Center in Beattyville, Ky., started a riot by trying to tear down a wooden guard tower. The prisoners, including four from Vermont who had been outsourced to be housed in Kentucky, broke in the prison canteen and threw items to other prisoners before a general riot erupted culminating in three buildings being set on fire. The Corrections Corp. of America runs the private facility. The center holds about 800 male prisoners, about 400 of whom are from Vermont sent there to ease overcrowding in that state. The Kentucky state police were called in to help quell the hours-long riot. Prisoner advocates claim the riot was a result of recent cuts in privileges and visiting hours at the prison. A week after the riot, CCA replaced the warden at the facility, Randy Eckman. CCA claims it does not believe the privilege and visiting cuts sparked the riot, but offered no other reasons. Prison officials say prisoners identified as being involved are expected to face criminal charges.

MO - On Sept. 15, '04, about 1,350 of the state's claimed most violent prisoners were moved to the new Jefferson City Correctional Center. The facility replaced the 170-year-old Missouri State Penitentiary. Staff from other prisons, sheriff and police departments helped with the transfer.

MT - A husband and wife team who run a prisoner re-entry program for former prisoners starting traveling throughout Montana in August '04 to help register ex-felons to vote. The team, Eddie and Casey Rudd, run Corrections, the re-entry program, that received a $5,000 federal grant this year as part of the Help America Vote Act education campaign.

National – In early Oct. '04 it was reported that the widow of Martin Luther King, Jr., said all felons should have the right to vote. Coretta Scott King said winning that right is part of the unfinished business of the civil rights movement at an NAACP event in Maine. King praised Maine and Vermont as the only states that allow prison inmates to vote in elections.

National - A new report released during Sept. '04 by the U.S. Bureau of Justice Statistics shows that the nationwide local jail population in 2002 was 665,475. The estimated racial breakdown of those people was 40% Black, 36% White, 19% Hispanic, 3% mixed race, 1% American Indian and 1% Asian.

National - The U.S. has 5 percent of the world's people, and 25 percent of its prison population.

[Source: The New York Times Magazine]

National - Some states are reconsidering what was suppose have been a money-saving measure, outsourcing a portion of their state prisoners to be housed in facilities, usually privately-operated, in other states. Wyoming has plans to bring all 550 of its displaced prisoners back by 2007. Arizona, which has over 2,100 prisoners in private facilities in other states, is withdrawing 400 prisoners from an Oklahoma prison after a riot there in May injured dozens. Hawaii is scrambling to find housing for 1,000 prisoners currently in mainland facilities. Wisconsin officials say they hope to have all but 500 prisoners back in the state by year's end, that's down from the 4,400 outsourced four years ago. Connecticut announced plans to retrieve 400 of its prisoners from Virginia state prisons after the state had to pay out more than $2 million to family members of two prisoners who were killed in Virginia.

NJ - During Aug. '04 state parole officials denied parole to a former member of the Black Liberation Army who was convicted of killing a New Jersey state trooper in 1973. Sundiata Acoli, 67, is serving a life sentence. Parole officials cited Acoli's prison writings as a reason for denying him parole, they say the writings advocate violence.

NY - Anthony Serra, the former boss of Rikers Island, was indicted on felony charges of forcing subordinates to work on political campaigns and for stealing more than $60,000 from Gov. Pataki's 2002 re-election bid. Serra pleaded innocent at his arrangement Aug. 12, 2004.

NV - High Desert State Prison was locked down July 14, '04, after a riot left one prisoner fatally injured and 18 others hurt from thrown rocks. The riot lasted approximately 20 minutes, say officials, and was quelled when guards fired shotguns toward the 60 prisoners involved in the disturbance.

PA - After two months on the run, Tammy Swittenburg-Edwards, 31, was captured by a bail bond company in her hometown of Norristown on July 29, '04. *She had* jumped bond on charges that she locked her 3-year-old daughter in the trunk of her car in a prison parking lot while she went in the prison to visit her husband in Aug. '03. The child was found in the trunk after about 40 minutes when guards heard her crying. ■

LEGISLATIVE WATCH BY ANTHONY STUART

The information contained in this section is compiled from published Session Laws and may be useful to or impact Florida prisoners. This section is an information source designed to provide accurate information concerning the latest in Florida law. Occasionally, Legislative Watch will publish other items of interest related to Florida's legislative such as upcoming bills, legislative history, and bios on current legislators. New law and pending bills will be clearly identified to avoid confusion as to what is law and what is not.

NEW LAWS, 2004 LEGISLATIVE SESSION

Prisoners – Frivolous Actions – Disciplinary Proceedings

Prisoners-S.B. No. 1596 passed. The Act amends section 944.279 (1) and (2), Florida Statutes.

In subsection (1) the Act amends to specify *in addition* to a prisoner who is found by a court to have brought a frivolous or malicious suit, action, claim, proceeding, or appeal in any Florida State or Federal Court filed after June 30, 1996, to include *collateral criminal proceedings filed after September 30, 2004,* as also being subject to disciplinary procedures pursuant to the rules of the Department of Corrections.

[**Note:** The Florida Supreme Court defined a collateral criminal proceeding in *Hall v. State,* 752 So.2d 575 (Fla. 2000), as 3.850 and the appeals regarding such filings. In *Saucer v. State,* 779 So.2d 261 (Fla. 2001), it was held that a writ of habeas corpus that challenges a sentence is also considered a collateral criminal proceeding.]

In subsection (2) of the Statute, where it specifies what proceedings section 944.279 *does not* apply to, the words "or a collateral criminal proceeding" have been struck out. The subsection still indicates that section 944.279 *does not* apply to a criminal proceeding relating to the original proceeding up to its *direct* finality.

The Act took effect October 1, 2004. Chapter 2004-285, Laws of Florida.

CORRECTIONAL INSTITUTIONS—ADMINISTRATIONS—CONTRACTS

Correctional Institutions—H.B. 1875 passed. The bill amends section 944.516 to add paragraph (h) to subsection (1), Florida Statutes, to allow the Florida Department of Corrections to charge all state prisoners an administrative processing fee of up to $6 per month for inmate banking services. Such fees shall be deposited into the department's Grants and Donations Trust Fund and shall be used to offset the cost of department operations. If an inmate's account has a zero balance at the end of the (monthly) billing cycle, a hold will be placed on the inmate's account to collect the processing fee when available. The effective date of this law was July 1, 2004. Chapter 2004-248, Section 21, Laws of Florida.

[**Note:** West Publishing Company, misprinted the above session law in the 2004 West's Florida Session Laws, Pamphlet No. 4. FPLP staff checked with the Florida Department of State upon noting West's misprint, and the DOS verified that there was no error in this law as it was filed with their department. The FDOC has reportedly sent an accurate copy of the entire law to all prison law libraries that is available for prisoners to review upon request.]

COURTS—FEES—ATTORNEYS

Courts—C.S.C.S.S.B. No. 2962 passed. The Act relating to the State judicial system, in part, made significant increases to state court's filing fees and costs.

In § 32 of the Act § 34.041(1)(a), Fla. Stat, is amended to increase civil action Filing fees across the board. In § 35 of the Act § 35.22(3), Fla. Stat., is amending to increase the DCA filing fee from $250 to $300.

In § 49 of the Act amendments are made to § 57.085(2)(3)(4) and (5), Fla. Stat., to clarify that filing fees and court costs of indigent prisoners who initiate or intervene in civil judicial proceedings are only deferred, not waived. The statement that must be included in prisoners' affidavits of indigency is modified and court clerks will no longer "certify" a prisoner to be indigent under the statute, but will simply "determine" them to be indigent when applicable.

The Act took effect July 1, 2004. Chapter 2004-265, Laws of Florida. [**Note:** Prisoner law clerks should familiarize themselves with the changes noted in the above Act so they may accurately assist prisoner litigants.] ■

> In law it is good policy never to *plead* what you *need* not, lest you oblige yourself to *prove* what you *can* not.
>
> Abraham Lincoln 1848

Death Sentences Decline, Exonerations Continue

According to a report released mid-September '04 by the Death Penalty Information Center, a group opposed to capital punishment, the number of death sentences handed down by juries has dropped almost 40% nationwide since the 1990s. The report notes that in the 1990s, an average of 290 people received death sentences each year. However, according to statistics, since then the average has dropped to 174 per year. The report credits the drop to increasing public awareness of death row exonerations from DNA testing and fears of sentencing an innocent person to death. Prosecutors, on the other hand, credit the drop to a decline in cases involving aggravated murder and the high cost of death penalty prosecutions causing the states to seek fewer death sentences.

DNA testing is also leading to more non-death penalty exonerations. In August '04 two men, one in Georgia and the other in Florida, were exonerated by the new testing of DNA evidence.

Clarence Harrison, 44, who spent 17 years in Georgia prisons for the 1986 rape, kidnapping and robbery of a female hospital worker, was freed after DNA testing of the rape kit used as evidence to give him a life sentence showed Harrison did not rape the victim. When released, Harrison said outside the courthouse, "I think I had given up years ago. I think God just carried me on through."

On August 12, 2004, Wilton Dedge, 42, walked out of the Brevard County Jail in Cocoa, FL, after wrongfully spending 22 years in Florida prisons for a rape he didn't commit. Dedge was freed after DNA testing of a semen sample taken from the 17-year-old victim in 1981 showed Dedge did not commit the crime. Although eight witnesses had testified at Dedge's trial that he was at work miles away at the time of the alleged rape, and the victim's description of her attacker did not match Dedge, state prosecutors convinced a jury to convict him, in part based on "scent evidence provided by a police dog." Jailhouse snitch Clarence Zacke, had also testified against Dedge after making a deal with prosecutors to reduce his conspiracy to commit several murders sentence from 108 years to 60 at a second trial against Dedge in 1984, where he was again wrongly convicted of the rape. The victim is said to be "devastated by the news" that Dedge was not her attacker.

Just hours after being released, after spending more than half of his life in prison, Dedge reflected, "I never got to have kids. I never got to get married. Now I've got to start and I've got nothing...Going through all this, I lost a lot of faith in people." ■

Outside the Wall

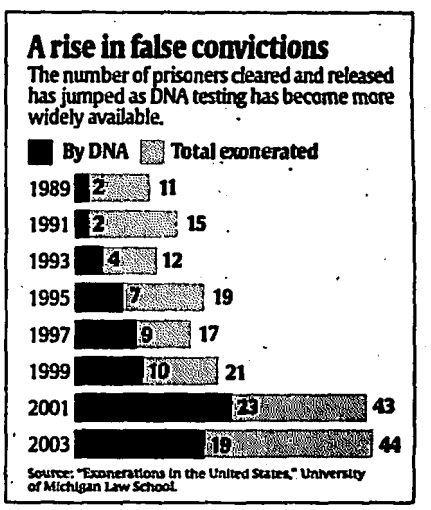
After spending 22 years in prison, Wilton Dedge is now outside the wall after DNA evidence exonerated him. But the silence from public officials speaks volumes about how our system of justice has failed and continues to fail by sending innocent men and women to prison. And not surprisingly, Florida leads the nation in wrongful convictions. But why?

A University of Michigan review of 328 exonerated prisoners nationwide, published in 2003, found eyewitness error in nearly two-thirds of the cases. The Michigan study found that perjury by co-defendants, snitches, and police informants was the leading cause of false murder convictions. False convictions, the Michigan study found, may well be at least as common for other crimes of violence, especially robbery. Unfortunately, without DNA, they are a lot more difficult to undo.

There are psychologists and other experts who specialize in the reasons why victims and other eyewitnesses are stupendously wrong. Among the most eloquent experts are the alleged victims themselves.

Usually victims are questioned by law enforcement and eye-witness experts as they relive the traumatic experience. They become susceptible to verbal and nonverbal clues that can be very persuasive, which ultimately contaminates their memory. Then six hours, six days or six weeks later, they are put in front of photos and all of a sudden your contaminated memory makes an incorrect determination, which ultimately leads to an arrest, trial and wrongful conviction.

Yet the last word from the Florida Supreme Court on this subject, six years ago, was outrageously wrong. In a 5-2 decision, it held that it is entirely up to the sound discretion of the trial judge whether to let a jury hear expert testimony on the fallibility of eyewitnesses. The man who lost that case, which depended largely on eyewitness testimony unsupported by any other evidence, is still serving a 30-year sentence. ■



U.S. Supreme Court to Decide Constitutionality of Federal Sentencing Guidelines

The first order of business when the U.S. Supreme Court started its new session on Oct. 4, 2004, was to hear oral argument in two cases in which the Court is expected to clear up confusion over the legality of federal sentencing guidelines that have been in use since 1987. Another decision earlier this year by the Court has already affected criminal sentencing in many states that also have in effect guideline sentencing schemes.

The confusion over whether the federal sentencing guidelines are constitutionally acceptable began in June with the Court's ruling in *Blakely v. Washington*, in that case the Court (applying the rule announced in 2000 in the case of *Apprendi v. New Jersey*) held that a Washington state defendant's constitutional right to a jury trial was violated where the sentencing judge, following the state's sentencing guidelines, used facts not admitted to by the defendant, nor found to be true by a jury "beyond a reasonable doubt," to impose a harsher sentence than what otherwise would have been authorized. (See: *FPLP* Vol. 10, Iss. 4, pg.19.) *Apprendi* had held that any fact, other than a prior conviction, used to sentence a defendant to a term longer than the statutory maximum, must be pled to in the indictment and be found by a jury beyond a reasonable doubt, or be admitted to by the defendant.

The *Blakely* decision was seen as raising the question whether federal and state sentencing guidelines that allow judges to impose longer sentences by a "preponderance of evidence," were constitutional.

The *Blakely* decision quickly threw federal courts, which sentence 64,000 offenders a year, into turmoil. Within just a couple months of the *Blakely* decision lower federal district and appeal courts split on whether *Blakely* meant the federal sentencing guidelines were constitutional or not. With the federal courts divided over the issue, and the U.S. Justice Department calling on the Supreme Court to clear up the confusion, the Court agreed to hear two federal drug cases that relied on *Blakely* to help throw federal guideline sentencing into doubt.

In the first case, *United States v. Booker*, the Seventh Circuit Court of Appeals overturned the sentence of a Wisconsin defendant where the judge, not a jury, decided the amount of drugs the defendant had and that the defendant obstructed justice and imposed a 30-year enhanced sentence where the federal guidelines (without those "facts") would only have allowed about 22 years. The appeals court, applying *Blakely*, said Booker's sentence was invalid because the judge, not a jury, had found the aggravating factors cited by the judge to enhance Booker's sentence.

In the second case, *United States v. Fanfan*, a Maine defendant was convicted of conspiring to distribute cocaine. While the judge had been prepared to sentence Fanfan to 16 years under the federal guidelines by finding facts not presented to the jury concerning the alleged quantity of drugs involved and Fanfan's alleged role as a leader in the trafficking, four days after *Blakely* was decided the judge reconsidered and reduced the sentence to 6 ½ years.

Although the federal sentencing guidelines (like those in Washington state and several other states) permit a judge to increase a sentence based on facts found solely by the judge, the courts in the above two cases said *Blakely* does not allow such enhanced sentences, calling into question the validity of the federal guidelines. The Justice Department disagreed and asked the Supreme Court to quickly provide some guidance on the issue. In a footnote to the *Blakely* decision the high Court had stated that, "the Federal Guidelines are not before us, and we express no opinion on them."

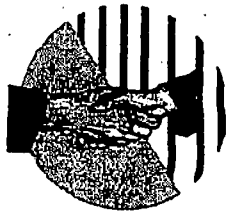
The Justice Department, which prosecutes federal criminal defendants, wants the Supreme Court to uphold the federal guidelines that allows judges to on their own increase sentences if there are aggravating factors involved in a crime, such as drug quantity, defendant's role in charges or uncharged conduct. The Justice Department's position is that the federal guidelines are not affected by *Blakely* because, unlike the Washington state guidelines, the federal guidelines were not promulgated by a legislature, but were promulgated by the independent U.S. Sentencing Commission. This is important, the DOJ claims, because the underlying rule in *Apprendi v. New Jersey*, that was relied on in *Blakely*, states a sentence may not exceed the *statutory maximum* unless a jury finds the facts that justify an upward departure (or the defendant admits the facts). The lawyers for Booker and Fanfan argue on the other hand that defendants should not receive longer sentences for facts not considered by a jury (or admitted), regardless of the sentencing scheme.

Several Supreme Court justices indicated that the federal guidelines may violate the right to a jury trial as guaranteed by the U.S. Constitution at the Oct. 4 hearing. Most of the justices seemed to agree that the federal guidelines are likely to be struck down by their decision on the *Booker* and *Fanfan* cases. That decision is expected to come quickly, likely before the end of the year. If the guidelines are struck down, there is a general feeling, as commented on by Justice Antonin Scalia, that it will only be an interim solution that Congress will quickly address with new sentencing laws.

While some experts applaud these developments as opening up the possibility of sentencing reform, others caution the alternative may be worse than sentencing guidelines as they currently exist. Congress and state legislatures may feel compelled to make every crime punishable by statutory minimum sentences to circumvent the Supreme Court's actions. ■

Florida Prisoners' Legal Aid Organization Inc.

BECOME A MEMBER



YES ! I wish to become a member of Florida Prisoners' Legal Aid Organization, Inc.

1. Please Check ✓ One:

- ☐ Membership Renewal
- ☐ New Membership

2. Select ✓ Category

- ☐ $15 Family/Advocate/Individual
- ☐ $9 Prisoner
- ☐ $30 Attorneys/Professionals
- ☐ $60 Gov't Agencies/Libraries/Orgs./etc.

3. Your Name and Address (PLEASE PRINT)

_____ DC#_____
Name

_____
Agency/Library/Institution /Org/

_____
Address

_____
City State Zip

_____
Email Address and /or Phone Number

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

Blakely v. Washington - Additional Resources

There has been a lot of interest about the *Blakely v. Washington*, ___ S.Ct. ___, 17 Fla. L. Weekly Fed. S430, 2004 WL 1402697 (U.S. S. Ct. Jun. 24, 2004), decision recently among prisoners. There is a lot of information about the case on the Internet. The following resources may provide useful information about the case:

National Assn. of Criminal Defense Lawyers, www.NACDL.org

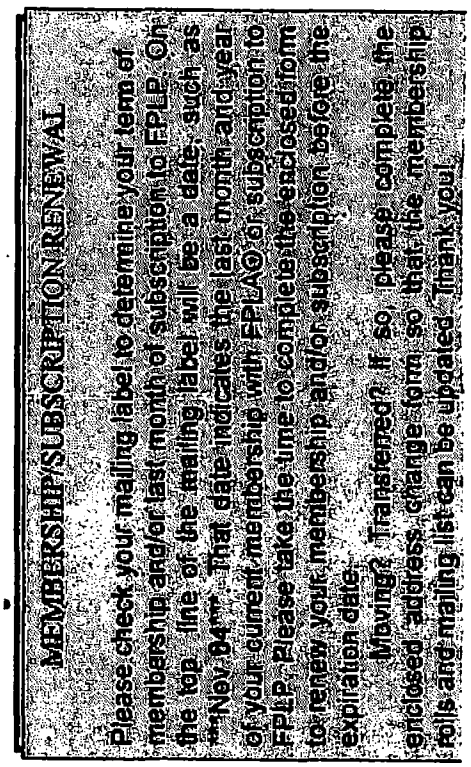
Punch and Jurist, chat section on *Blakely*, www.fedcrimlaw.com

"Sentencing Policy and the Law, webblog of Professor Douglas Berman, http:// sentencing.typepad.com

Goldstein and Howe, webblog, www.goldsteinhowe.com/blog/index.cfm

Federal Criminal Defense Law, Attorney Daniel Horowitz, www.home.earthlink.net/~bdega/criminaldefenselawyerdanielhorowitz

"Aggravated Sentencing: *Blakely v. Washington*– Practical Implications for State Sentencing Systems," by Jon Wool and Don Steman, Vera Institute report, www.vera.org/publications/publications.asp



SUBMISSION OF MATERIAL TO *FPLP*

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

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

PRISON LEGAL NEWS

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

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

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

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

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

Email PLN at:
webmaster@prisonlegalnews.org

HAVE YOU MOVED OR BEEN TRANSFERRED?

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

NEW ADDRESS (PLEASE PRINT CLEARLY)

Name _____

Inst. _____

Address _____

City _____ **State** _____ **Zip** _____

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

VOLUME 10, ISSUE 5 SEP/OCT 2004

Florida Prison Legal Porspectives

PO Box 660-387
Chuluota Fl 32766