Florida Prison Legal Perspectives

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LEGISLATORS COMPLAIN ABOUT FDOC

When Michael Moore came from South Carolina to take over as the secretary of the Florida Department of Corrections he brought Michael Wolfe with him to serve as his deputy secretary. Since Moore took over the department during January of 1999 he has struggled to maintain his position as the department has been hit with scandal after scandal, but Wolfe had been able to keep a low profile that whole time — until November that is.

On Nov. 16 state representative Allen Trovillion confirmed that he went to Gov. Jeb Bush with complaints about the on—the—job—behavior of Wolfe. Trovillion said that he told Bush that FDOC deputy secretary Michael Wolfe is abrasive and "offensive."

Rep. Trovillion, a Winter Park Republican, who chairs the House corrections committee, said, "We've had a lot of complaints; he's (Wolfe) very harsh in the way he operates. His method of dealing with people is so offensive its affected morale in the department."

Trovillion would not elaborate on his complaint to Bush, saying only that he has received complaints from other FDOC employees about Wolfe, some of who described him as Moore's "hatchet man."

Trovillion did say he has warned Wolfe about his behavior on several "occasions," before finally going to the governor and House Speaker John Thrasher about him.

FDOC spokesman C.J. Drake said no one in the department had prior knowledge about Trovillion's complaints. Wolfe had no comments: he has a policy of not speaking to the media.

FDOC officials claim to be bewildered why Trovillion has taken such an adverse position to Moore and his administration, especially when Moore is a fellow republican who was appointed by a republican governor. Trovillion has been an outspoken critic of Moore, claiming he is not doing enough to protect prisoners and summoning him before the corrections committee earlier in 1999 to answer questions about the operation of the department.

"I'm not trying to run the department, but as chairman of the corrections committee it's my responsibility to be aware and to help develop the best department we can," Trovillion said.

This was not the first time Trovillion had went to Gov. Bush complaining about the DOC. In May '99 he and Larry Kennedy, an Orlando management consultant, met with Bush's legal counsel to discuss what Kennedy called "serious matters of mismanagement, negligence and corruption: within the department. They were told the Florida Department of Law Enforcement was already investigating contract problems that predate Moore taking over the department.

Approximately two weeks after Rep. Trovillion's recent complaints about Michael Wolfe other legislators were raising new complaints. Michael Moore came under criticism from both republican and democrat legislators on Dec. 7. They accused Moore of muzzling DOC employees and making sweeping changes without informing the legislature.

Rep. Al Lawson, Tallahassee, complained that under Moore's direction a North Florida prison was closed this past summer without alerting him or local officials. Lawson said Moore also "muzzled" his employees to keep

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them from talking about the closing before it occurred.

Another republican lawmaker, Rep. George Crady, whose district includes several large prisons, said that corrections employees have been contacting his office saying they are afraid to publicly criticize how the department is being operated.

A spokesman for Gov. Bush, however, said Bush will continue to stand by Michael Moore and has confidence in the job he is doing as DOC secretary.

[Sources: *Miami Herald*, 11/17/99; 12/8/99] ■

FROM THE EDITOR:

A few months ago I mentioned in *FPLP* that a reorganization of this newsletter and its parent organization, Florida Prisons' Legal Aid Organization, Inc. (FPLAO), was being considered by the board of directors. That reorganization would mean going to a membership—based organization, with newsletter subscriptions one of the benefits of membership. During December, the board of directors voted unanimously to go to a membership—based organization.

In order to simplify this change, all current subscribers to *FPLP* are now listed as members of Florida Prisoners' Legal Aid Organization, Inc. Memberships will run on a yearly basis and will be available to all those interested in participating in and advancing the goals of the organization and its members. The primary goal of the organization will continue to be addressing and advocating issues that affect Florida prisoners and their families, friends and loved ones.

This reorganization makes FPLAO the largest membership—based, grassroots— supported nonprofit organization in Florida concerned with prisoner and family advocacy. It also means members will share more directly in the projects taken on, and in the growth and effectiveness of the organization.

In coming months, members will see additional changes designed to form the organization into a more cohesive network of prisoners, their families and friends, attorneys, students, media representatives, and other advocates for responsible and accountable criminal justice and corrections reforms in Florida.

I'd also like to remind everyone that on April 12, 2000, the 3rd Annual Capitol Rotunda Rally will be held in Tallahassee, inside the Capitol Building. This event provides the opportunity for Florida prisoners' families, friends and advocates to come together, meet one another, and present a unified voice to state lawmakers. I encourage all prisoners to have their family member and friends attend this important event.

And I'd like to thank Mike, Mark, Joe, Oscar, Ney, Jesse, Charles, Greg and Rayl for not hesitating to fill the breach when prison officials attempted to muzzle my voice recently. You proved the old adage: When the going gets tough, the tough gets going. Thanks guys! You obviously realize the importance of sticking, and working, together.

That's it for now. I hope everyone finds the information in this issue as interesting as I did. All members are encouraged to inform others about FPLAO and get them to sign up as members. The more of us there are, the more that can be done. And I know you want to see your organization grow. — BOB POSEY ■

CREATING A BOILERPLATE DEFENSE

"If you don't like it, file a grievance!" How may times have you as a prisoner in Florida heard that from a guard, a ranking officer, or even a classification officer, assistant warden or warden? It's kind of a Stock response anytime you question something you feel is wrong, huh? Both they and you know the grievance procedure rarely results in a favorable outcome for prisoners. More often when you attempt to complain about a DOC employee's wrongful actions, whatever they may be, your response will be, "the officer denies your allegations, therefore your grievance is denied."

Essentially, the term "file a grievance" has become a joke in Florida's prisons; confidence in the grievance system among prisoners is at an all-time low, while prison staff often retaliate with impunity against those prisoners auda-

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

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

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Membership Form

You are invited to become a member of, or renew your membership in, Florida Prisoners' Legal Aid Organization, Inc. Membership benefits include a one—year subscription to the organization's popular bimonthly newsletter, *Florida Prison Legal Perspectives*. Contributions to the organization (a registered 501(c)(3) non profit) are *tax—deductible*. Contributions will be used to organize and advance the interests of members; to provide a voice for Florida prisoners and their families, loved ones and advocates; and, to educate the public about the Florida criminal justice and prison systems.

1. Please check one:

- ☐ Membership Renewal
- ☐ New Membership
- ☐ Subscription to FPLP without membership

2. Select Category:

- ☐ $12 Family/Advocate/Individual
- ☐ $6 Prisoners
- ☐ $25 Attorneys/Professionals
- ☐ $50 Gov't agencies, libraries, organizations, corporations, etc.
- ☐ I understand that FPLAO depends the generosity of its members to grow and operate effectively. Therefore, I would like to make an additional contribution of:

___ ___ ___ ___ ___ ___
$10 $25 $50 $100 $250 Other

3. Your Name and Address:

_____
Name DC# (if applicable)

_____
Prison, Agency, Organization (if applicable)

_____
Address

_____
City State Zip

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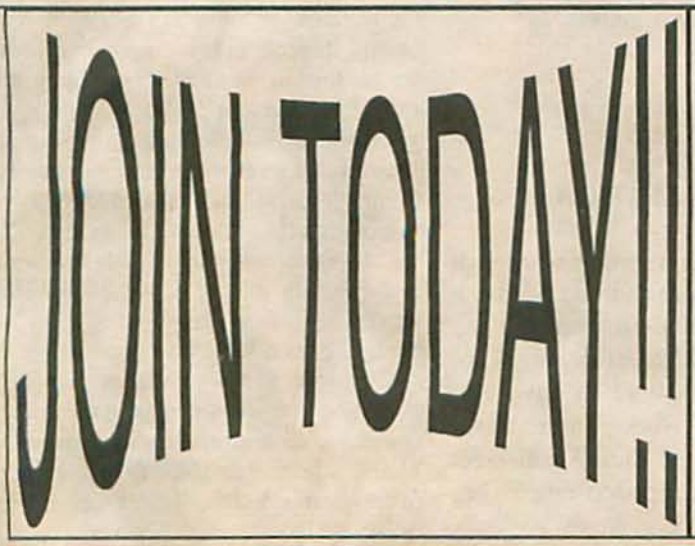
4. Total Enclosed_____

Please make all checks or money orders payable to: Florida Prisoners' Legal Aid Org., Inc., P. O. Box 660-387, Chuluota, FL 32076, or Florida Prison Legal Perspectives (same address). New, unused, U.S. postage stamps are acceptable from prisoners for membership contributions. For family members of prisoners unable to afford the basic membership dues, any contribution is acceptable.



HAVE YOU MOVED OR BEEN TRANSFERRED?

If so, please complete the below information and send it to FPLP so that the mailing list can be updated and so you don't miss an issue.

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(Continued from page 2)
cious enough to carry through with written grievances. It's no secret — on the inside of the razor wire fences.

It was no real surprise then, when in December, prisoners statewide were required to watch a three minute video with Florida Department of Corrections Secretary Michael Moore advising prisoners that if they feel they have had excessive force used against them by any correctional staff to "file a grievance."

Perhaps Moore is not aware just how disreputable the DOC grievance system has become. He must be aware, however, that the majority of uses of force against prisoners occur in the confinement units, and that potentially abused prisoners must give any *grievances* to the same officers (or their fellow workers), who may have used the excessive force, to forward to the mailroom. That's similar to handing a lawsuit to someone you intend to sue and asking them to take it to the courthouse to file for you, with the odds of them doing so about the same.

Of course, no prisoners who saw Moore's video really believed it was giving advice for their benefit. No, the general consensus was that the abbreviated video message reiterating the DOC's rules on when force is authorized to be used against prisoners, and advising use of the grievance procedures when those rules are violated, was intended to serve another purpose beneficial to Moore and the beleaguered DOC.

No doubt, the video will be shown to legislators and any others who might question what Moore is doing to reform the DOC following the highly publicized beating murder of prisoner Frank Valdes at Florida State prison this past July by a gang of guards — some of whom had documented histories of abusing prisoners. And the video might be shown to the FBI and Florida Department of Law Enforcement, agencies that are currently investigating widespread allegations of brutalization and human rights abuses in Florida's prisons.

Moore can be heard now, telling legislators or FBI investigators that he personally advised all prisoners to "file a grievance" if they believe they have been wrongfully beaten, subjected to shock shields or stun devices delivering 50,000 volts, or had pepper spray fogged into their cells from canisters reminiscent of those pest exterminators carry.

It is doubtful, though, that anyone will ever see the boilerplate denials that prisoners most often receive on their grievances alleging excessive use of force.

By a stroke of fortune, however, we can see in the letter accompanying this article what steps the Police Benevolent Association (PBA), a union which represents many FDOC prison guards, has apparently taken to circumvent new FDOC policies. Instead of advising prison guards not to use excessive force, an attorney for the PBA, Hal Johnson, advised FDOC union members to include a "boilerplate defense" in use of force reports so that guards may later change their story concerning an incident, if videotape evidence does not support the first story they told.

And, according to Johnson's letter, the FDOC tacitly approved this "defense in advance" that basically makes the new use of force policies of the Department meaningless. ■

FDOC DEMOTIONS

During September a former warden at prisons located in Jasper and Madison was demoted to assistant warden and transferred to a different prison. Thomas Fortner was found to have created a hostile work environment through a pattern of having indiscreet affairs with female prison employees over which Fortner had authority. Fortner will take an approximate $7,000 salary cut with the demotion, going from $65,560 to $58,000 a year in his new position.

During December a racial slur resulted in the demotion of Florida State Prison Major Harry Tison to a sergeant's position. Tison, 58, a career FDOC prison guard, was demoted on Dec. 3 for "conduct unbecoming," according to FDOC officials. Allegedly, Tison, while talking to two other guards about Assistant Warden Adam Thomas, stated, "Just what we need, another nigger on the compound." Thomas, who is black, started at the prison in mid—August and supervised the work camp section of Florida State Prison. Tison admitted making the statement, but claimed it was just a "slip of the tongue." Tison told investigators that he grew up using such language and apologized for the slip.

[Sources: *PLN*, 12/99; *St. Pete Times*, 12/10/99] ■

VIDEO VISITING AT TWO FEMALE PRISONS

by Teresa Burns

Starting in February, state prison officials in Florida will launch a new visitation program for female prisoners that is designed, in part, to stifle criticism from prisoner advocacy groups, and state legislators, that the Department of Corrections (DOC) has in the past erected "many impediments" making it difficult for families to visit and remain connected to incarcerated loved ones. This new program will allow televised visits between incarcerated mothers located in prisons in Central Florida and their children who live in the Miami/South Florida area.

Using closed-circuit video cameras and monitors located at Lowell and Hernando Correctional Institutions, up to 200 women prisoners, who otherwise might not be able to visit with their children because of the distance involved, will be connected to a similar set-up located in Miami where their children will be able to see, hear and talk live with their moms.

This new project is one more step by the DOC to address the fact that while most of the 3,500 female prisoners in Florida are actually from South Florida, most female prisons have been located in North and Central Florida. The travel distances involved have made it impossible for many families to visit and has made it especially hard for incarcerated mothers to maintain close ties with their children.

Within the last few months the DOC finally converted a South Florida men's prison near Miami to a woman's prison specifically to address that problem.

The DOC furnished $385,734 and got a $300,000 federal grant to fund the video-visiting program. Priority will go to poorer families who cannot afford the travel involved in long distance visiting. Alliance/IFP-South, formerly the Alliance for Media Arts, a nonprofit group that promotes independent filmmaking, will provide the offices and equipment in Miami where the children will go to participate.

Nadine Anderson, executive director of Families with Loved ones In Prison, expressed concern that if successful video visiting may replace regular contact visits for all prisoners. DOC officials denied that would ever occur. "We would not do that," said Richard Nimer, director of program services for the DOC. "Nothing takes the place of a personal visit and that wouldn't be our intent by any stretch of the imagination."

While Florida Prisoners' Legal Aid Organization (FPLAO) directors were among those pushing for some type of relief for women prisoners in their visiting situation over the past three years, there are some reservations with the planned video visiting program. There is concern over who will select which women prisoners will participate in the program and whether there will be a "hidden" criteria for participation attached for women prisoners.

There is also concern over the DOC's announced intent that the visits will be for one hour each and will consist of the moms reading books to their children. While literacy is a laudable goal, such a regimented restriction may do little as far as maintaining a family relationship when such a short period for the visit is allowed to begin with. And it is ironic that literacy will be such a concern for the DOC in the video visits when the DOC still has not complied with the 1999 legislative mandate that equipment and supplies be provided in the regular visiting parks to help keep visiting children occupied. FPLAO staff will be pushing for that compliance this year. ■

PRISONER BEATEN AT FSP FILES SUIT

JACKSONVILLE — On Nov. 9, former Florida State Prison (FSP) prisoner Willie Mathews filed a federal lawsuit claiming his civil rights were violated when he was beaten and had his jaw broke by FSP guards.

The suit, represented by attorney Guy Rubins, says 21 prison employees either participated in or were witnesses to the six days of beatings that Mathews suffered on the now infamous "X—Wing" at FSP, the same wing where death row prisoner Frank Valdes was beat to death by guards on July 17, 1999. The lawsuit alleges, in part, that Valdes was beaten to death because of his complaints about Mathews and four other Hamilton Correctional Institution (CI) prisoners being systematically beaten and abused by guards and then denied medical care for the injuries they suffered.

Mathews was one of five prisoners sent to FSP on July 4, 1999, from Hamilton CI, where they were accused of assaulting six guards the day before. One female guard involved in the disturbance at Hamilton allegedly had a miscarriage a week later. That is when prison guards at FSP went berserk.

Mathew's lawsuit claims that on July 10, several FSP guards handcuffed him, put a pillowcase over his head, tied a rope around his neck, and knocked and dragged him down a staircase. Mathews claims that during that struggle with guards his jaw was broke, but he remained in solitary confinement for nine days, his complaints ignored by guards, and medical staff.

It wasn't until July 19, when Florida Department of Law Enforcement agents descended on FSP to investigate Frank Valdes' murder, that Mathews finally was given medical treatment. He underwent jaw surgery at Shands Hospital in Gainesville where a metal plate had to be embedded in his face to repair his shattered jaw.

Mathew's lawsuit also claims that FSP Warden James Crosby, prison inspector Tim Gieberg, prison dentist James Posten and other prison staff and medical personnel knew what had happened to him and became part of a conspiracy to cover up the guards' actions.

After being taken out of FSP Mathews was subsequently sent to the North Florida Reception Center, then to Union CI, Baker CI and Columbia CI. In an interview with an *FPLP* staff member at Columbia CI, Mathews said that he was threatened by guards with being killed if he talked after Frank Valdes was killed. He stated that he had been threatened at Union, Baker and Columbia CIs. He also stated that he had been refused food for several days after being beat at FSP.

On August 25 Mathews and the four other Hamilton CI prisoners were each charged with aggravated battery on a law enforcement officer and five counts of battery on a law enforcement officer.

In the lawsuit filed by Mathews he seeks actual and punitive damages. Guy Rubin said other prisoners who have been beaten at FSP may be added to the suit.

[Source: *Gainesville Sun*, 8/27/99; *Tampa Tribune*, 11/11/99; Willie Mathews] ■

FDOC CORRECTIONS CAPTAIN ARRESTED

A Florida Department of Correc-

tions (FDOC) captain was arrested by Florida City police on 11/17/99 for allegedly assaulting his girlfriend - a Florida City police officer.

According to police reports, Darryl J. Hall, 38, a captain at the South Florida Reception Center, was charged with battery on a law enforcement officer and burglary into an occupied motor vehicle after hitting his former police officer girlfriend, Nivia Cordero, 28, when she was on duty in her police car.

Allegedly Hall and Cordero had been in a six—year relationship. On Nov. 7, Hall approached Cordero's patrol car parked at a Wal-Mart where Cordero was talking to a male friend.

Police say Hall got angry and punched Cordero in the face through the open car window.

Florida City Deputy Chief Juan Santos said Hall is responsible for thousands of prisoners at the South Florida prison. The FDOC had no comment on the incident.

[Source: *Miami Herald*, 11/18/99] ■

NEW HAMPSHIRE DOC CUTS PRISON PHONE RATES

Seven months after NH prisoner Michael Guglielmo threatened to sue the NH Department of Corrections over excessive phone rates being charged prisoners and their families and friends, who accept collect calls from prisoners, the state began renegotiating its prison telephone contracts with Sprint and WorldCom telephone companies.

Guglielmo started his intended action by filing a public records request to obtain the phone contracts between the NH DOC and the phone companies that show the amount of commission that the DOC was receiving back on every dollar collected by the phone companies. Those contracts showed that in 1997 Sprint had kicked-back 35 percent and WorldCom 40 percent of everything they made off prisoners' families and friends to the DOC.

In July 1999 a new contract was approved that will reduce the initial surcharge on out-of-state calls from $3.28 down to $1.50, and the per minute rate will be reduced from 55 cents down to 20 cents, the same as regular citizens pay for collect calls from pay phones in NH.

[Source: *Concord Monitor*, 7/23/99] ■

CENSORING ATTEMPT QUICKLY OVERTURNED

During August prison officials at North Florida Reception Center in Lake Butler, Florida, attempted to censor the September issue of Esquire magazine as it allegedly contained an article that was "dangerously inflammatory." The article, "The Making of Bonecrusher," by Richard Stratton, told the story of a brutal prison guard at Corcoran State Prison in California. The guard, Roscoe "Bonecrusher" Pondexter, gave his account in the article of how he and other guards brutally abused prisoners and forced them to fight "gladiator" style in confinement unit exercise areas, how bets would be placed on the outcome of the fights, and how numerous prisoners were shot and killed by guards during the staged fights.

The decision to prevent Florida prisoners from reading the September issue of Esquire was made by a single warden, Robert Honsted, of the North Florida Reception Center. When Esquire received a notice that the issue was being rejected they alerted news organizations, which picked up on the story. Once several newspapers in Florida reported on the censorship, the Florida Department Of Corrections (FDOC) quickly moved to announce that the rejection would be taken before the department's Literature Review Committee in Tallahassee for a final decision.

The implication of Warden Honsted's "dangerously inflammatory" reason for censorship was that simply reading the article might cause Florida prisoners to become violent and/or otherwise cause security problems. Esquire Editor-in-Chief David Granger was quoted as saying; "I was struck that they would think our piece so powerful it could cause problems." He said he didn't think the piece would actually spur prisoners to violence just because it reports guards in another prison system abused inmates. "It has nothing to do with Florida prisons," said Granger.

The attempt to censor the magazine came during the midst of the shakeup the department is going through concerning the murder of death row prisoner Frank Valdes at Florida State Prison on July 17th by prison guards, a subsequent investigation by the FBI into abuse throughout the FDOC, and intense scrutiny and questioning of the FDOC by state legislators. It was initially felt by some mainstream news reporters that the magazine rejection was prompted by the problems the department is having. A spokesman for the FDOC, C.J. Drake, after speaking with Warden Honsted, stated that did not appear to be the case.

One thing that is clear, the FDOC immediately moved to convene the literature review committee, which found that the magazine was admissible, and would not be rejected the next day after the first newspaper article appeared about the censorship. C.J. Drake stated following that decision that the committee members didn't find the article particularly inflammatory. This was perhaps the quickest review of a publication rejection that the FDOC has ever performed. Prisoners report that normally when prison officials attempt to refuse delivery of a publication to them that it may take a month or two to get a final decision from the review committee in Tallahassee.

[Sources: *Miami Herald*, 8/25; *Gainesville*

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FLORIDA POLICE BENEVOLENT ASSOCIATION, INC.

To: *All State* Correctional Officer Chapter Members

From: G. "Hal" Johnson, General Counsel

Date: November 16, 1999

Re: ***Incident/Use of Force Reports – Videotaped Cell Extractions and Uses of Force***

As you are aware, the Florida Department of Corrections has implemented a policy which requires that cell extractions and uses of force (where possible) be videotaped. Since the Department has determined officers will not be permitted to review the videotape prior to the preparation of incident and use of force reports, there is a good chance your report will not be totally accurate. The Florida P.B.A. (and hopefully the Department) understands these inaccuracies are not on purpose, but a matter of memory lapses due to the stress of the situation.

This matter has been discussed with the Department. Based upon these discussions, the Florida P.B.A. suggests the following sentences be included in incident or use of force reports which have been videotaped: **THIS REPORT REFLECTS MY BEST RECOLLECTION OF THE INCIDENT AND MY ACTIONS DURING IT; HOWEVER, I HAVE NOT HAD THE OPPORTUNITY TO VIEW THE VIDEOTAPE OF THE INCIDENT. ANY DIFFERENCES BETWEEN MY DESCRIPTION OF THE INCIDENT AND THE VIDEOTAPE ARE NOT INTENTIONAL, BUT INSTEAD, REFLECT A LACK OF MEMORY OF SOME DETAILS OF THE INCIDENT DUE TO THE STRESS OF THE SITUATION. I WOULD LIKE TO RESERVE THE OPPORTUNITY TO CHANGE OR AMEND MY REPORT AFTER I REVIEW THE VIDEOTAPE OF THE INCIDENT.**

The Florida P.B.A. understands these sentences may seem long, unnecessary and a bunch of "legalese." Still, we suggest you include them in your report; as soon as you don't, you'll wish you had. It's better to be safe than sorry.

GHJ/mkb

(Continued from page 6)
Sun, 8/27; St. Petersburg Times, 8/28] ■

ATTENTION PAROLE ELIGIBLE INMATES

There are basically four groups of inmates left in the Florida Department of Corrections (FDOC) that are "Parole Eligible." The first group are those that were sentenced prior to October 1st, 1983 (when parole was eliminated). The second group are those that were sentenced for a crime prior to 10-1-83 and were later paroled and then committed a new crime after 10-1-83 while they were on parole on their previous conviction. This group is under both systems. Then there are the capital life sentences with mandatory twenty-five year sentences and this group falls into two categories. The first are those that have completed at least twenty-five calendar years and the second are those that haven't completed their minimum mandatory twenty-five years.

There are currently almost 2,200 inmates that fall into the first category. These are men and women that were sentenced to prison prior to the implementation of guideline sentencing on October 1st, 1983 and therefore must either EOS their sentence or be paroled. After 10-1-83, inmates entering the FDOC were no longer under the authority of the Florida Parole Commission (FPC).

There is a tremendous feeling of hopelessness among these "Parole Eligible" inmates. Many of them have given up hope of ever being released from prison even though they have done everything that has been required of them. They have paid their debt to society (even if evaluated by today's 85% standard) the majority of them would qualify for release. Most of them have very good to exemplary prison records. Most of them are in the age group with the lowest risk for recidivism. In light of the fact that inmates sentenced after October 1st, 1983 are being released every day that have committed the same types of crimes, there is no justification for continuing to keep the majority of these inmates incarcerated.

Granted there are a few of these inmates that are extremely dangerous, or have such mental aberrations that they would not be able to fit into society as law-abiding citizens. But this is a small group. The majority have demonstrated by their institutional adjustment that they do not fall into either of these categories.

I believe it is time that these inmates be given the chance to return to their families and their communities. I am willing to help but I cannot do it alone. I will need help. I've been working on this project for several months now,

and we recently held our first statewide meeting in Orlando. We had inmate families, ex-offenders, and concerned citizens in attendance as well as Representative Allen Trovillion, the chairman of the corrections committee for the Florida Legislature.

Chairman Trovillion is very interested in the plight of the elderly in Florida's prisons and has promised his support in our effort to help this group of inmates obtain their freedom. Chairman Trovillion also has a very good understanding of the fiscal consequences of keeping elderly inmates incarcerated. The cost to incarcerate elderly inmates (50 or older) can be three times as expensive as the cost to incarcerate younger inmates. It can cost as much as $60,000.00 a year to incarcerate this age group.

There are many ways which you can help. First of all, you can make a list of the people that you know that are concerned and have them contact us (this will save us time and money). Once this proposal has been officially submitted as a member project by Chairman Trovillion, you can contact your representative and ask him to please support this effort. For those that are not in prison that would like to volunteer their time, talent, and or treasure, we can use all of the resources we can that we can get. Those of you that are incarcerated who can afford to send a financial contribution (even if it is nothing more than a stamp) should help as much as you are able. And of course, everyone can pray.

Due to lack of time, energy and resources, we have to deal with this as a group problem rather than on a case by case basis. There is no way that I can personally answer inmate mail. It will take away from the time that I need to devote to this, so please try to understand. Besides, I am sure that you would rather I devote my time to the task at hand than answer your letter.

For those of you that aren't incarcerated that want to be involved, please send me your name, address, city, state, zip, home phone, work phone, e-mail and any other information that you feel would be useful. Please let **me** know if you have skills that you feel would be helpful in this effort IF you are sending a financial contribution, make your check out to **Time for Freedom, Inc.** and on the memo line put **P.E.I. Project** (that stands for parole eligible inmates). Please add this project on your prayer list and remember it's needs.

Bernie DeCastro

Please send all check, money orders, stamps along with a note specifying P.E.I. project to:

Time For Freedom, Inc.
P.O. Box 819
Ocala Fl 34478

PRISON LEGAL NEWS

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

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

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ANNOUNCEMENT

Thomas E. Smolka is proud to announce the establishment of his law practice in Richmond. His practice areas include: Criminal Defense Law, Appellate Criminal Law, Post-Conviction Relief, Major Civil Litigation, Inmate Administrative Law and Proceedings involving the Department of Corrections, Probation and Parole, Executive Clemency, Interstate Compact and Institutional Transfers, Immigration Law and Detainer Actions.

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Subsequent to his 1975 graduation from America's oldest law school at the College of William & Mary, **Thomas E. Smolka** was admitted to the Virginia State Bar and became a member of the National Association of Criminal Defense Lawyers. Tom's legal experience includes service as an Assistant City Attorney of Norfolk, Virginia followed by many years in private law practice. Most importantly, **Tom Smolka's** direct understanding of the American judiciary came when he confronted the criminal justice system, won his direct appeal and was exonerated. *See Smolka v. State,* 662 So.2d 1255 (Fla. 5th DCA 1995), *rev. denied, State v. Smolka*, 668 So.2d 603 (Fla. 1996).

NOTABLE CASES
by Sherri Johnson and Brian Morris

ELEVENTH CIRCUIT ANSWERS QUESTIONS RELATING TO TWO PROVISIONS OF THE PLRA

The Eleventh Circuit Court of Appeals answered several important questions relating to two provisions of the Prison Litigation Reform Act of 1996 (PLRA). Title 42 U.S.C. section 1997e(a) (Supp. II 1996) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Title 42 U.S.C. 1997e(e) (Supp.II 1996) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

The district court was faced with the following questions: (1) whether section 1997 e(e) applies to former prisoners who file a claim for injuries suffered while in custody, after they have been released from incarceration; (2) whether section 1997e(a) requires prisoners to exhaust all administrative remedies before they bring a federal law action with respect to prison conditions, even if it would be futile for the prisoner to seek such administrative remedies, and even though the administrative remedies are inadequate; (3) what level of injury must be sustained for a prisoner to meet the section 1997e(e) requirement that the prisoner must make a "prior showing of physical injury" before filing suit for "mental or emotional injury suffered while in custody"; and (4) the constitutionality of section 1997e(e).

Eleven prisoners in the state of Georgia brought this civil rights action suit for damages and injunctive relief against the prison officials of the Georgia Department of Corrections (GDOC). The prisoners 'alleged violations of their Fourth, Eighth, and Fourteenth Amendment rights as a result of actions allegedly taken by the prison guards during a prison "shakedown". The prisoner plaintiffs alleged that members of the special prison "Tactical Squad" stormed the prison on October 23, 1996 and ordered them to strip naked. The Squad performed body cavity searches while members of the opposite sex were present. The Squad physically harassed some prisoners and ordered one prisoner to "dry shave".

During the pendency of this action six of the eleven plaintiffs were released from prison. Those six plaintiffs moved to withdraw their claims for injunctive relief while maintaining their suit for damages. The magistrate judge treated the plaintiffs' motion as an amendment to the complaint and issued a report and recommendation to the district judge.

After receiving the magistrate judge's recommendations, the district judge for the Middle District of Georgia divided the plaintiffs into four classes according to their different factual circumstances, and issued a ruling particular to each class as follows:

First, the district court found that plaintiffs Danny Chadwick, Federick Harris, Lenios Cook, Willie Hooks, Farrell Nation, and William Dailey had been released from custody. As such, their claims for injunctive relief were moot. The court also granted defendants' 12(b) (6) motion and dismissed with prejudice these plaintiffs' claims for compensatory and punitive damages because they did not allege any physical injury. In doing so the court reasoned that the claims were barred by section 1997e(e)'s physical injury requirement. The district court adopted the magistrate judge's recommendation with only a slight modification and held that "section 1997e(e) is applicable to claims of prisoners who have been released."

Second, the district court dismissed without prejudice the claims of plaintiffs Samuel Locklear, Alan Kilgore, and Leroy Langes because these plaintiffs had not yet exhausted all their available administrative remedies and thus had not satisfied the exhaustion requirement of section 1997e(a). The district court also found that these plaintiffs' claims for compensatory and punitive damages were barred by section 1997e(e) because they did not allege the requisite physical injury.

Third, the district court dismissed without prejudice the claims of plaintiff Dayton Brinkley because he had not yet exhausted all of his available administrative remedies and thus had not satisfied section 1997e(a). The district court also found that Brinkley's claim for compensatory and punitive damages were not barred by section 1997e(e) because he alleged the requisite physical injury. The district court noted that before Brinkley could bring his action to the court he would be required to exhaust all available administrative remedies.

Finally, the district court granted defendants' 12(b) (6) motion and dismissed with prejudice plaintiff James Wade's claims for compensatory and punitive damages because even though Wade was still in prison and had exhausted all available administrative remedies, his allegations of physical injury were not serious enough to satisfy the physical injury requirement of section 1997e(e). Accordingly, the claims were barred. The district court did not address Wade's claims for injunctive and declaratory relief.

Plaintiffs appealed to the Eleventh Circuit.

The Eleventh Circuit upheld the dismissal of those claims for injunctive relief for those plaintiffs who had been released from custody but vacated the order dismissing with prejudice the released prisoners' claims for compensatory and punitive damages. The circuit court found error in the district court's holding that section 1997e(e) is applicable to prisoners who have been released. The circuit court made it clear that once the district court treated the released prisoners' complaint as amended, those six plaintiffs became "former prisoners" who had filed a complaint for monetary damages against employees of the GDOC for injuries suffered while in custody.

The circuit court relied on the express language of section 1997e(e) and the definition of "prisoner". Thus, section 1997e(e) did not apply to "former prisoners" or those who have been released from a correctional facility because such persons are clearly not "confined in a jail, prison, or correctional facility" as required by section 1997e(e). The circuit court was not persuaded by the defendants' congressional intent argument because of the distinction made between prisoners and those who are not prisoners by Senators Dole and Kyl. The circuit court also joined the Seventh Circuit in holding that section 1997e(e) only applies to prisoners who are incarcerated at the time they seek relief, and not to former prisoners who seek damages for injuries suffered while they were incarcerated. See: *Kerr v. Puckett*, 138 F.3d 321,323 (7th Cir.1998).

The circuit court affirmed the district court's dismissal of claims by two categories of plaintiffs who had failed to exhaust administrative remedies prior to bringing their suit. Those plaintiffs made a valiant argument that they should not be required to exhaust their administrative remedies because of futility and that no administrative relief is "available" to plaintiffs because the Inmate Grievance Procedure does not provide for monetary damages awards plaintiffs seek.

The circuit court reaffirmed that section 1997e(a) imposes a mandatory requirement that prisoners exhaust all available administrative remedies prior to bringing a civil rights suit. Further, the circuit court held that the term "available" as used in section 1997e (a) does not mean that prisoners must only exhaust their administrative remedies if the relief they seek is "available" within the administrative apparatus; instead, the term means that a prisoner must exhaust all administrative remedies that are available before filing suit, regardless of their adequacy.

The remaining plaintiff James Wade had exhausted all available administrative remedies and alleged the

requisite physical injury in his complaint for compensatory and punitive damages. Wade alleged that the Squad made him "dry shave" which caused bleeding, inflammation, irritation, ingrown facial hair, infection, purulence and pain.

The court evaluated Wade's claim and joined the Fifth Circuit in fusing the physical injury analysis under section 1997e(e) with the framework set out by the Supreme Court *in Hudson v. McMillian*, 503 U.S. 1,9, (1992), for analyzing claims brought under the Eighth Amendment for cruel and unusual punishment. The court concluded that in order to satisfy section 1997e(e) the physical injury must be more than de minimis (trifling, minimal), but need not be significant. See: *Gomez v. Chandler*, 163 F.3d 921,924 (5th Cir. 1999). The court determined that Wade had not alleged a physical injury that is more than de minimis. A "dry shave" without more, is simply not the kind of "injury" that is cognizable under section 1997e(e).

Because the circuit court agreed with the district court that Wade's injuries were not sufficient to meet the physical injury requirement of section 1997e(e), it was faced with his remaining contention that section 1997e(e) is unconstitutional as applied barring his claim for compensatory and punitive damages. Wade argued that the statutory bar to claims not involving physical injury amounts to a denial of due process under the Fifth Amendment and in violation of the Equal Protection Clause under the Fourteenth Amendment.

Wade contended that the application of section 1997e(e) amounted to a due process violation because it tailors the court's jurisdiction to preclude all effective remedies for a claimed constitutional violation. The court opined that had the statute precluded all effective judicial review, the statute would then raise a constitutional question. The court continued by stating the statute merely puts a limitation on a damage remedy while leaving open declaratory and injunctive remedies. The court declined to further address the vexing jurisdictional questions.

Wade couched this same argument under the guise of a equal protection violation under the Fourteenth Amendment. Wade reasoned that section 1997e(e) impinged on his fundamental right to access the courts. The court responded that section 1997e(e) does not affect prisoners' right of judicial access. It only affects the remedies prisoners may seek. The court asserted that prisoners still retain a "reasonably adequate opportunity" to seek relief from constitutional violations that do not involve physical injury, because they may still file suits for declaratory and injunctive relief; prisoners just may not recover monetary damages for such claims.

In sum, the circuit court AFFIRMED the district court's ruling with respect to plaintiffs Locklear, Kilgore, Langes, and Brinkley. The circuit court also AFFIRMED the district court's dismissal of plaintiff Wade's claims for compensatory and punitive damages, but REMANDED with instructions that the district court consider Wade's claims for declaratory and injunctive relief. The circuit court VACATED the district court's dismissal of claims for compensatory and punitive damages for plaintiffs Chadwick, Harris, Cook, Hooks, Nation, and Dailey, and REMANDED for further proceedings consistent with its opinion. *Harris, Chadwick, et al. v. Garner et al.*, 12 Fla. L. Weekly Fed. C1317 (11th Cir. Sept.30,1999).

[Comment *It is important to note that the Eleventh Circuit declined to address jurisdictional questions presented by Wade. Further, the court did not attempt to clearly define when a physical injury becomes significant for purposes of satisfying section 1997e(e). It appears that the court will treat future cases on a case-by-case basis. The most troublesome aspect of this case is the court's refusal to recognize a equal protection violation by the disparate treatment of prisoners from those who are not prisoners, especially when it comes to monetary damage suits. While a free person has monetary redress for constitutional violations, a prisoner is precluded from this same remedy. This is probably why constitutional violations continue to plague prisons throughout the nation. What better way to deter constitutional violations than to hit the violator where it hurts, his wallet – oh]* ■

— Administrative Law —

Reasons for Denial of Sec. 120.54(7) Petitions not Reviewable on Direct Appeal by Prisoners

Prisoner James Quigley (an *FPLP* advisor) filed a sec. 120.54(7), Fla. Stat., petition to repeal DOC rule 33—3.005(9). That rule prohibits prison official notaries from notarizing the copies of legal documents that Florida prisoners keep for their own files. Quigley requested in his petition that the rule be replaced with one that would allow prisoners to keep a notarized copy of any documents that prison officials might notarize.

The DOC denied Quigley's petition, claiming that the rule advanced a legitimate penological interest in preventing prisoners from altering documents they might have notarized.

Quigley, relying on the plain language of sec. 120.81 and 120.68, Fla. Stat., which state that prisoners may not seek direct review of agency action under sec. 120.63 except when proceeding pursuant to sec. 120.54(3) or (7), filed a direct appeal to the DCA on the denial of his petition to repeal and replace the rule.

The DCA took this opportunity to erect another hurdle to prisoners' ability to challenge rules through legitimate means.

In its search for a way to deny Quigley's appeal and bar any other prisoners from directly appealing the denial of sec. 120.54(7) petitions, the DCA ignored the plain language of sec. 120.81(3)(a). The Court focused instead on whether the DOC properly handled Quigley's petition to within 30 days either: (1) initiate rulemaking, (2) otherwise comply with the requested action, or *(3)* deny the petition with written reasons. Since the DOC gave Quigley written reasons for denying his petition, it complied with the statutory requirements, according to the DGA.

As to the merits of Quigley's claim that the rule unconstitutionally impedes prisoners' access to court, the DCA determined that it would not address same as, according to its interpretation of the statutes, prisoners cannot directly appeal the denial of such petitions on the merits, they may only appeal whether the agency properly handled the petition, as above.

The DCA concluded that the only avenue for judicial review of the reasons that the DOC gives in a written denial of sec. 120.50(7) petition is to seek declaratory or other relief in the circuit court, as was done in *Bass v. DOC*, 684 So.2d 834 (Fla.1st.DCA 1996).

This decision, therefore, forces prisoners to go through the circuit court hoop, and the attendant bias of the Second Judicial Circuit Court, and filing fee barrier, to challenge rules of the DOC following denial of 120.54(7) rule adoption, repeal or amendment petition, unlike any other citizen of the state.

See: *Quigley v. FDOC*,____So.2d____, 24 Fla.L.Weekly, D2405—06 (Fla.1st.DCA 10/20/99).

Evidentiary Hearing Required To Resolve Mailbox Rule Claim

Second Judicial Circuit Judge N. Sanders Sauls dismissed a petition for writ of mandamus challenging a DOC disciplinary action against prisoner Alfonso Detroy Ponton. The dismissal occurred where Ponton failed to comply with a case management order to file an indigency affidavit and related papers per section 57.085, Fla. Stat.

On appeal Ponton claimed that he had timely turned the required documents over to prison officials to mail, but for unknown reasons they were not sent to the court.

The appeal court reasoned that Ponton, as a prisoner, was entitled to the benefit of the "mailbox rule". *Haag v. State*, 591 So.2d 614,617 (Fla. 1992) (Pleading deemed filed when inmate turns document over to prison officials for processing). In the face of Ponton's claim *that he had* turned the documents over to be mailed, the Court remanded for an evidentiary hearing to determine if that was true, and if so, for the circuit court to afford Ponton an opportunity to re-file the documents in accordance with *Masiello v. Moore*, 24 Fla.L. Weekly D1778 (Fla. 1st DCA 7/29/99), *and Marquart v. Fla. Parole Comm'n*, 701 So.2d 674 (Fla. 1st DCA 1997).

See: *Ponton v. Moore*,____So.2d____, 24 Fla.L.Weekly D2470 (Fla. 1st DCA 10/29/99).

Error to Deny Rehearing Motion Where Order was Substantially Complied With

Prisoner John Gosman filed a petition for writ of mandamus in the circuit court challenging prison disciplinary proceedings that were subsequently dismissed because he failed to comply with a case management order to file the required certificate regarding his prison bank account and amount of deposits for the *preceding six* months. Gosman, upon receiving the order dismissing, filed for a rehearing and then filed the certificate and account information. The circuit court, Judge N. Sanders Sauls, however denied the motion for rehearing and Gosman appealed.

On appeal (or more likely certiorari review, although the DCA is silent how it treated this review), the DCA found the circuit court erred in denying the rehearing motion where Gosman had substantially complied with the case management order by filing the required documentation. The DCA Reversed and Remanded the case to the circuit court.

See: *Gosman v. Michael Moore, DOC*, ____ So.2d____, 24 Fla.LWeekly, D2467 (Fla.1st DCA 10/29/99).

Error to Dismiss Mandamus Petition Which Should Have Been Treated as Habeas Corpus

Prisoner Corey Stanley filed a petition for writ

of mandamus alleging in part that the granting of relief would entitle him to immediate release from prison (presumably with the restoration of certain gain time). Stanley filed that petition in the Second Jud. Cir. Court although he is in a prison located within the jurisdiction of the Tenth Jud. Cir. Court.

Circuit Judge Sanders Sauls dismissed Stanley's petition because he failed to comply with unspecified indigency provisions of sec. 57.085, Fla. Stat. (1997), and Stanley appealed that dismissal.

The appeal court determined first off that since Stanley alleged he was entitled to immediate release from prison that his mandamus petition should have been treated as one for habeas corpus, for which there is no filing fee or indigency application requirements per Art. I, Sec. 13, Fla. Const.; *and Steele v. State*, 733 So.2d 1117 (Fla. 4th DCA 1999).

Additionally, the appeal court determined, that while the circuit court erroneously dismissed the petition for a non—applicable indigency requirement, the circuit court still could have properly dismissed on the grounds that as a (de facto) habeas petition it should have been filed in the circuit court where Stanley was in prison, the Tenth Jud. Cir. Court. Citing sec. 79.09, Fla. Stat. (1997); *Alday v. Singletary*, 719 So.2d 1260 (Fla. 1st DCA 1998).

Thus, the appeal court Reversed and Remanded Stanley's case to the circuit court with directions to transfer the petition to the Tenth Jud. Cir. Court. Citing *Lewis v. Fla. Parole Comm'n*, 697 So.2d 965, 966 (Fla. 1st DCA 1997).

See: *Stanley v. Moore*,___So.2d____ . 24 FLW D2506 (Fla. 1st DCA 11/1/99)

Abuse of Discretion To Dismiss Petition Without Opportunity to Correct Case Management Order Deficiencies

When prisoner Joseph Tooma filed a petition for writ of mandamus against Michael Moore he also applied to precede as an indigent per sec. 57.085, Fla. Stat. (1997). However, Tooma failed to attach a copy of his prison account statement as required by statute and a case management order issued in the case. Because of that failure, Second Jud. Cir Court Judge Sanders Sauls dismissed Tooma's petition.

Tooma appealed and argued it was an abuse of discretion for Judge Sauls to have dismissed the petition without providing Tooma as opportunity to correct the deficiency. The appeal court agreed with Tooma and tersely admonished Judge Sauls where the appeal court had "previously and succinctly held" that an opportunity must be provided to correct such errors. *Marquart v. Fla. Parole Comm'n*, 701 So.2d 674 (Fla. 1st DCA 1997); *Masiello v. Moore*, 24 FLW D1778 (Fla. 1st DCA 7/29/99). The appeal court Reversed and Remanded Tooma's case to the circuit court.

See: *Tooma v. Moore*, ____So.2d____, 24 FLW D2506 (Fla. 1st DCA 11/1/99).

FL. S.Ct. Blasts Indigent Prisoners' Filing Fee Statute, Call it Administrative Nightmare

In a truly surprising opinion, the Florida Supreme Court "strenuously urge[d] the Legislature to further review" the indigent prisoner provisions of sec. 57.085, Fla. Stat., that were adopted just three years ago to allegedly curb civil litigation by prisoners in state courts. In the dictum of this opinion the high court also touched on two problem areas that have plagued Florida prisoners in recent years in trying to access the courts: storage of legal materials and legal document photocopying.

This case started when prisoner Douglas Jackson filed a petition for writ of mandamus in the Fla. S.Ct. seeking an order directing the Department of Corrections (DOC) to pay him money for his work in prison. Jackson is serving a life sentence for multiple murders committed in 1981. Initially the court granted Jackson leave to proceed with the mandamus action without cost. Later, however, it came to the court's attention that Jackson had not fully complied with the requirements of sec. 57.085(7), Fla. Stat., that provides, in part, that indigent prisoners seeking to proceed in forma pauperis in a Florida Court, and who have twice in the preceding 3 years been adjudicated or certified indigent by a state or federal court, must included in any new request for leave to pursue a new civil action a listing and copy of each prior complaint and disposition thereof that has been filed by the prisoner in any court or adjudicatory forum in the preceding 5 years.

Jackson had not met that requirement so the court vacated its earlier order on indigency and instructed Jackson that he could ref ile for leave to proceed, if he fully complied with the indigency statute.

Jackson re-filed for indigency status to proceed, listed the names of several courts he had litigated in during the past 5 years, but stated he was unable to attach the required case documentation as it had been destroyed. The court held that was inadequate, noting that between 1992 and 1998, when the instant action was filed, Jackson had filed 13 actions as an indigent in the Fla. S.Ct. alone, and since filing the instant case before the court Jackson had filed 11 more cases in just that court alone. The court noted that in all those cases Jackson had been able to avoid the requirements of sec. 57.085, Fla. Stat., but indicated that will no longer occur.

The court then examined the history behind that statute; how in 1996 the Fla. legislature modified the indigency statutes to curb "frivolous lawsuits" by prisoners to require either partial filing fees and costs for civil litigation and/or liens on prisoner's accounts for the full fees and costs to be deducted per a specified schedule, in addition to the listing and production of documentation of all cases filed during the previous 5 years —when seeking new leave to proceed as an indigent with two previous indigent adjudications within the past 3 years.

The court determined that the listing and photocopy attachment provision was designed to allow courts to review a prisoner's litigational history to see if frivolous pleadings had been filed before or whether the same claims had been raised before. Additionally, the court noted that having to comply with that provision "present litigious prisoners with some procedural hurdles" that become more "time—consuming and costly" for such prisoners to continue filing new actions as an indigent.

However, the court noted, one drawback to that provision is that when indigent prisoners have no money to pay for the required photocopies of past actions, sometimes amounting to thousands of pages, the DOC is still required to make the copies. That places a "tremendous burden on the Department and, ultimately, on the taxpayer," the court said.

Also, there is the problem that the Department must provide storage space for litigious prisoners' legal materials or face a potential problem and drawn out proceedings to determine if the Department forced a prisoner to dispose of prior pleadings or whether the prisoner unnecessarily disposed of the pleadings.

Those problems, combined with the partial payment/monthly deductions provisions of the statute, requiring that all filing fees and costs of filing and serving civil actions ultimately be paid by even indigent prisoners, if and when they receive money in their prison bank accounts, have imposed a huge burden on both the courts and the Department.

The court commented that additional court staff had to be hired to handle the administrative burden caused by the statute, and painted a picture of Fla. S. Ct. clerks wheeling carts of stacks of pleadings, of "tremendous size and weight," back and forth to judges' offices where indigent prisoner have had to comply with the photocopy provisions of sec. 57.085(7). Then there is a storage problem of saving those files for the record in each case.

To resolve some of the problem, the court suggested that a one-time reduced filing fee for partially indigent prisoners would probably have the same effect in reducing frivolous lawsuits in the long run, and reduce the accounting burden of the courts and the

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However, the combination of problems led the court to "strenuously urge the Legislature to further review this statute in an attempt to remedy what has truly become an administrative nightmare for Florida's court system."

In Douglas Jackson's particular case, the court dismissed his mandamus petition without prejudice to him to filing a new petition along with the filing fees or strict compliance with the indigency statutes and held he will have to do the same in all future cases he might file.

See: *Jackson v. FDOC*, ___So.2d___, 24 FLW S549 (Fla. 11/18/99).

Second DCA Admonishes Statewide Prosecutor

In the appeal of this case, the Second DCA found that James Anthony Gavlick was improperly sentenced as an habitual offender. In admonishing the statewide prosecutor, the court highlights a couple of significant facts pertaining to habitual felony offender qualifications:

We turn ... to [Gavlick's] argument that he was improperly sentenced as a habitual felony offender. We agree that the trial judge erred in so sentencing [Gavlick] and reverse and remand for sentencing within the guidelines. In doing so, we are constrained to observe with dismay that the representative of the statewide prosecutor who was trial counsel for the State urged upon the trial judge a habitual felony offender sentence when the law clearly dictated that such a sentence was unavailable. Trial judges, particularly, should be entitled to rely upon accurate representation of the law by trial counsel. The assistant statewide prosecutor represented to the trial court two alternative bases for [Gavlick's] habitual felony offender sentences, neither of which had merit. The first argument presented was that [Gavlick's] release from probation within five years of the commission of the [instant] racketeering offense qualified as a "release from a prison sentence or other commitment." It has been repeatedly and clearly held that in order to sentence as a habitual felony offender, the felony for which the defendant is being sentenced must have been committed within five years of his release from prison or other commitment and not his release from probation, community control or parole. See Reynolds v. State, 674 So.2d 180 (Fla. 2d DCA 1996); Hightower v. State, 630 So.2d 1220 (Fla. 2d. DCA 1994); Bacon v. State, 620 So.2d 1084 (Fla. 1st. DCA 1993); Allen v. State, 487 So.2d So.2d 410 (Fla. 4th DCA 1986).

The State's alternative theory that [Gavlick] was qualified for habitual felony offender sentencing is equally unavailable and flawed. The alternative argument was that [Gavlick] had a qualifying offense within five years of the commission of the offense for which he was now being sentenced. The information below upon which [Gavlick] was being sentenced alleged the commission of the racketeering offense between the dates of May 18, 1989 and May 2, 1996. The State argued that [Gavlick's] qualifying offense was a burglary conviction. The obvious problem with using the burglary conviction as a habitual felony offender qualifying offense is that the burglary was committed on April 28, 1996, and the conviction for the burglary occurred on November 8, 1996. Section 775.084(1), Florida Statutes (1995), requires that in order to be a qualifying prior felony, "[t]he felony for which the defendant is to be sentenced was committed: ... (b) within 5 years of the date of conviction of the defendant's last prior felony... ."

Clearly, the qualifying felony must be a prior felony and the defendant must have been convicted of the ppior felony within five years of the date of commission of the offense for which the defendant is being sentenced. The dates alleged for the commission of the racketeering charge were from May 18, 1989 to May 2, 1996. The date of conviction for the burglary offense which was used as a qualifying felony was November 8, 1996. The burglary conviction was after, not prior to the date of the commission of the offense for which sentence was being imposed. The burglary offense was therefore not a qualifying offense. Hall v. State, 738 So.2d 374 (Fla. 1st DCA 1999).

See: Gavlick v. State, 740 So.2d 1212 (Fla. 2d DCA 1999) (emphasis supplied in opinion).

Prison Releasee Reoffender Act Only Applies to Florida Correctional Facility Releases

Michael Damien took an appeal to the Fifth DCA from his convictions and sentences entered for the charged offenses of resisting an officer without violence and resisting an officer with violence.

It's not uncommon for the state to over—charge a criminal defendant in an effort to have something to offer toward negotiating a plea (i.e., dropping or reducing what it knew to be an exaggerated charge to begin with). Unfortunately, the criminal defendant who exercises the constitutional right to trial by jury often ends up being convicted of the exaggerated charge. Fortunately for Damien, in his appeal, the state conceded that his "continuous resistance to an attempt to effect his arrest will support only one count of resisting even where several officers are involved in the effort to arrest him." Subsequently, the Fifth DCA vacated the misdemeanor conviction entered for resisting an officer without violence.

At issue, however, is the fact that, in this case, the state also convinced the trial court to over—sentence Damien. That is, on appeal, the DCA also concluded that the trail court erred in enhancing Damien's sentence under the "Prison Releasee Reoffender Act."

The "Prison Releasee Reoffender Act," codified at section 775.082, Florida Statutes (1997), provides in pertinent part:

(8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit: a. Treason; b. Murder; c. Manslaughter; d. Sexual battery; e. Carjacking; f. Home—invasion robbery; g. Robbery; h. Arson; i. Kidnapping; j. Aggravated assault; k. Aggravated battery; l. Aggravated stalking; m. Aircraft piracy; n. Unlawful throwing, placing, or discharging of a destructive device or bomb; o. Any felony that involves the use or threat of physical force or violence against an individual; p. Armed burglary; q. Burglary of an occupied structure or dwelling; or r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071; within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

Damien "was sentenced under the Act based on his release in 1995 from a Kentucky state prison." Damien argued that he did not qualify as a prison releasee reoffender because the plain language of the reoffender statute limits its application "to recent releases from incarceration with 'the Department of Corrections or a private vendor.'" Significantly, the DCA agreed with Damien's position and announced: "By qualifying the phrase 'a state correctional facility' with the phrase 'operated by the Department of Corrections or a private vendor'" (emphasis supplied in opinion), "we are constrained to hold that the language is limited to a correctional facility operated by the Department of Corrections of the State of Florida." See:

Damien v. State, — So.2d —, 24 FLW D2379 (Fla. 5th DCA 10-15-99).

Fifth DCA Finds Illegal H.F.O. Sentence

Timothy Summers filed a Rule 3.850 post conviction motion presenting numerous claims of ineffective assistance of counsel. The trial court denied the motion on the basis that it was both untimely and successive and an appeal was taken. On appeal, although the Fifth DCA found that the "motion was inartfully drafted to allege ineffective assistance of counsel," the court also found that Summers was illegally sentenced and, therefore, enti-

(Continued on page 15)

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tled to relief.

The problem arose when, on December 16, 1996, Summers was sentenced to 40 years in prison as an habitual offender for a January 1994 second degree murder with a firearm. "The second—degree murder conviction was reclassified as a life felony based on the jury verdict finding that Mr. Summers used a firearm in the commission of the crime." In his Rule 3.850 motion, Summers alleged that his sentence was illegally enhanced under section 775.084, Florida Statutes (the habitual offender statute), because at the time the murder was committed "life felonies were not subject to enhanced sentences under the habitual offender statute." Indeed, it was not until October 1, 1995, that the legislature included life felonies as crimes for which habitual offender sentences could be imposed. In an unusually liberal, but certainly meaningful, opinion coming from the Fifth DCA, citing Judge v. State, 596 So.2d 73 (Fla. 2d DCA 1991), rev, denied, 613 So.2d 5 (Fla.1992), the Summers Court found that:

In a 3.800(a) appeal involving an habitual offender issue, the Second District Court of Appeal characterized an habitual offender sentence as being illegal if it exceeds the enhanced statutory maximum penalty or a prior offense necessary to adjudicate the defendant as an habitual offender does not actually exist. ... Likewise, an habitual offender sentence imposed for a felony which does not qualify for habitual offender treatment is illegal because under the law the court could not have imposed it in any circumstance. [Emphasis supplied in opinion].

In Carter v. State, 704 So.2d 1068 (Fla. 5th DCA 1997), this court held that an improper habitual offender adjudication could not be challenged under a 3.800(a) appeal unless the sentence exceeded the enhanced statutory maximum penalty. However, our Carter opinion was issued prior to State v. Mancino, 714 So.2d 429 (Fla.1998), which expanded the remedy of Rule 3.800(a) to include jail credit issues where an error is clear on the face of the record. In Carter, this court followed former precedent which held that only a sentence that exceeds the statutory maximum may be corrected pursuant to Rule 3.800(a). However, if the supreme court allows a jail credit error apparent on the face of the record to be corrected under Rule 3.800 (a), surely an improper habitual offender classification, also apparent from the record, could and should be remedied under Rule 3.800(a) or Rule 3.850.

The case was REVERSED AND REMANDED for the trial court to resentence Summers on the second degree murder conviction. See: *Summers v. State*, 24 FLW D2606 (Fla. 5th DCA, 11—19—99).

[Comment: There is a large body of case law decisions indicating that a "life felony" committed prior to October 1, 1995, is not subject to an habitual offender enhancement. Nonetheless, I found this particular case very interesting because it was the Fifth DCA, which I often considered to be an extremely conservative court, that found the claim cognizable in a rule 3.850 motion. I found it even more interesting in light of the fact that the Fifth DCA actually reversed the case even though the motion was initially denied by the trial court as being both untimely and successive. Not long ago the Fifth DCA had, in my opinion, erroneously concluded that no sentencing error should be considered "fundamental error." Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998). Although it is still early, it is hoped that the decision entered in Summers is a true indication that the Fifth DCA is making a sincere effort to shy away from its extremely conservative decision making process. — bm]

PRR Does Not Apply To Burglary Of An Unoccupied Dwelling

In this case, the State appealed from the trial court's decision not to sentence Stanely Huggins under the Prison Releasee Reof fender Act (PRR). Huggins, pursuant to a plea of guilty, was adjudicated guilty for the offense of burglary to an unoccupied dwelling. Prior to the trial court accepting Huggins' plea, the State moved the court to find that Huggins qualified for sentencing under the PRR. The trial court ruled that "burglary of an unoccupied dwelling was not one of the enumerated offenses, and thus, the PRR did not apply to Huggins." The court imposed a 55—month state prison term pursuant to the sentencing guidelines. "Had Huggins been sentenced under the PRR, the trial court would have been required to sentence him to a mandatory sentence of fifteen years. ... ."

On appeal, the Fourth DCA "was called upon to apply the principles of statutory construction." Quoting our Florida Supreme Court's decision entered in Perkins v. State, which holds:

One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.

576 So.2d 1310, at 1312 (Fla.1991) (citations omitted).

In an *En Banc* decision, the DCA determined that the word "occupied," set out in the PRR, codified at § 775,082(8)(a)(1)(q), Florida Statutes (1997), modifies both structure and dwelling. That is, the DCA rejected the State's position that the PRR applies whether the dwelling is occupied or not. The *Huggins* Court found that "[ut is not unreasonable to conclude that since the legislature did not deem that burglary of an occupied conveyance was a serious enough offense to warrant inclusion in the PRR, then burglary of an unoccupied dwelling also does not reach the threshold of warranting inclusion in the PRR." The *Huggins* Court held that:

Due process requires that before a defendant such as Huggins can be subjected to a mandatory sentence of fifteen years, instead of the 55—month sentence he received from the trial court, the legislature must clearly and unambiguously provide for such punishment in the PRR. If the legislature did not intend for the word "occupied" to modify dwelling, it could have simply stated: "Burglary of a dwelling or occupied structure." The failure to do so creates an ambiguity which is susceptible to differing constructions. Because of the rule of lenity codified in section 775.021(1), Florida Statutes (1997) [footnote omitted], *we conclude that the word "occupied" found in section 775.082(8)(a)(1)(q) modifies both structure and dwelling. Since Huggins was convicted of burglary of an unoccupied dwelling, we affirm the trial court's decision to sentence Huggins to 55 months in the Department of Corrections instead of the mandatory sentence of fifteen years required under the PRR.*

To the extent that its previous opinions entered *in Scott v. State*, 721 So.2d 1245 (Fla. 4th DCA 1998), *State v. Linton*, 736 So.2d 91 (Fla. 4th DCA 1999, and *Wallace v. State*, 738 So.2d 972 (Fla. 4th DCA 1999), conflicted with its *En Banc* decision entered in Huggins' case, the Fourth DCA receded from those decisions. The *Huggins* Court also certified conflict with the Second DCA's decision entered in *State v. White*, 736 So.2d 1231 (Fla. 2d DCA 1999), which relied in part on the decision entered in Scott.' The Fourth DCA concluded that, in order to qualify under the PRR, the burglary must be to an occupied structure or occupied dwelling. Ultimately, the DCA affirmed the trial court's decision to sentence *Huggins* to a 55—month prison term under the sentencing guidelines. See: *State v. Huggins*, 24 FLW D2544 (Fla. 4th DCA, 11-10-99)(*En Banc*).

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FDOC FAMILY OMBUDSMAN

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

FDOC SPANISH HELPLINE

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

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

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