FLORIDA PRISON LEGAL

Perspectives

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Court Okays Inmate Account Processing Fees

by Bob Posey

TALLAHASSEE – On Dec. 21, 2004, Second Judicial Circuit Court Judge Nikki Ann Clark ruled that the Florida Department of Corrections can charge Florida's 80,000 state prisoners up to $6 a month as an inmate bank account processing fee.

Judge Clark's ruling came in a suit that had been filed by Kindred Spirits Charitable Trust, a nonprofit organization that helps prisoners and their families, and two state prisoners, Jesus Scull and James O'Callaghan, who receive money assistance from Kindred Spirits. The lawsuit had been filed in July '04, shortly after the legislature passed a new law authorizing the DOC to collect a bank fee from prisoners who have money in the inmate bank system run by the Department. (See: *FPLP*, Vol. 10, Iss. 4, pg. 16). The lawsuit claimed that the law authorizing the fee was unconstitutional because it was lumped together in a bill with unrelated subjects, a violation of Florida's constitutional requirement that bills contain provisions on only one subject.

The final judgment came in the case with Judge Clark granting summary judgment for the DOC. Judge Clark ruled that the fee provision law, section 944.516(1)(h), Florida Statutes, created by Chapter 2004-248, s. 21, Laws of Florida, did not violate the state's single subject requirement because all of the sections in Chapter 2004-248 deal with authority to operate the Florida prison system in some manner. Judge Clark held that Section 21, containing the fee provision, "is logically connected to the subject of the act because it deals with the authority to operate the Florida prison system, even though some sections deal with private prisons."

Judge Clark noted in the order granting the DOC judgment that under a new standard of review set forth in *Franklin v. State*, 29 Fla.L.Weekly S 538 (Fla. 2004), where there is a claim of single subject violation the court's review must be "highly deferential" to the constitutionality of the legislative act. Any doubt, under that standard, must be resolved in favor of upholding the constitutionality of the act, wrote Judge Clark, who also rejected the plaintiff's claim that the title of the act was misleading.

Interestingly, before ruling on the single subject violation claim, Judge Clark also addressed the DOC's claim that neither Kindred Spirits nor the two prisoners had standing to challenge the statute. The judge determined that indeed, Kindred Spirits did not have standing to pursue the case because any money it sends to prisoners no longer belongs to Kindred Spirits. The funds belong to the prisoners once given and that is whose funds the DOC is authorized to deduct the fees from. The two prisoners, therefore, did have standing to challenge the law, but not Kindred Spirits.

FAMILIES ADVOCATES PRISONERS

ON THE INSIDE

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Kindred Spirits plans to appeal the ruling, said Randall Berg, Jr., executive director of the Miami-based Florida Justice Institute, which represented the case. However, the Institute has previously cautioned Florida prisoners not to be overly optimistic that this suit can or will succeed in stopping the fee deductions. Prisoners have been advised that the best bet to eliminate the fees is for them to have their families and friends contact state legislators demanding that the fee law be repealed. (See: *FPLP*, Vol. 10, Iss. 4, pg. 16)

The DOC had initially proposed a rule to implement the fee deductions that would have allowed $4 a month to be deducted from prisoners' accounts and allow a lien to be placed on accounts for that amount for prisoners who have no money. On December 10, 2004, the Department changed that rule proposal to allow a $1 deduction for every week that a prisoner has money in his or her inmate account, and allow a $0.50 deduction for each deposit to or special withdrawal from the account, up to a max of $6 per month. No lien would be placed on indigent prisoners' accounts under the change made to the rule proposal.

Peggy Taylor, a Deland retiree whose husband is in prison, said she lives on Social Security and can only send a few dollars at a time to her husband's DOC-run bank account. "You have to scrape to pay your bills as it is, and when I send him money, they [DOC] will take some of it," she told *The Daytona Beach News-Journal*.

After the ruling was handed down denying the legal challenge to the processing fee law on Dec. 21, Sterling Ivey, the DOC's spokesman, said the Department will start collecting the fees from prisoners' accounts within 4 to 6 weeks.

Kindred Spirits Charitable Trust, Jesus Scull and James O'Callaghan v. James V. Crosby, Case No. 2004-CA-1799 (Fla. 2d. Jud. Cir. Ct.).

[Note: Florida prisoners and their families are rightly upset about this new "processing fee." This is only one more way that the DOC is gouging money out of prisoners and their families, on top of the exorbitant phone rates, steadily increasing canteen prices, co-payments for medical services, kickback commissions on Western Union deposits to inmate bank accounts, forcing prisoners to pay an exorbitant price for legal photocopies by passage of mail rules that prevent such copies from being made by a family members and mailed back in, forcing prisoners to pay high canteen prices for food to supplement the low quality and small portions provided by private food contractor Aramark Corporation, forcing prisoners to purchase shoes and underwear at DOC-inflated prices (DOC is severely restricting the clothing and shoes provided by the state) and the list goes on. The money for all that comes from the families; Florida prisoners are prohibited from any activity to earn money while incarcerated.

Being upset, however, is not going to do anything to stop the processing fees or any of the other ways that DOC is gouging money out of families to support a corrupt system to keep their loved ones incarcerated.

Action can kill the fees. Florida Prisoners' Legal Aid Organization joins with the Florida Justice Institute in calling on all family members and friends of Florida prisoners to contact your local state legislators, *right now*, the 2005 legislative session starts in March, and demand that the processing fee law, section 944.516(1)(h), Florida Statutes, be repealed. **ALL** prisoners are called on to get your family members and friends to make that protest to their legislators, *right now.*

If we do not stop this gouging by DOC, we can only expect more of the same in the future. Once started the "processing fee" will steadily be increased like the canteen prices have been. New ways to gouge our families out of money will be developed. **IF** every prisoner has just one person contact their legislator, that would be 80,000 calls to repeal the fee law, enough to probably get it done. Let's do it people.] ■

From the Publisher...

Dear Members and Readers:

Greetings. As you may already know, membership dues and advertisement income only cover a portion of the expenses associated with publishing *Florida Prison Legal Perspectives*. We depend on donations from you, our members and readers, to make up the difference. Occasionally we receive a small grant from a foundation, usually to fund a project, but given the unpopularity of prisoner advocacy, grants are hard to come by. So, we have to rely on the people who believe in the value of this magazine and its goals for the support to keep publishing. If you are reading this, *You* are one of those people, and we need your support now more than ever.

In the past several months we have been receiving more and more requests from prisoners in long term confinement on Close Management or from death row prisoners, who have nothing and no way to get anything, for free subscriptions to *FPLP*. It is our policy to provide such subscriptions as finances allow, and we have been doing that. On top of that, perhaps because of the recent hurricanes that have hurt the economy and caused a lot of hardship, we've had more family members and friends of prisoners wanting to become members but unable to afford the full dues. We, of course, can't turn them away, we sign them up and send them FPLP and welcome them into the organization.

We have quite a few prisoners who can only send a few dollars or stamps at a time, but want to receive *FPLP* and be a part of Florida Prisoners' Legal Aid Organization, Inc. Though it means more work to keep up with partial dues, we do it because we want all prisoners to become a member and receive *FPLP* if they want.

Usually, donations from our more solvent members make it possible for us to do the above, though the budget is stretched thin. Recently, however, donations have slowed, perhaps because of the hurricanes and downturn in the economy, and the budget for *FPLP* has become more than stretched, it has become very strained.

We, and when I say "we" I mean *all* those who work to keep *FPLP* going, are all volunteers. None of us receive a salary. We volunteer our time and often long hours to the effort because we care. We often donate out of our own pockets when necessary to keep everything going. And we do want *FPLP* and the organization to keep going, but we need your help and additional support right now, at this time, to make that possible.

IF you can make a donation, no matter how small or large, I'm asking you to do so now. If you are renewing your membership dues and can, include a couple of extra dollars, every little bit will help. If you can't make a donation, get a family member or friend to become a member or make a donation.

We are willing to continue bringing this magazine to you and fighting for prisoners and their families here in Florida, which we are doing in some form every day. But if we are to survive this rough bump we are experiencing right now, then you and your support are what's going to make it possible. Thank you for your support, I know we can count on you.

Sincerely,

Teresa Burns Posey

Teresa Burns Posey, Publisher ■

Wrongful Convicitons: An Inside Story

by Oscar Hanson

The story has been told countless times; the ending is much the same. Men and women freed from prison, often after spending years on death row staring in the eye execution or physically assaulted by other inmates, and for some, isolation. With the advent of better DNA testing, over 100 men have been freed from death row alone, but only after an average of eleven years, according to a study conducted by the University of Michigan.

Recently one of those wrongfully convicted was released from a Florida prison after serving over 21 years in prison for a crime he never committed. His story is shocking, but not unique. We've only touched the tip of the iceberg, the fact remains that hundreds, maybe even thousands of innocent men and women remain behind bars for crimes they never committed. And for them, their time is the hardest because they can never come to grip why

they remain in prison. Unfortunately for many, if not most, they will remain in prison until the expiration of their sentence because they do not have the key that has opened the gates for the recent exonerees: DNA.

The Accused

Wilton Dedge was released from prison on August 12, 2004, after spending 21 years, 10 months, and 23 days in the Florida Department of Corrections. He entered the prison system when he was 20 years old. Dedge lived with his parents in Port St. John, a town of 400 anchored by the twin towers of a Florida Power and Light Plant.

On December 8, 1981, Dedge was in New Smyrna Beach where he was working for a garage repairing transmissions. As the close of the day approached, one of the garage owners invited Dedge to ride on their motorcycles to Pub 44 for some sandwiches and a cold beer. After they ate, darkness fell and the two men headed to another pub called Moe's Bar.

The Assault

Forty six miles away in Canaveral Groves, a young girl, 17 years old was repeatedly beat and raped by a man who wore jeans, a white cut off T-shirt and brown motorcycle gloves. He had long, fine blond hair, a thin mustaches, and green eyes. In the span of 45 minutes, the young girl, nicknamed Trish, was cut 65 times and raped twice.

Trish's boyfriend took her to the hospital and fortunately most of her wounds were superficial.

Four days later Trish and her sister drove to nearby Port St. John to check out the home they lived in before their parents divorced. Perhaps memories of childhood days would restore Trish and erase some of the trauma she had suffered.

The Arrest

As Trish and her sister traveled through Port St. John they made a stop at the Jiffy Mart to buy cigarettes and soda. While at the store Trish saw a man she thought resembled the assailant. She discussed this with her sister who then recognized the man as an elementary classmate. When asked whether she wanted to call police, Trish answered, no.

Trish retuned to the Jiffy Mart a week later and saw the man again. Her sister initially thought his name was Walter Hedge, Trish later corrected it to Walter Dedge.

On January 8, Brevard County Sheriff's Sgt. Steven Kindrick arrested Wilton Dedge's older brother, Walter.

Two days later Sgt. Kindrick showed Trish a photo pak that included Walter. Surprisingly Trish told Kindrick that it wasn't Walter, but his brother. Later Kindrick released Walter and arrested Wilton. He then showed Trish a new photo pak that included Wilton where she quickly pointed out Wilton. No doubt about it.

The Evidence

In March of 1982 Dedge was accompanied by an investigator from the state attorney's office where he was instructed to wet his hands then dry them on paper towels. He then gave them to investigator George Dirschka who hung them in his office to dry. Later he placed them in an evidence bag and sealed it.

Eight days later, Kindrick took the bag to a crime scene investigator who had arranged a line up of five sets of bedroom sheets. In the No. 3 position were Trish's soiled bed sheets with traces of blood on them. The other four sets where white sheets from the jail's dirty laundry.

In came dog handler John Preston and his man-trailing purebred German Shepherd, Harrass II. Preston stuck the bag containing the paper towels Dedge had dried his hands with in front of the dog's nose. Suche, he commanded the dog, meaning Search in German. Twice Preston walked the dog past the five piles of sheets. On the second pass, Harrass II stopped, put his nose on pile No. 3 and sniffed.

David Jernigan, a microanalyst with the Florida Department of Law Enforcement conducted forensic tests and used pubic hair collected from Wilton and found both similarities and differences, yet determined the differences were not sufficient to entirely eliminate Dedge as a suspect.

Prosecutors were more zealous. They were sure Dedge was their man: Trish was convincing; they had dog scent evidence; and now, the pubic hair. To them, it all fit.

The Trial

The trial lasted eight days. Trish pointed Dedge out; she said he was the man who raped her. The dog handler and the hair analyst testified. In his defense, Dedge said it wasn't him. His alibi witnesses—five in all—put him at the auto repair shop, nearly 50 miles away.

The jury deliberated four hours then pronounced him guilty as charged.

At sentencing, Dedge's father beseeched Circuit Judge J. William Woodson. Dedge Sr. told Judge Woodson that someone out there did this, and they have not been caught. The Judge acknowledged that and responded, but the juries I have seen let a lot of guilty ones go, in my mind and the defense attorneys minds, that they know are guilty.

Dedge's lawyer, Joseph Moss, jumped in and stated that he had never had a case in his 12 years of practice that he thought was decided as wrongly as this one.

Dedge was sentenced to 30 years.

The Snitch

During the 1980's, Sumter Correctional Institution was coined the gladiator school for Florida's prisoners. So many inmates had knives and other lethal objects. Anger and racial tension permeated the place.

Dedge's first eighteen months was kept to himself, unassuming, observant, until good news came as the calendar turned to 1984. An appeal court ruled that Dedge's trial judge should not have barred his defense attorney from putting on an expert to challenge the dog-scent evidence. He was entitled to a new trial.

On January 23, 1984, Dedge left Sumter Correctional bound for Brevard County to request bail while he waited for his second trial. During transport, several stops were made at local jails and other prisons. At the North Florida Reception Center at Lake Butler, Clarence Zacke got in the van. Zacke had been sentenced to 180 years for three murder-for-hire plots. He had become accustomed to testifying against others as a jailhouse snitch, and with favorable results: His sentence was cut. He was heading for Brevard to testify against someone else.

Shackled and seated on wooden benches opposite each other, Dedge and Zacke talked for two hours. The next night, Dedge's prosecutor, John Dean Moxley, Jr., got a call at home. It was Zacke's son. He had some information regarding the Dedge case.

At Dedge's bail hearing a few days later, Clarence Zacke testified that Dedge told him he "raped and cut up some old hog." Bail? Denied.

The Second Trial

Mark Horwitz was Dedge's new lawyer at the second trial, and he had a slew of ammunition ready. Among the arsenal was transcripts from the previous trial where the dog handler had testified that he was a member of the United States Police Canine Association. He was not. Preston had also misrepresented his level of training at the Tom McGean School for Dogs in Pennsylvania.

Moreover, the United States Postal Service had investigated Preston, questioning the reliability of his tracking in a number of criminal cases. Dog handling experts had accused Preston of cuing his dogs and had questioned his assertion that his dogs could track someone years after the fact. In one case, a judge ordered a test after just four days; Preston's dog failed.

As Preston's credibility faltered, the prosecution shifted focus to its new evidence: Clarence Zacke. A veteran snitch, his testimony is other cases shaved 130 years from his sentence and got a confiscated truck returned to his girlfriend. He also got the prison transfer he wanted. For testifying against Dedge, he hoped to improve his chances for parole.

The all-male jury deliberated seven hours and reached the identical verdict as had the first jury.

At sentencing, December 12, 1984, Prosecutor Robert Wayne Holmes pointed to Zacke's testimony that Dedge had threatened to kill the victim. That gave the judge the leeway to exceed the 30 years Dedge got initially. This time Dedge was sentenced to life in prison.

Inside Prison

Dedge was returned to prison where he found himself becoming friends with murders, drug dealers, burglars, and a host of others. He chose not to focus on what they were in prison for, instead he took them for how they were like.

Soon he got his GED and practiced various hobbies. He tried not to think about his anger for the system, but occasionally he'd catch himself writing about it and the prosecutor, only to rip it up later.

For five years he lived court document to court document until he exhausted all available remedies. He spent two years with nothing to cling to, until he read a newspaper article about a new DNA test.

Dedge contacted his former attorney's secretary to determine if the pubic hair and semen sample evidence still remained. He contacted 35 lawyers; not one would take his case.

Four years passed.

In early 1994, Dedge was watching Good Morning America where lawyer Peter J. Neufeld and Barry C. Scheck had started the Innocence Project, a nonprofit legal clinic that worked to obtain new DNA testing for prisoners.

Dedge wrote and the Innocence Project started investigating. The pace was excruciating. Three more years passed.

In 1997, Scheck's team, unable to get Dedge's prosecutors to agree to test his DNA, asked a judge for permission. One of the first in Florida.

The state fought the request to apply new science to an old case, claiming the time for post conviction relief had elapsed.

Appeals courts agreed the Dedge was "procedurally barred" from obtaining the evidence.

By now, prominent Miami Lawyer, Milton Hirsch, an expert on criminal procedure, had joined the team. He worked for free and appealed to a judge to allow the test for the sake of justice. In 2000, the judge agreed.

Unfortunately the semen sample had degraded across 18 years; the DNA test was inconclusive. But the test on the pubic hair was definitive: It had not come from Dedge.

At trial, Holmes had told the jury that the pubic hair all but put Dedge in the victim's bed. Now he claimed the hair was irrelevant, it could have come from anywhere.

Hirsch demanded a new trial. Holmes responded the timing was off. First, Holmes had argued that Dedge

was too late—the time for appeals had passed—now he argued that it was too early.

The Florida Legislature had recently passed a law providing a mechanism for prisoners to seek DNA testing in old cases. Because Dedge got permission for DNA testing before the new law passed, the prosecution said he could not take advantage of the new law.

The issue found its way to the Fifth District Court of Appeal that ruled Dedge could indeed use the DNA evidence to seek a new trial.

Freedom

After the inconclusive DNA test on the semen sample in 2000, a more advanced test, known as Y-chromosome had become available.

The two sides now flopped positions.

The state, which had opposed tests, wanted this one. The defense, which had demanded tests, opposed it—for now. It had been three years since DNA proved the pubic hair came from somebody other than Dedge.

The state got its way.

On August 11, Dedge got a call from Nina Morrison, one of his new lawyers. The results were back, the semen was not his. You're free.

At 1:15 a.m. August 12, he was released to his family.

Epilogue

The outpouring from the community was overwhelming. The men at his brother's metal fabrication plant chipped in $300 to help Dedge in his new lease on life. A lady sent a $100 coupon for Wal-Mart. Someone at the checkout lane at Publix handed him $10. A dentist offered free dental service. And someone sent him $5,000 anonymously through a local church.

Several job offers came in, many from wastewater and water plant treatment businesses.

Leading the effort to compensate Dedge for his lost years is Sandy D'Alemberte, a former legislator and Florida State University president whose office in next door to the Florida Innocence Initiative. Currently the law caps claims against the state at $100,000; to get more, the Legislature must pass a special claims bill.

Dedge's attorneys say they intend to file a civil rights lawsuit for wrongful imprisonment. Also, J. Cheney Mason, an Orlando lawyer, said he is investigating whether Zacke, the snitch, was planted on the prison transport van to get Dedge to talk. Zacke has said that prosecutors from the Dedges case fed him information to make another case against Gerald Stano, an accused serial killer who has since been executed.

Dedge's story is not unique. To date there have been over 180 people exonerated, many from death row as a result of this new DNA testing. Countless others remain imprisoned without this freedom tool. It's time for prosecutors to be accountable for wrongful prosecution. If these types of prosecutions are allowed to continue, then many of the civil liberties carved by our founding fathers are meaningless, and what we once deemed vital to our society is now a delusion. ■

Legislative Policy Proposal Summmary

TALLAHASSEE—On Dec. 6, 2004, the Florida Department of Corrections submitted a proposal to the state Legislature suggesting amendments to Chapter 948, Florida Statutes.

The proposal recommends both technical and substantive changes to Chapter 948. It urges the legislature to rename that chapter of state laws from "Probation and Community Control" to "Community Supervision," and would provide definitions for department, conviction, community residential facility, non-institutional residential placement, supervision services and violent offense.

The proposal would re-define the levels of community supervision to: Administrative Supervision, Non-violent Offender Supervision, Intensive Offender Supervision, and Community Control. Electronic monitoring would be authorized with Intensive Offender Supervision and Community Control at the discretion of the FDOC.

The redefined supervision levels would enable the FDOC to re-direct resources to supervision of offenders based upon their risk to public safety, according to the proposal.

The proposal would require local law enforcement to arrest and take into custody offenders without a warrant at the request of a probation officer. It has a requirement for the Clerk of the Circuit Court to implement a uniform order of community supervision and further would require the clerk to provide, at no cost, specified court documents to the FDOC.

The proposal would also create "Automated Reporting Authorized," to allow low risk, non-violent offenders to report and submit written reports without reporting to the probation officer in person. It would also require the state attorney to notify the court of any outstanding warrants of arrest and whether the accused is currently on any type of community supervision.

The FDOC, through the Office of Community Corrections, provides supervision of over 150,000 offenders on probation, community control, drug offender probation, sex offender probation, pretrial intervention, and post prison release. Supervision is provided through three regional offices and twenty circuit offices, each circuit corresponding to the judicial circuit in its geographical area.

The FDOC currently has 2,346 officers supervising offenders sorted into five budget entities that correspond to different types of supervision (community

control, drug offender probation, pretrial intervention, sex offender, and post prison release supervision, and regular probation).

Because the term "probation" only describes one type of supervision, the proposal shows that the intent of the DOC is to re-define any type of offender supervision program as "Community Supervision." The term "community supervision" is substituted throughout Chapter 948 for the terms "probation" and "community control" in the legislative proposal.

The FDOC is hoping this proposal will be introduced as a bill during the 2005 legislative session and passed into law this year. ■

Misdirected Injustice

Eleven people directed to the wrong courtroom in the Seminole County Courthouse were arrested and jailed when they didn't appear before the proper judge, who was in an adjoining courtroom less than 100 feet away.

The six men and five women spent eight hours in jail before everything was corrected. One of the jailed was in court on a traffic ticket for not having her registration and proof of insurance with her as she traveled in the county. Her citation directed her to report to Courtroom 1B. However, the County judge was holding court in Courtroom 1A.

When the eleven people failed to show up in Courtroom 1A, Seminole County Judge John Sloop signed warrants for their arrests. By the time the eleven finally discovered they had been misdirected by court personnel and asked to appear before the judge to explain what had happened, the draconian judge would not see them and ordered their arrests.

Later that day, Circuit Judge James Perry, chief judge of the 18th Judicial Circuit, took action to release the eleven. For reasons unclear, Sloop took similar action to have the eleven released without bail.

[Source: Associated Press, *Florida Today*, 12/5/04] ■

Prison Guard Loses Beach House to Immate

A Texas prison guard has been forced to give his beach house to an inmate he sexually assaulted. Guard Michael Chaney agreed to give inmate Nathan Essary the deed to his beach property near Galveston to settle the sexual-assault lawsuit against him. Essary claimed he was assaulted by Chaney three years ago at a prison unit in Navasota, Texas. He complained to Chaney's superior but got nowhere, so he secretly collected the guard's DNA during two attacks and mailed it to the FBI and federal prosecutors in Houston. A DNA analysis led to Chaney's arrest. His criminal case is pending. –USA Today, 12/23/04. ■

From the Associate Editor...

As the staff at FPLP focuses on the new year and the many challenges it will undoubtedly bring. I have reflected on some of the major events that occurred in 2004 to see how they will likely set the stage for events in 2005. Perhaps the most significant news involved the exodus from prison of an alarming number of wrongfully convicted, freed primarily on DNA evidence that exonerated them. This topic is one that shocks the conscience and one that is especially sordid for me for reasons beyond this commentary.

But as the number of exonerated grows, concerns are mounting about the difficulties these former prisoners experience in finding employment and readjusting to society once they are free. While prison paroles and early release prisoners typically get free job placement assistance and temporary housing, the exonerated often are released into an employment no-man's land.

These wrongly convicted men and women get scant help finding jobs. For obvious reasons their résumés have gaps from spending years in prison. The average time from wrongful conviction to exoneration is more than eleven years, according to a study conducted by the University of Michigan.

The undeniable problem lies in the lack of legislative support for the wrongfully convicted. Only 18 states, the federal government and Washington D.C., have laws for compensating the exonerated. Even the states with such laws have deterrents in place that cause exonerees not to use them. Compensation can take years to get and in most instances, exonerees need an official pardon or an adjudication from the court declaring them innocent. But compensation alone is not enough. The real problem lies in employability.

Potential employers are leery of hiring former prisoners who may have been wrongfully convicted. Job skills have proliferated so much that some exonerees may have never sent an e-mail or even used a computer. Even more significant is the emotional displacement these men and women suffer. According to the Michigan study, more than 95 percent grapple with emotional problems. Some narrowly escaped execution. Others have been physically or sexually assaulted by other inmates or kept in isolation. Many are obviously angry. And some even resort to crime after their release.

Another huge problem plaguing the exonerated is the fact that their records will continue to show they were arrested, tried, and convicted. Records are not automatically expunged, even in cases of a gubernatorial pardon. In other words, employers conducting a

background check will likely come across the information *and opt* not to interview the applicant, especially with unemployment figures around 5.4 percent as it was in the 4th quarter of 2004.

Action must be taken to generate legislative support for employment assistance and record expungment. For our freeworld readers, contact your local representatives and express your concern for these unjustly treated exonerees, demanding some legislative action to address their concerns. For our incarcerated friends, tell your family to make their voice heard. Our wrongfully convicted counterparts desire our support. After all, one day it could be someone from your family in these shoes, or worse—yourself.

On behalf on the staff at FPLP, have a successful and prosperous New Year. *–Oscar Hanson* ■

What states offer the exonerated

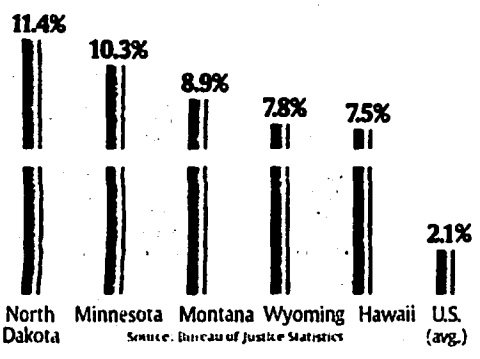
Just 18 states, Washington, D.C., and the federal government have compensation laws for the wrongly convicted. Amounts are sometimes determined by a state agency, sometimes by a court and can be capped by law. Final payments vary widely:

Alabama: Minimum of $50,000 for each year served.
California: $100 a day for each day served.
District of Columbia: No cap.
Illinois: Maximum $15,000 for up to five years; $30,000 for six to 14 years, $35,000 for more than 14.
Iowa: $50 a day for each day served and lost wages up to $25,000 a year, plus attorneys' fees.
Maine: Maximum $300,000. No punitive damages.
Maryland: No cap on compensation described as "actual damages sustained."
Montana: Free tuition to any school in the state's university system.
New Hampshire: Maximum $20,000.
New Jersey: Capped at twice the amount earned the year before incarceration or $20,000, whichever is greater.
New York: No cap.
North Carolina: $20,000 a year, total not to exceed $500,000.
Ohio: $25,000 a year of incarceration, plus lost wages and attorneys fees.
Oklahoma: $175,000 maximum. No punitive damages.
Tennessee: $1 million cap.
Texas: $25,000 per year of incarceration, total not to exceed $500,000, plus one year of counseling.
Virginia: 90% of the average Virginia income for up to 20 years; $10,000 in tuition to enroll in the state's community-college system.
West Virginia: No cap.
Wisconsin: $25,000 cap.
Federal government: $5,000 cap.

Sources: Adele Bernhard, professor of law at Pace University; The Innocence Project

North Dakota leads prison boom

States that had the largest percentage increases in state prison inmates from Dec. 31, 2002 to Dec. 31, 2003:



Source: Bureau of Justice Statistics

Prisoner Suicide: Many Mentally Ill

Prison officials in Iowa and Ohio are studying suicide prevention policies in the wake of recent deaths at their state prisons. Despite the spike of suicides in these two states, the suicide rate in both state and federal prisons, as well as local jails, has declined over the past two decades, according to the Federal Bureau of Prisons and the Bureau of Justice Statistics. Yet suicide remains the No. 1 cause of death in most local jails and is the third-leading cause in state and federal prisons, behind natural causes and AIDS, making suicide a continuing concern for corrections officials.

Many inmates who take their own lives have diagnosed mental health problems and according to a specialist on inmate suicide there is a connection between mental illness and suicide. Yet, Lindsay Hayes, project director for the National Center on Institutions and Alternatives, a non-profit group dealing with mental health issues, claims that it's a misnomer to believe you have to be mentally ill to kill yourself. The stresses of being in prison or jail can lead a seemingly healthy person to attempt suicide.

Nevertheless, criminal justice and mental health experts agree that mental illness is a common thread connecting many prisoners who take their life.

In October 2003, a Human Rights Watch report on how U.S. prisons deal with mentally ill inmates noted there are three times more mentally ill people in prison than in mental health hospitals. In addition, prisoners have rates of mental illness two to four times greater than the rates found in the general population.

There are many mentally ill who are homeless because they have nowhere else to go. If they are not hospitalized, there are too few community-based mental health programs available to assist them. And if they commit even petty crimes, they wind up incarcerated.

Prisons are the de facto mental institutions of this century. Not surprisingly, they are woefully ill-equipped to deal with this increasingly large population. In Florida, the trend has been to sedate and lockdown such prisoners in close management cells for 23 hours a day.

And while some say that greater awareness of how to prevent suicide has contributed to the declining rate of prisoner suicide, others say that the development of suicide-prevention policies is not enough. There has to be a mechanism in place to ensure those protocols are in fact put into place and acted on. Something many question has occurred.

[Source: USA Today, 12/6/04] ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Consistent with recent legislation, the Florida Supreme Court has extended the deadline for inmates requesting postconviction DNA (deoxyribonucleic acid) testing to prove their innocence. The deadline has been extended to October 1, 2005. Any persons with cases that could be resolved favorably through DNA testing are strongly urged to pursue such relief immediately in order to avoid missing the October 1, 2005 deadline. The purpose of this article is to provide some guidance as to the procedures relating to DNA testing.

Florida Rule of Criminal Procedure 3.853 and Florida Statutes §925.11 provide for postsentencing DNA testing. Firstly, it is important to note that relief under rule 3.853 is only available to defendants who took their case to trial. Criminal defendants who entered a guilty or *nolo contendere* plea cannot avail themselves of the benefits of Rule 3.853. See, Delidle v. State, 866 So.2d 748 (5th DCA 2004). But, if a defendant took his case to trial, was convicted and later learned that DNA evidence existed which likely would have made a difference at trial, Rule 3.853 is a viable postconviction vehicle for seeking relief from a judgment and sentence. §925.11 provides that any person who has been tried and found guilty of committing a crime and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he has been sentenced which may contain DNA and which would exonerate that person or mitigate the sentence that person received.

A Rule 3.853 motion must be under oath, filed with the trial court, and should include the following:

*a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location of last known location of the evidence and how it was originally obtained.

*a statement that the evidence was not tested previously for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result.

* a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime.

* a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received

*a statement of any other facts relevant to the motion.

* a certificate that a copy of the motion has been served on the prosecuting authority.

If the 3.853 motion is going to be filed *pro se*, it would be wise to request a finding that you are indigent (if applicable) and the appointment of counsel. The rule provides that the trial court may appoint counsel. Additionally, unless the movant is adjudicated indigent, he will be responsible for the costs of the DNA testing. But, if there is a finding of indigency, the State shall bear the cost of the testing.

If the court finds that the allegations in the 3.853 motion are sufficient, then DNA testing will likely be ordered. Pursuant to Rule 3.853, the testing will be done by the Florida Department of Law Enforcement. However, the rule does allow for testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such testing. Therefore, if feasible, it may be beneficial to have the DNA testing done by a laboratory unconnected with the State.

If DNA testing has been ordered and shows that the movant is unconnected to the DNA samples available, a Rule of Criminal Procedure 3.850 (or 3.851 in a capital case) motion should be filed requesting a new trial or resentencing. A motion to vacate filed under rule 3.850 or a motion for postconviction or collateral relief filed under rule 3.851, which is based solely on the results of the court-ordered DNA testing obtained under Rule 3.853, shall be treated as raising a claim of newly-discovered evidence and the periods of limitation set forth in rules 3.850 and 3.851 shall commence on the date that the written test results are provided to the court, the movant, and the prosecuting authority.

Once again, it is important to keep in mind the October 1, 2005 deadline that has been set for Rule 3.853. A motion for postconviction DNA testing must be filed: (1) within 4 years following the date that the judgment and sentence in the case became final if no direct appeal was taken; (2) within 4 years following the date the conviction was affirmed on direct appeal if an appeal was taken; (3) within 4 years following the date collateral counsel was appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case in which the death penalty was imposed; or (4) by October 1, 2005, whichever occurs later. Or, the motion may be filed at any time if the facts on which the petition is predicated were unknown to the petitioner or the movant's attorney and could not have been ascertained by the exercise of due diligence.

If a 3.853 motion is wrongfully denied by the trial court the movant may request a rehearing if he does so within 15 days of the denial. Such a motion for rehearing shall toll the time for filing an appeal until the motion for rehearing has been ruled upon. If the trial court

denies the motion for rehearing, the denial can be appealed to the appropriate district court of appeal. The time for filing a notice of appeal under Rule 3.853 is within thirty days of when the order denying the 3.853 motion is rendered or from when a motion for rehearing is denied, whichever is later.

Florida Rule of Criminal Procedure 3.853 and Florida Statutes §925.11 provide an important vehicle for innocent persons wishing to challenge their convictions when DNA will prove their innocence. The deadline has been extended for older cases and should not be ignored. If you have a case that is appropriate for Rule 3.853 relief, a motion should be filed immediately requesting DNA testing. Otherwise, this possible avenue for relief may be waived.

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.* □

Death Penalty Approval Slips

Following the exoneration of an overwhelming number of mistakenly convicted death row prisoners, the public's approval of capital punishment has slid from 80 percent in 1994 to 66 percent this past year, according to Gallup polls.

Recently the Scott Peterson trail underscored the unevenness around the country in applying the death penalty. At the extremes are California, where the pace of death-sentence appeals and executions is extremely slow, and Texas, which has put more than three times as many inmates to death as the next closest state since the United States Supreme Court reinstated capital punishment in 1976.

While California's death row is the nations biggest—643 inmates—it's modest in relation to the state's 35.5 million population. Of 11 states with at least 100 condemned inmates, nine, including Texas, have more per capita than California. Only one of the eleven, Pennsylvania, has a lower ration of executions to population. Texas has the second highest ratio after Oklahoma.

Prisoners condemned to death row may sit for up to 20 years before they are ultimately executed. It often takes four or five years for a condemned inmate just to get an initial appeal in California. In Texas, the process is much faster. Florida rests somewhere in the middle.

Federal appeals of death sentences can't begin until state appeals are exhausted. They habitually take longer.

The national average stay on death row is 9.6 years, according to the Justice Department.

A death row prisoner's biggest handicap is poor counsel. For example, at least four Texas prisoners have been executed because their attorney's failed to file federal appeals on time, claims Richard Dieter, executive director of the Death Penalty Information Center in Washington, D.C., a clearing house for capital punishment data. ■

States with executions since 1976

Thirty-eight states and the federal government allow capital punishment. States that have executed prisoners since the Supreme Court legalized the death penalty in 1976:

State	Executions Since 1976	2004
Texas[1]	337	23
Va.	94	5
Okla.	75	6
Mo.	61	-
Fla.	59	2
Ga.	36	2
N.C.	34	4
S.C.	32	4
Ala.	30	2
La.	27	-
Ark.	26	1
Ariz.	22	-
Ohio	15	7
Del.	13	-
Ill.	12	-
Nev.	11	2
Ind.	11	-
Calif.	10	-
Miss.	6	-
Utah	6	-
Md.	4	1
Wash.	4	-
Neb.	3	-
Pa.	3	-
Ky.	2	-
Mont.	2	-
Ore.	2	-
Colo.	1	-
Idaho	1	-
N.M.	1	-
Tenn.	1	-
Wyo.	1	-
Federal gov.	3	-

Note: Connecticut, Kansas, New Hampshire, New Jersey, New York and South Dakota allow the death penalty but have not executed a prisoner since 1976.
1 – Texas has executed one prisoner in 2005
Source: Death Penalty Information Center

U.S. Prison Population Continues to Grow

According to the latest U.S. Bureau of Justice Statistic's report, the number of people in federal and state prisons in the U.S. was a record 1.47 million in 2003. The report noted, however, that the rate of growth in the number of prisoners was only 2.1%, continuing a decline from 6.5% in 1995. This, according to the report's authors, suggests that fewer new prisoners are entering prisons, but those already there are serving longer sentences and are not being release, leading to an older prison population. Since 1995, middle aged prisoners have made up almost half of the prison population growth rate, and according to the bureau's annual survey of prisoners, in 2003 almost 30% of prisoners nationwide were between the ages of 40 to 54-years-old.

The bureau's report also notes that:

- Women are being sent to prison at a higher rate than men. In 2003 there were about 101,000 women in federal and state prisons, an increase of almost 50% since 1995. The federal prison system and Texas and California accounted for almost one-third of all female prisoners.

- The U.S. average was 482 prisoners per 100,000 residents, Louisiana, Mississippi, Texas, Oklahoma and Alabama had the highest rate of incarceration, with more than 635 prisoners per 100,000 state residents.

- The racial makeup of U.S. prisons remained largely the same. On Dec. 31, 2003, approximately 44% of all prisoners were black, 35% were white and Hispanics made up about 19%. Nationwide, about 9% of all black males between 25 and 29-years-old were in prison, compared to almost 3% of Hispanic males and 1% of white males in the same age group.

- The federal prison population is growing the fastest. Since 1995 the federal system's growth rate has averaged 7.7% per year, compared to an average of 3.3% for the state prison population. The general consensus is that the growth in federal prisoners is directly attributable to the Bush administration's aggressive enforcement of federal drug laws.

Supporters of increasing incarceration say that falling crime rates are proof that longer sentences and reduced release opportunities are effective in reducing crime.

"The reason crime rates have fallen to levels we haven't seen for more than 30 years is due to the nationwide movement to keep habitual criminals behind bars," said Michael Rushford, president of the Criminal Justice Legal Foundation in Sacramento, CA. Rushford also claims, "The increase in inmate population since 1995 reflects the fact that fewer repeat felons are being released from prison."

Critics of America's incarceration policies argue that the record prisoners, combined with continuously falling crime rates, justifies implementing less costly alternatives to prison.

"Half the prison population [is] now serving time for a non-violent offense, and [there is] an aging prison population," said Marc Mauer, assistant director of The Sentencing Project that's based in Washington, D.C. □

More inmates

The number of state and federal prison inmates hit a record high last year:

State	2003	2002	% change
Ala.	29,253	27,947	4.7
Alaska	4,527	4,398	2.9
Ariz.	31,170	29,359	6.2
Ark.	13,084	13,091	-0.1
Calif.	164,487	161,361	1.9
Colo.	19,671	18,833	4.4
Conn.	19,846	20,720	-4.2
Del.	6,794	6,778	0.2
Fla.	79,594	75,210	5.8
Ga.	47,208	47,445	-0.5
Hawaii	5,828	5,423	7.5
Idaho	5,887	5,746	2.5
Ill.	43,418	42,693	1.7
Ind.	23,069	21,611	6.7
Iowa	8,546	8,398	1.8
Kan.	9,132	8,935	2.2
Ky.	16,622	15,820	5.1
La.	36,047	36,032	0.0
Maine	2,013	1,900	5.9
Md.	23,791	24,162	-1.5
Mass.	10,232	10,329	-0.9
Mich.	49,358	50,591	-2.4
Minn.	7,865	7,129	10.3
Miss.	23,182	22,705	2.1
Mo.	30,303	30,099	0.7
Mont.	3,620	3,323	8.9
Neb.	4,040	4,058	-0.4
Nev.	10,543	10,478	0.6
N.H.	2,434	2,451	-0.7
N.J.	27,246	27,891	-2.3
N.M.	6,223	5,991	3.9
N.Y.	65,198	67,065	-2.8
N.C.	33,560	32,832	2.2
N.D.	1,239	1,112	11.4
Ohio	44,778	45,646	-1.9
Okla.	22,821	22,802	0.1
Ore.	12,715	12,085	5.2
Pa.	40,890	40,168	1.8
R.I.	3,527	3,520	0.2
S.C.	23,719	23,715	0.0
S.D.	3,026	2,918	3.7
Tenn.	25,403	24,989	1.7
Texas	166,911	162,003	3.0
Utah	5,763	5,562	3.6
Vt.	1,944	1,863	4.3
Va.	35,067	34,973	0.3
Wash.	16,148	16,062	0.5
W.Va.	4,758	4,544	4.7
Wis.	22,614	22,113	2.3
Wyo.	1,872	1,737	7.8
Federal	173,059	163,528	5.8
USA	1,470,045	1,440,144	2.1

Source: Bureau of Justice Statistics

IN THE NEWS

AZ – According to a study released by *The Arizona Republic* in Nov. '04, non-violent juveniles in Arizona are more likely than violent juveniles to return to prison within three years of their release. The average time served by non-violent juvenile offenders in Arizona is 32 months, twice as long as the national average. The study also found that once released more than one in four nonviolent juveniles will commit a violent crime.

FL – A Florida Department of Corrections probation officer in Bradenton, R. Steven Quesenbury, 60, was arrested and charged with raping and fondling a child under the age of 12 on August 27, 2004.

FL – At least 200 employees have been hired at juvenile justice facilities in Florida in recent years after being fired from similar jobs for violence, misconduct or incompetence, according to a recent report in *The Palm Beach Post*. The report was the result of a yearlong review of records from the state and private contractors. State officials claim they have tightened hiring standards.

FL – In Nov. '04 the state agreed to pay $1.45 million to settle a lawsuit filed by the mother of a teenager who died from a burst appendix in a state juvenile facility. Miami Children's Hospital also agreed to settle but didn't disclose the financial terms. It was under contract to provide nurses at the facility. Cherry Williams said her son, Omar Paisley, 17, suffered cruel and unusual punishment when his pleas for help were ignored for three days before he died in June 2003. His death prompted reforms in the Department of Juvenile Justice and lost jobs for almost two-dozen employees. The nurses have been charged with manslaughter and third-degree murder.

FL – Bowing to continued and increasing criticism of the state's refusal to automatically restore ex-felons' civil rights and a huge backlog of applications to have rights restored, on Dec. 9, 2004, Gov. Bush and the Cabinet approved new rules they say will make it faster and easier for some felons to regain their civil rights. Florida is only one of seven states that does not automatically restore civil rights to felons once they complete their sentence, instead, to have rights restored ex-felons must apply for demency to the governor and cabinet sitting as the Clemency Commission, a process that can take years. Currently Florida has over 500,000 people who have lost their civil rights, more than any other state. There is currently a backlog of about 4,000 clemency applications pending, but the Commission only considers about 200 applications a year. The backlog is expected to increase where the state recently lost a legal case and is now required to provide more assistance to felons to apply for rights restoration when they are released from prison. Critics, including the ACLU, say the new rules don't go far enough and that civil rights, including the right to vote, should automatically be restored once a person completes their sentence. Gov. Bush said he will ask the Legislature for more money this year so the Parole Commission, which conducts clemency investigations, can hire more people. Bush says that will help speed up the process and reduce the backlog.

FL – The Florida Department of Corrections angered judges, prosecutors and defense attorneys in Pinellas County in Dec. '04 when the DOC pulled probation officers out of courtrooms where they have been available for years to help judges decide the fate of probation violators. Responding to two high-profile murder cases in 2004, linked to men who some say should have been in jail for violating parole; the DOC has instituted a zero-tolerance policy in which all violations result in arrest. DOC officials said it had to pull probation officers out of the courtrooms because they are needed in the field to help supervise the 150,000 people on probation statewide. Officers have also been pulled from courtrooms in Orlando, Jacksonville, Tallahassee and Ft. Myers. Other bay counties, including Hillsborough, will follow Pinellas, DOC officials say. Critics say the DOC, by arresting all violators, is just trying to insulate itself from more bad press and let judges take all the heat if they release a parole violator after the DOC has them arrested. Since the DOC's zero-tolerance policy has started, public defenders report that the number of parole violation cases assigned to their offices have tripled, and many of the violations are absurd. In one case a probationer was violated because his roommate had a dog that wasn't licensed. County jails are being overwhelmed with the probation violation arrests, several sheriffs have said.

GA – During Dec. '04 the Georgia Department of Corrections announced that it is cutting the daily amount of calories fed to female prisoners by about 20 percent to 2,472. The National Academy of Science recommends 2,200 calories per day for teen-age girls and active

women. The new policy won't effect male prisoners' diets, who will still get about 3,000 calories a day.

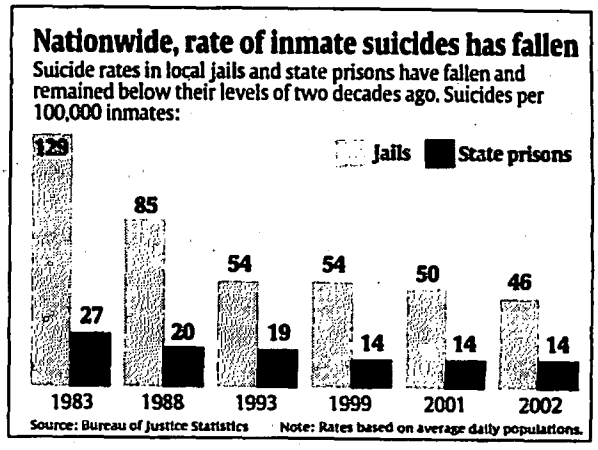
IN – On Jan. 5, 2005, Gov.-elect Mitch Daniels named a prison official from Kentucky to head Indiana's Department of Corrections. J. David Donahue, deputy commissioner of the Kentucky DOC, is the first person from outside the state that Daniels has appointed to head an Indiana agency.

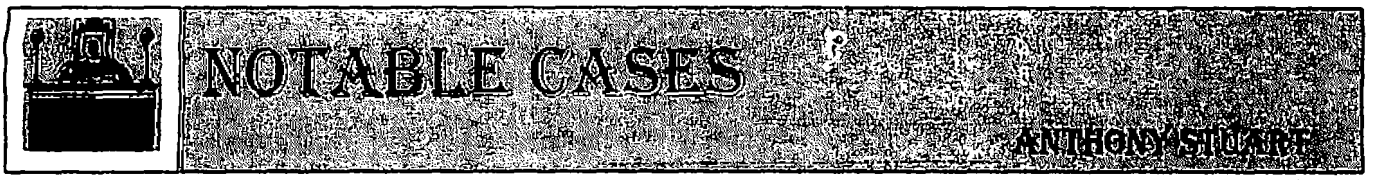
KY – The Kentucky prison population has exploded 600 percent since 1970 and will continue growing because of "irrational" sentences enacted by lawmakers, claims a report released in Nov. '04. U of K professor of law Robert Lawson, who wrote Kentucky's penal code, says the state budget for incarcerating prisoners has risen from $7 million to more than $300 million since 1970 and is threatening to bankrupt the system.

VA – Disbarred attorney Thomas Smolka, 57, was sentenced to six years in federal prison on Sept. 10, 2004. Smolka, who had formerly been tried and acquitted of murdering his wife in Florida, was convicted of mail fraud charges for defrauding prisoners and their families out of money for legal work he never performed. Smolka still faces mail and bank fraud charges in Oregon, where he went after jumping bail and fleeing the charges in Virginia. Oregon prosecutors charge that Smolka had falsely claimed he had been sexually abuse by a Catholic priest while growing up in Portland. Smolka was also ordered to pay his victims $130,000 in restitution. U.S. District Judge Robert Payne, who sentenced Smolka, told him, "You are an embarrassment to the profession of law."

VT – Beginning Feb. 1, 2005, private company Prison Health Services will take over provision of health care to Vermont state prisoners. The company beat out several other private medical companies with its $26 million bid for the three-year contract. The Tennessee-based firm provides medical services to about 235,000 prisoners nationwide. It has been the subject of more than 1,000 prisoner lawsuits and complaints around the country, but a spokesman for the firm, Lawrence Pomeroy, said PHS is sued less often than its competitors. The company will replace Correctional Medical Services, another private medical contractor, whose contract expires in January. CMS had been criticized for billing the state for services that were never provided. Maine recently refused to renew its contract with PHS saying the company has "performance problems." Prisoner advocates in Vermont say the state should scrap private companies altogether and use state employees to provide health care to prisoners.

WV – The West Virginia state prison population more than doubled between 1994 – 2004, from 1,962 to 3,942. The Legislature during that period had increased sentences for a variety of crimes. □





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.

U.S. SUPREME COURT

Florida v. Nixon, 18 Fla.L.Weekly Fed. S33 (11/13/04)

The main concern in this case is where a defense counsel concedes the guilt of a defendant for the commission of murder at the guilt phase of a trial, and to concentrate the defense on establishing cause for sparing the defendant's life at the penalty phase. All without the consent of the defendant.

The Florida Supreme Court held that any concession of that order, made without the defendant's express consent, however gruesome the crime and despite the strength of the evidence of guilt, automatically ranks as prejudicial ineffective assistance of counsel necessitating a new trial.

It was decided that the Florida Supreme Court erred in applying a presumption of deficient performance, as well as a presumption of prejudice. The Untied States Supreme Court held that it has instructed that latter presumption is reserved for cases in which counsel fails meaningfully to oppose the prosecution's case. A presumption of prejudice, it further explained, is not in order based solely on a defendant's failure to provide express consent to a defendable strategy counsel has adequately disclosed to and discussed with the defendant.

The Florida Supreme Court's judgment was reversed based on the findings and the case was remanded for further proceedings consistent with the United States Supreme Court's opinion.

U.S. COURT OF APPEAL

Day v. Crosby, 18 Fla.L.Weekly Fed. C54 (11th Cir. 11/29/04)

In this case the 11th Circuit Court granted Patrick Day's certificate of appealability to determine whether the district court erred in addressing the timeliness of his habeas corpus petition, filed pursuant to 28 U.S.C. section 2254, after the appellee had concede that the petition was timely.

Day had filed his petition beyond the one-year time limit as required under the Antiterrorism and Effective Death Penalty Act (AEDPA). A magistrate judge directed an order to the state to make arguments regarding potential failure to exhaust state remedies or procedural default. The order did not mention the statue of limitations, although it noted the magistrate judge's acknowledgment of Day's petition being "in proper form." The state answered the order erroneously asserting that it agreed the petition was timely filed. The district court then *sua sponte* ordered Day to show cause why his petition should not be dismissed as untimely.

After reviewing Day's arguments to the show cause order, the magistrate judge recommended dismissal of his petition because Day's arguments did not meet the standard for equitable tolling under section 2244. In his objection to the report and recommendation, Day argued for the first time that the concession of timeliness by the state was dispositive.

The Eleventh Circuit Court cited *Jackson v. Secretary for the Department of Correction* where it had held that after the state has filed a response to a habeas petition that does not raise the statute of limitations as an affirmative defense, a district court may dismiss a habeas petition *sua sponte* because the limitations period of one year, under AEDPA, has expired.

Day argued that both the Sixth and Ninth Circuits had reached a contrary result, but the Eleventh Circuit held that *Jackson* is binding and that it required it to part with the Sixth and Ninth Circuits on the issue.

The Eleventh Circuit explained that Day's *sua sponte* dismissal differs significantly from other *sua sponte* rulings that the United States Supreme Court has criticized. In *Calderon v. Thompson*, the Supreme Court was unanimous as to one point: it refused to condone the efforts of a court to recall its own mandate as a mechanism to frustrate the requirements Congress imposed under AEDPA. The eleventh Circuit decided its decision fulfilled the purposes of AEDPA by enforcing its limitation period.

Therefore, a concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA. Thus, the

Eleventh Circuit Court affirmed the judgment of the district court in Day's case.

Benning v. Georgia, 18 Fla.L.Weekly Fed. C61 (11th Cir. 12/2/04)

Ralph Harrison Benning is a prisoner of the Georgia State prison system. He is a Torah observant Jew and is compelled by his system of religious belief to eat only kosher foods, wear a yarmulke at all times, to observe specific holy days, and perform specific rituals. Benning requested from numerous prison officials to be provided with a kosher diet and be permitted to wear a yarmulke. His requests was denied. Subsequently, Benning filed a prison grievance in which he specifically asserted his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) (The RLUIPA requires state prisons that receive federal funds to refrain from burdening the religious exercise of prisoners. See 42 U.S.C. section 2000cc-1).

Upon Benning arguing his claims in a suit, Georgia moved to dismiss and argued that section 3 of RLUIPA, 42 U.S.C. section 2000cc-1, exceeds the authority of congress under the Spending and Commerce Clauses, and violates the Tenth Amendment and Establishment Clause. The United States intervened to defend the constitutionality of RLUIPA.

The district court dismissed Benning's claims against the individual Defendants, but concluded that RLUIPA does not violate the Establishment Clause and denied the motion to dismiss with regard to Georgia and the DOC. The district court certified its denial of the motion to dismiss for immediate appeal, under Federal Rule of Civil Procedure 54(b), and alternatively certified it's ruling for interlocutory appeal under 28 U.S.C. section 1292(b). The 11th Circuit granted the petition by Georgia for permission to appeal under section 1292(b).

After a lengthy discussion, the 11th Circuit found that because Congress properly exercised its spending power by unambiguously conditioning the use of federal funds for state prisons on the related accommodation of the religious exercise of prisoners and that accommodation of does not endorse a religious viewpoint, it concluded that section 3 of RLUIPA, 42 U.S.C. section 2000cc-1, was validly enacted under the Spending Clause and does not violate either the Establishment Clause or the Tenth Amendment. Therefore, the judgment of the district court was affirmed.

U.S. DISTRICT COURTS

Prison Legal News v. Crosby, 18 Fla.L.Weekly Fed. D 53 (M.D. Fla. 11/16/04)

The Prison Legal News (PLN) filed, pursuant to 42 U.S.C. section 1983, a Complaint for Declaratory and Injunctive Relief against James v. Crosby, in his official capacity as Secretary, Florida Department of Corrections, et al., (Defendants). In this action, PLN claimed that the Defendants have violated PLN's First Amendment and due process rights.

The background of this case is the Defendants were refusing to allow delivery of PLN's journal, which the Defendants claimed violated the Florida Administrative Code (FAC). They asserted that this was mainly based on the journal containing advertisements for telephone companies other than those assigned to the prison, and it violated rules concerning the security of institutional telephone systems.

PLN sought to forbid the Defendants from barring the receipt of its journal by inmate subscribers and further sought to forbid the Defendants from penalizing inmates who receive compensation for writing articles for the publication. Because of the prohibition of compensation for writing articles is mandated by the FAC, PLN also sought declaratory judgment asserting that those rules of the FAC are unconstitutional. It argued that refusal to allow the compensation chills the journal's ability to receive articles for publication and constitutes a prior restraint on free speech.

In their Motion for Summary Judgment the Defendants claimed PLN's action was moot because of changes made in the prison's policies and practices. However, PLN countered the argument by asserting that the prison policy has been changed several times in the past, and that the Defendants' continued "flip-flop" of their policies at will means its claims with regard to the distribution of the PLN journal within Florida prisons are not moot.

The United States Middle District Court of Florida stressed on the notation where PLN pointed out the "flip-flop" of the Defendant's policy stance at least three times in the past, and that they conceivably remain free to once again change their policy at the conclusion of the lawsuit.

After it reviewed and discussed the standard in regards to summary judgment and PLN's laying out of the chain of events, demonstrating the Defendants' [flipped-flopped] policies, the Middle District Court agreed the claims of PLN were not moot. It further opined that the case resembled other cases where the courts have held that voluntary discontinuation of allegedly illegal conduct will not render a case moot if the defendants can simply return to their old policies.

Because of its findings and regardless that the Defendants claimed they have completely and irrevocably done away with the effects of the alleged violations, the Middle District denied the Defendants' motion for summary judgment. It found that the Defendants did not meet their burden

of establishing that PLN's claims are moot.

FLORIDA SUPREME COURT

Thompson v. State, 29 Fla.L.Weekly S667 (Fla. 11/12/04)

Paul Thompson pled guilty to a felony charge of knowingly driving with a license that had been suspended or revoked (felony DWLS) under section 322.34(2)(c), Florida Statutes (Supp. 1998) (amended statute). Subsequently, pursuant to Rule 3.850, Florida Rules of Criminal Procedure, Thompson filed a motion for postconviction relief in the trial court. He argued that it was improper to use his two prior driving-while-license-suspended (DWLS) convictions to enhance his third under the amended statute to a felony DWLS.

In his claim, Thompson used *Huss v. State*, 771 So.2d 591 (Fla. 1st DCA 2000), as authority for his argument. Like Thompson, Huss was convicted of felony DWLS under the amended statute by the use of prior DWLS convictions that occurred before the effective date (October 1, 1997) of the amended statute.

In *Huss*, the First District Court of Appeal held that because Huss's prior convictions occurred before the statutory amendment, those convictions could not be used under the amended statute for purposes of enhancement to felony DWLS.

The trial court denied Thompson's claim and subsequently, the Fifth District Court of Appeal affirmed the denial that had held that Huss's case constituted a change in decisional law that should not be retroactively applied. Thompson then sought and was granted review in the Florida Supreme Court based on the conflict that was between the First and Fifth Districts.

It was noted by the Florida Supreme Court where the First District explained in a prior case, *Stutts v. State*, that its decision in *Huss* did not change the law, but merely stated the plain meaning of the amended statute. At any rate, it was found that the Fifth District was correct in that the *Huss* decision should not be retroactively applied. However, it was further found that the Fifth District should not have ended its analysis of Thompson's claim with just the question of retroactivity. It should also have been evaluated in light of the due process principles set forth in *Fiore v. White*, 531 U.S. 225 (2001), and also brought out in *Bunkley v. Florida*, 538 U.S. 835 (2003). (The United States Supreme Court had remanded Bunkley's case in explanation that the question was not just one of retroactivity, the Florida Supreme Court was instructed to resolve the due process question of whether all the elements of the crime were satisfied.)

In 1997 the Legislature amended section 322.34, Florida Statutes (Supp. 1998), by adding language that the driving while license was canceled, suspended, or revoked must be done *knowingly* of such cancellation, suspension, or revocation. Thus, adding a knowledge element to the crime. Otherwise, it was provided in the amended statute that a person *without* knowledge of such, is merely guilty of a moving violation.

Prior to the 1997 amended version, the statute did not contain a knowledge element. Therefore, the State in Thompson's case could not demonstrate all of the elements needed to apply the enhancement under the amended statute. The Legislature could have, but did not make a provision in the 1997 law for enhancement based on convictions under the pre-1997 statute.

In *Huss*, the First District explained that DWLS convictions under the previous statute, which did not contain a knowledge element, do not qualify as prior convictions under the amended statute, which contains knowledge as an element of the DWLS offense.

As the United States Supreme Court explained in *Fiore*, "the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." Thus, Thompson's conviction failed to satisfy federal constitutional due process and the Florida Supreme Court ruled that his conviction must be reversed. It further quashed the Fifth District's decision in *Thompson* and approved the First District's in *Huss*. Thompson's case was remanded for proceedings consistent with that of the opinion given by the Florida Supreme Court.

Davis v. State, 29 Fla.L.Weekly S 672 (Fla. 11/18/04)

Travis Terrell Davis's case regarded a conflicting opinion of whether an extension of time pursuant to Rule 3.050, Florida Rules of Criminal Procedure, applies to the 60-day time period a trial court has to rule on a motion pursuant to Rule 3.800(b)(2).

The Fifth District Court of Appeals opined that no extensions of time were authorized under Rule 3.800(b). It considered the general provisions of Rule 3.050 to conflict with the specific provisions of the 60-days provided by Rule 3.800(b)(1)(B).

Contrary to the Fifth District's decision in Davis's case, the Second District in *McGuire v. State*, 779 So.2d 571 (Fla. 2d DCA 2001), held that Rule 3.050 authorizes the trial court to extend the 60-day time period of Rule 3.800(b), if the trial court acts within the 60-days to extend the time and there is a showing of good cause.

Although both parties in Davis's case urged the Fifth District to allow the extension showing good cause, it would not agree to allow the extension. Thus, based on the conflict, review was granted in the

Florida Supreme Court to resolve the question.

After a showing of where it had allowed extensions of time under Rule 3.050 for both 3.800 and 3.850 motions in its own prior case rulings, the Florida Supreme Court quashed the Fifth District's decision in Davis's case and approved the Second District's in its analysis.

R.J.L. v. State, 29 Fla.L.Weekly S673 (11/18/04)

This case dealt with conflicts within the District Courts of Appeals regarding expungement of nonjudicial criminal history record when fully pardoned of offenses.

It was found that an individual who received a gubernatorial pardon is not entitled to a certificate of eligibility for records expunction pursuant to section 943.0585(2) of the Florida Statutes, as a pardon does not have the effect of eliminating guilt or the fact of conviction. A pardoned individual cannot satisfy the constitutional requirements of section 943.0585(2), because like other convicted individuals, a pardonee cannot maintain that he has not be adjudicated guilty of, or adjudicated delinquent for committing any acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains.

Everett v. State, 29 Fla.L.Weekly S714 (Fla. 11/24/04)

The main question involved in this case is whether a law enforcement officer's request for a consent to search (provide DNA biological samples in this case) from, or service of an arrest warrant on, a defendant in custody who has invoked the right to counsel violates the Fifth Amendment.

The United States Supreme Court (Supreme Court) in *Miranda v. Arizona* has firmly established that once a person has invoked his or her rights to remain silent until counsel is present the *interrogation* must cease until an attorney is present. (See: *Michigan v. Mosley*, 423 U.S. 96 (1975).) The Supreme Court did not require counsel's presence for *all* further communications, only for the interrogations.

Interrogation under *Miranda* was defined in *Rhode Island v. Innis* in that it refers to a measure of compulsion above and beyond that inherent in custody itself. It also "refers not only to express questioning, but to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect..."

In *Arizona v. Roberson* the Supreme Court has distinguished between the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. The former arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him. The latter is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges.

The scope of the right to counsel under *Miranda* is more limited than under the Sixth Amendment. The invocation of the right to counsel under *Miranda* does not require the immediate appointment of an attorney because the right extends only to interrogation. In *Roberson* the Supreme Court held that once a suspect has invoked the right to counsel under *Miranda*, police are not forbidden all contact with that defendant in custody; in fact, it expressly exempted from the definition of "interrogation" routine police contact normally attendant to arrest and custody.

It was found that the serving of an arrest warrant is routine police procedure. It does not require a response from a suspect; nor can it be reasonably expected to elicit an incriminating response. Neither can an officer's request to consent to provide DNA biological samples or to search be found to be reasonably likely to elicit an incriminating response.

It was held in *Holt v. United States* back in 1910 that the "prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." It was also noted that in *Schmerber v. California* the Supreme Court held the Fifth Amendment privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and that the withdrawal of blood and the use of that analysis in question does not involve compulsion. The right to silence only applies to testimonial or communicative acts of a suspect.

Accordingly, the question is answered by the Florida Supreme Court that neither the service of an arrest warrant nor the request to consent to providing physical evidence constitutes a word or action that the authorities should know is "reasonably likely to elicit an incriminating response from the suspect." Thus, the Fifth Amendment is not violated.

Nesbitt v. State, 29 Fla.L.Weekly S772 (Fla. 12/9/04)

This case presented a controversy in whether a conviction for a lesser offense not sufficiently charged in the charging document is fundamental error.

On review, the Florida Supreme Court made its determination by looking to a prior case, *Ray v. State*, 403 So.2d 956

(Fla. 1981), where it held that the fundamental error doctrine should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Thus, after its analysis of the controversy, the Supreme Court held that it is not fundamental error to convict a defendant under an erroneous lesser included offense when he had an opportunity to object and did not do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense, or 2) defense counsel requested the improper charge or other affirmative action.

Williams v. State, 29 Fla.L.Weekly S773 (Fla. 12/9/04)

In this case the Florida Supreme Court was presented with the question of whether the procedures in *Anders v. California*, 386 U.S. 738 (1967), that are applicable to criminal cases are to be followed in cases involving appeals from Jimmy Ryce Act commitment orders.

The United States Supreme Court set forth procedures in *Anders* that are to be used by appointed counsel in criminal cases when counsel cannot in good faith ascertain any meritorious issue to present on appeal. After the Florida Supreme Court reviewed those procedures, it noted a prior decision it made in the applicability of the *Anders* procedures to involuntary civil commitment orders under Florida's Baker Act in *Pullen v. State*, 802 So.2d 1113 (Fla. 2001).

In *Pullen* it was decided that while *Anders* involved an indigent criminal defendant, the United States Supreme Court expressed an overriding concern for substantial equality and fair process in the appellate process. It was noted that an individual who faces involuntary commitment to a mental health facility under the Baker Act has a liberty interest at stake. Constitutional due process required that a person in such a case has a right to the effective assistance of counsel at all significant stages of the commitment process.

Regarding the liberty interests at stake in the Baker Act commitment, it is limited by statute to only six months, whereas under the Jimmy Ryce Act, the confinement is for an indeterminate and potentially indefinite period of time. Like the Baker Act, the involuntary civil commitment under the Jimmy Ryce Act presents a massive curtailment of liberty interests where constitutional due process would dictate the requirement of the effective assistance of counsel in all its significant process stages.

By following its decision in *Pullen* regarding the Baker Act, the Florida Supreme Court held that the policies and interests served by the *Anders* procedures in criminal proceedings are also present in involuntary civil commitment proceedings under the Jimmy Ryce Act. It concluded by answering the question in the affirmative; *Anders* procedures are applicable in cases involving appeals from Jimmy Ryce Act commitment orders.

State v. White, 29 Fla.L.Weekly S821 (Fla. 12/23/04)

This case regarded the question like that that was also brought out in *Burton v. State* (as published in this section under the District Court of Appeals Notable Cases: "Whether an individual can be committed under the Jimmy Ryce Act absent a jury instruction that the state must prove the individual has serious difficulty in controlling his or her dangerous behavior.")

To answer the question, the Florida Supreme Court looked to a United States Supreme Court case, *Kansas v. Crane*, noting that Kansas' Sexually Violent Predator Act procedures for civil commitment are liken to that of Florida's Jimmy Ryce Act.

Civil commitment under Florida's Jimmy Ryce Act requires that a factfinder must determine by clear and convincing evidence that an individual has been convicted of an enumerated sexually violent offense and suffers from a mental abnormality or personality disorder that makes the individual likely to engage in acts of sexual violence if not confined in a secure facility for long-term control and treatment.

It found the United States Supreme Court's decision in *Crane* did not impose, as a constitutionally required additional element necessary to commit a person under the Jimmy Ryce Act, the requirement that the individual have serious difficulty controlling his or her behavior. A jury need not be instructed on that element. It held that the standard jury instructions accurately reflect the requirements of the Ryce Act, and that the Ryce Act sufficiently limits civil commitment to dangerous sexual offenders to comport with substantive due process requirements.

By specifying the nature of mental abnormality and requiring that the mental abnormality predispose an individual to commit sexually violent offenses and that he or she be likely to engage in acts of sexual violence, the Florida Supreme Court decided the Ryce Act adequately narrows the class of persons eligible for confinement to those who are unable to control their dangerousness. Thus, the jury need not be instructed that the individual must have serious difficulty controlling behavior.

Hale v. State, 30 Fla.L.Weekly S11 (Fla. 12/23/04)

The main point that was brought out in this case is William Hale's argument in that the Jimmy Ryce Act does not apply to him because when the civil commitment petition was filed in his case he was not in custody for a sexually violent offense. Hale cited in his argument

section 394.925, Florida Statutes (1999).

First, the Florida Supreme Court clarified that Hale's case is controlled by the *original* version of the Act contained in sections 916.31-.49, Florida Statutes (Supp. 1998), not the 1999 version. The amended version, sections 394.910-.931, Florida Statutes (1999), did not become effective until May 26, 1999. The State filed the civil commitment petition against Hale on April 5, 1999.

In section 916.45, Florida Statutes (Supp. 1998), it provides: "Applicability of act.—Sections 916.31-.49 apply to all persons *currently in custody who have been* convicted of a sexually violent offense, as that term is defined in sec. 916.32(8), as well as to all persons convicted of a sexually violent offense in the future." Also in the definition of a sexually violent offense it was found in sec. 916.32(8)(g), "Any conviction for a felony offense in effect at any time before October 1, 1998, which is comparable to a sexually violent offense under paragraphs (a)-(f) or any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense;..."

The Court, in expressly pointing out the above provisions, found that the statute clearly says nothing about whether the person must be currently incarcerated for that type of offense. It does not state that it applies to all persons currently in custody *for* a sexually violent offense and it does not otherwise link the current incarceration to the sexually violent offense.

Therefore, it was decided that reading sections 916.45 and 916.32(8)(g) together, the Act applies to all persons who are currently incarcerated and who *at some point in the past have been* convicted of a sexually violent offense.

In the conclusion of its analysis, the Court held that an individual does not need to be in custody for a sexually violent crime at the time the civil commitment petition is filed. In other words, quoting Judge Pariente in her dissenting opinion, "As this case illustrates, the net cast by the Ryce Act encompasses an individual whose crime of sexual violence is far in the past...and whose most recent incarceration subjecting him to civil commitment was for an offense unrelated to sexual violence."

[**Note:** The wonder of this case, on its novel approach to crime, punishment, and public safety, is where will it lead. How can it be known whether the legislature will continue to view only sexual offenders as a special and unique class of criminals? If prosecutors are able to find mental health professionals that are willing to testify that people who commit repetitive assaults of a *non*-sexual nature have a mental abnormality predisposing them to such violent behavior, will the legislature pass laws to keep them incarcerated beyond their criminal sentences by the device of civil commitment? How about perpetrators of multiple domestic violence? Chronic drunk drivers? Violent drug offenders? What are the limits of this *end run* around the normal criminal justice process? –as]

DISTRICT COURTS OF APPEAL

Woodard v. State, 29 Fla.L.Weekly D2348 (4th DCA 10/20/04)

With regard to information or document requests addressed to a custodian of public records (clerk of court, state attorney, etc.), this case demonstrated the importance of retaining copies of dated correspondence of such requests.

The reason for the retention of such correspondence is because the need seeking to compel for action may arise when a custodian of public records fails to execute its duty to respond to a request.

It was stressed by the Fourth District Court of Appeal that when the need to compel compliance of the request becomes apparent, copies of the dated correspondence sent *must* be attached to a writ of mandamus seeking to compel compliance with a public records request (pursuant to either section 119.07, Florida Statutes, or Florida Rule of Judicial Administration 2.051).

The original request for the public records *must* state the identity of the documentation needed with sufficient specificity to permit the custodian to identify the record and forward it or, if any, cost information involved to obtain the records sought.

[**Note:** Although this case was regarding public records requests, it should be eminent that it is important for one to retain dated copies of any and all types of legal or agency correspondence because, down the road, one never knows if the need will arise to show proof of its existence. - as]

Burton v. State, 29 Fla.L.Weekly D2365 (2d DCA 10/22/04)

The main issue involved in this case is where Gary Burton argued that the jury was not properly instructed on an essential element of volitional control regarding Burton's civil commitment as a sexually violent predator under the Jimmy Ryce Act. He claimed that the jury should have been required to find that he had a serious difficulty in controlling his dangerous behavior.

Although the Second District Court of Appeal found that Burton's issue was not preserved for appeal it opined that the issue did not rise to the level of a fundamental error, the appellate court certified a question as one of great public importance regarding the issue:

"May an individual be committed under the Jimmy Ryce Act in the absence of a jury

instruction that the state must prove that the individual has serious difficulty in controlling his or her dangerous behavior?"

Love v. State, 29 Fla.L.Weekly D2487 (5th DCA 11/5/04)

In this case the Fifth District Court of Appeals certified the question, "Why would the Legislature allow an order of probation withholding adjudication to be a conviction which can qualify a defendant for habitualization, but not consider the order to be a sentence when determining whether the prior convictions were sequential?"

The question was brought because the Fifth District had concluded that the purpose of the habitual offender statutory requirement is met by construing a probation order to be a sentence within the meaning of the statute.

There are numerous cases that has held probation is not a sentence. More on point to the issue explained in the Fifth District, but decided in contrary, is *Richardson v. State*, where the Fourth District modified its opinion at 29 Fla.L.Weekly D215 (Fla. 4th DCA 1/14/04). The court in *Richardson* reasoned that a sentence and probation are distinct concepts and emphasized that when a defendant is placed on probation, the court stays and withholds the imposition of a sentence. It found that a defendant placed on probation had never been sentenced, so that when the defendant later violated that probation and committed a new offense, the defendant was being sentenced for the first time in the probation violation case, and that conviction could not constitute a sequential conviction to the new offense.

The Fifth District opined that it "believed the interpretation applied by the Fourth District in *Richardson* is hyper-technical and illogical." Thus, the certified question.

Hall v. State, 29 Fla.L.Weekly D2621 (2d DCA 11/19/04)

Almost 7 years after his conviction and sentence became final, Marty J. Hall filed a rule 3.850 motion. This was six days after he found that he was not receiving the gain time credits that his defense counsel assured him that he would receive upon pleaing guilty to his crimes. Hall maintained in his motion that he would not have accepted the state's plea offer had he known that he would not receive gain time credits. The trial court denied the motion and Hall appealed the decision.

On appeal, the Second District Court of Appeal cited a prior case where it was confronted with a strikingly similar situation as in Hall's, *Spradley v. State*, 868 So.2d 632 (Fla. 2d DCA 2004). The trial court had denied Spradley's rule 3.850 motion as untimely because it fell outside the two-year window period from when his conviction and sentence became final. The Second District however found that Spradley could not have known about the Department of Corrections' (DOC) forfeiture of gain time. Like Hall, Spradley only discovered the forfeiture upon receiving a response from DOC after filing administrative grievances. Once informed of the forfeiture by the DOC, Hall, like Spradley had two-years from that time to file a rule 3.850 motion.

Based on its prior ruling in *Spradley*, the Second District reversed the lower court's denial of Hall's motion and remanded with instructions for the trial court to rule on the merits of the motion.

Burrows v. State, 29 Fla.L.Weekly D2619 (2nd DCA 11/19/04)

In regards to the *Blakely v. Washington* and *Apprendi v. New Jersey* federal cases, the Second District Court of Appeals in this case has expressed its opinion.

The Second District cited its prior, *Gisi v. State*, where it held that *Apprendi* does not apply retroactively to sentences that were final prior to its issuance. It went on to explain that all its sister courts have come to the same conclusion, and cited numerous other case in different district courts in the State of Florida that has ruled the same.

In regards to the *Blakely* case the Second District found that on the same day that the United States Supreme Court issued the *Blakely* opinion, the Court also released its opinion in *Schriro v. Summerlin*, 124 S.Ct. 2519 (2004). *Schriro* held that *Ring v. Arizona*, which extended the application of *Apprendi* to death penalty cases, was not to be applied retroactively to cases on collateral review.

The Eleventh Circuit Court of Appeals for the United States, in its opinion in *In Re Dean*, 375 F.3d 1287 (11th Cir. 2004), relied on *Schriro* to conclude that the United States Supreme Court has not made *Blakely* retroactive to cases on collateral review. Recently the Fourth District, in *McBride v. State*, held that, like *Apprendi*, *Blakely* does not apply retroactively to cases on collateral review. The Second District Court of Appeals opined that it agreed with the findings. - as

Wells v. Aramark Food Service, 29 Fla.L.Weekly D2649 (4th DCA 11/24/04)

Thomas Perry Wells, Jr., petitioned the Circuit Court of Broward County, Florida, for a writ of mandamus to order Aramark Food Service Corporation to provide a copy of the food service contract between it and that Florida Department of Corrections, pursuant to the Florida Public Records Act. The lower court dismissed the petition on the ground that mandamus does not lie against a private corporation doing business with the State.

On appeal, the Fourth District Court of Appeal cited *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group Inc.* where the Florida Supreme Court

identified factors to consider in determining whether a private corporation is an "agency" subject to Florida's Public Records Act. After reviewing these factors, the Fourth District concluded that the trial court in Well's petition did not undertake the required analysis to determine whether Aramark is and "agency" as used in Florida's Public Record Act, which would subject it to compliance with the statute. It was made clear by the Supreme Court in *News & Sun-Sentinel Co.* that the factors it listed was not "all-inclusive," due to the variety of circumstances that can be presented.

The denial of Well's petition was reversed and the case remanded for further proceedings.

Beneby v. State, 29 Fla.L.Weekly D2696 (4th DCA 12/1/04)

The Fourth District Court of Appeals brought out a reminder in this case for those that are calculating their time to file a Rule 3.850 motion. That is, the two-year limitations period would not begin to run in a case where the appellate court has issued a mandate from a direct appeal that orders a resentencing until that order has been complied with by the sentencing court.

Cleveland v. State, 29 Fla.L.Weekly D2712 (5th DCA 12/3/04)

This case brings out a common type of pro se error when one files a notice of supplemental authority. However, in this case the state made the error.

The State had moved for a rehearing after the appellate court reversed Paul Henry Cleveland's judgment and sentence and remanded for a new trial due to the issue involved.

On that issue, the State's motion for rehearing not only argued other claims for the first time, but also brought up a notice of supplemental authority that did not comply with Rule 9.225, Fla. Rules of Appellate Procedure. It did not comply with the rule because it contained new argument not previously addressed in its answer brief. Also, the new argument relied on a Supreme Court case that had been decided *four years prior* to the State's filing of its answer brief.

"Notices of supplemental authority may be filed with the courts before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause. The notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument...," as provided in Florida Rule of Appellate Procedure 9.255. The Fifth District in this case opined that it appeared the State, through its supplemental authorities, was attempting to file an additional brief.

The Fifth District continued however and regarded the motion for rehearing itself, filed pursuant to Rule 9.330 where it provides, in part, "A motion for rehearing, clarification, or certification may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding..."

Cotterell v. State, 29 Fla.L.Weekly D2775 (5th DCA 12/10/04)

In Stephen Cotterell's appeal the Fifth District Court of Appeals brought to light its "discomfort with the fact that Florida Rule of Criminal Procedure 3.850 requires a defendant be told he or she has 30 days in which to appeal and 3.800 does not. It is a discrepancy without a reason and a trap for the unwary." However, as it noted, the Florida Supreme Court adopted an amendment to Florida Rule of Criminal Procedure 3.800 to repair another equally illogical discrepancy between Rule 3.800(a) and Rule 3.850. See: *In Re Amendments to Florida Rules of Criminal Procedures*, 29 Fla.L.Weekly S568 (Fla. 10/7/04).

The amendment authorizes defendants under *both* rules to file motions for rehearing, thereby tolling the time to file an appeal. Prior to the amendment, which became effective January 1, 2005, defendants who filed motions for rehearing under Rule 3.800(a) often lost their rights to appeal and their notices of appeal, filed after denial of their motions for rehearing, were untimely.

The Fifth District concluded this case with the opinion, "Perhaps this remaining discrepancy should also be addressed."

Larimore v. Florida Department of Corrections, 29 Fla.L.Weekly D2787 (1st DCA 12/10/04)

In a petition for writ of habeas corpus filed to a circuit court, William Todd Larimore argued that the Department of Corrections (DOC) acted without statutory authority when it forfeited previously awarded gain-time following revocation of the probationary portion of his original split sentence, and absent that unauthorized forfeiture he was entitled to immediate release. The circuit court denied his petition and Larimore sought and was granted certiorari review in the First District Court of Appeals.

The background of this case is Larimore pled in two separate cases and each had an offense of a second degree felony which were punishable by up to 15 years in prison. The first offense was committed in 1987, and the second offense was committed in 1990. In a plea agreement using a single sentencing guidelines scoresheet, the court initially sentenced Larimore to 15 years prison for the 1987 offense,

followed by a 5 year term of probation for the 1990 offense.

Through accumulation of actual time served and gain time Larimore was released after 7.25 years to begin his probationary portion of the sentence. He violated the terms of the probation and the probation was revoked, sending him back to prison. In accordance with *Tripp v. State*, Larimore succeeded in securing an award of credit for time served for the 1987 offense against the five year sentence imposed upon revocation of probation with respect to the 1990 offense. After that credit was applied however, DOC forfeited all gain-time earned by Larimore, relying on section 944.28(1), Florida Statutes, and *Eldridge v. Moore*, 760 So.2d 888 (Fla. 2000).

The First District found that since Larimore's crimes (as one unit being on a single scoresheet) occurred prior to the effective date of the 1989 amendment to section 944.28, authorizing the forfeiture of gain-time upon revocation of probation, its decision in *Tranquille v. State*, 828 So.2d 1034 (Fla. 1st DCA 2002), bars DOC from applying that amendment in calculating the *Tripp* credit. Because of the results in Larimore receiving 15 years for credit towards his five year sentence, which precludes the trial court from imposing any sanction, which precludes the trial court from imposing any sanction upon V.O.P. the first District certified the question: "where a defendant serving a probationary split sentence as defined in *Tripp*, is incarcerated for a crime committed prior to October 1, 1989, and placed on probation for a crime committed after October 1, 1989, is the defendant exempt from the forfeiture provisions of section 944.28(1), Florida Statutes (1989), in calculating the *Tripp* credit upon the revocation of probation?"

The First District quashed the circuit court's order and remanded the case with directions to order Larimore's immediate release from custody. ■

Inmates put to death since 1976

The 38states that have the death penalty vary widely in how often it is used. Inmates executed since the U.S. Supreme Court reinstated the death penalty in 1976, and the number so far in 2004:

State	Total	2004	State	Total	2004	State	Total	2004
Texas	335	22	Ill.	12	0	Idaho	1	0
Va.	94	5	Ind.	11	0	N.M.	1	0
Okla.	75	6	Nev.	11	2	Tenn.	1	0
Mo.	61	0	Calif.	10	0	Wyo.	1	0
Fla.	59	2	Miss.	6	0	U.S.[1]	3	0
Ga.	36	2	Utah	6	0			
N.C.	34	4	Md.	4	1			
S.C.	32	4	Wash.	4	0			
Ala.	30	2	Neb.	3	0			
La.	27	0	Pa.	3	0			
Ark.	26	1	Ky.	2	0			
Ariz.	22	0	Mont.	2	0			
Ohio	15	7	Ore.	2	0			
Del.	13	0	Colo.	1	0			

1 - Federal executions.

No executions: Connecticut, Kansas, New Hampshire, New Jersey, New York and South Dakota have the death penalty but have not executed anyone since 1976.

No death penalty: Capital punishment is banned by the District of Columbia and 12 states: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin.

Source: Death Penalty Information Center

*** Attention ***
Veterans

Have you ever been in the U.S. Military? Do you have a service-related disability? Are you in prison? If your answer is yes to those questions you may very well be eligible to receive disability benefits while you are incarcerated, as well as benefits for your spouse, children or parents. For more information about benefits for imprisoned disabled veterans contact or have someone contact:

Department of Veteran Affairs
P.O. Box 1437
St. Petersburg, FL 33731

or call Toll-free
1-800-827-1000

or on the web at:
www.vba.va.gov ■

Walker v. Crosby: A New Lease on Habeas Corpus

by Richard Geffken

Passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996 limited the time in which to seek federal habeas corpus relief to one year after a judgment and sentence becomes final in the state system by the conclusion of direct review or the time to seek such review. In a past issue of FPLP (Volume 10, Issue 4) I wrote about how that one-year time limit has now been extended to one year plus 90 days. In this article I will discuss how the one-year AEPDA time limit is reset in the event that direct or collateral (post conviction) review results in resentencing.

Walker v. Crosby, 341 F.3d 1240 (11th Cir. 2003) is an important case wherein the federal Eleventh Circuit Court of Appeals clarified that for purposes of deciding the timeliness of a habeas corpus petition under AEDPA provisions a judgment and sentence do not become final until after resentencing, if such an event occurs.

Walker, a state prisoner, had filed a Rule 3.800(a), Fla.R.Crim.P., Motion to Correct an Illegal Sentence, five years after his AEPDA clock had expired. Walker claimed his two 15-year probation sentences were run consecutive rather than concurrent as required. The trial court agreed and resentenced Walker to concurrent sentences. Walker then challenged his entire conviction by filing a federal habeas corpus petition pursuant to Title 28 U.S.C. § 2254. The U.S. District Court, however, dismissed Walker's petition as untimely, stating it was not filed within one year of his (original) conviction and sentencing or direct review or time to seek such review of same as required by the AEPDA. Walker appealed the dismissal.

On appeal the Eleventh Circuit observed that the AEPDA statute of limitations runs from the latest of several dates. See: Title 28 U.S.C. § 2244(d)(1) (A-D). In Walker's case, the Court held, subsection (A) would apply because Walker's sentence did not become "final" until the state court changed what it had originally decreed by resentencing Walker. The appeal court did not stop there. The question also existed whether Walker was limited to raising only issues that occurred in connection with the resentencing and whether issues going back to the original conviction and sentencing were AEPDA time-barred.

On that question the appeal court noted that "the statute directs the court to look at whether the [habeas corpus] 'application' is timely, not whether the individual 'claims' within the application are timely." *Walker* at 1243. Thus, the Court held that the application (petition) must be looked at as a whole and not just the timeliness of the individual claims presented therein. *Walker* at 1245. The appeal court concluded by stating, "We recognize that § 2244(d)(1) as written allows for the resurrection of what seems to be time-barred claims tagging along on the coattails of a timely claim," but the plain language of the statute cannot be read "any other way." *Walker* at 1247.

Authority supporting the principle of law expressed in *Walker* is considerable. In an en banc decision out of the Eleventh Circuit, *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992), all district courts were instructed to respond to all claims in a habeas application, whether relief was granted or not. That would appear to prohibit responding to just resentencing issues. In *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, at 1622 (1998), the U.S. Supreme Court held that if no judgment was made on the merits of a claim which was dismissed for "technical, procedural reasons," second or successive does not apply. And in *Villaneuva v. U.S.*, 346 F.3d 55, at 60 (2d Cir. 2002), this principle was specifically held to include claims "erroneously dismissed as untimely."

The first court to specifically address erroneously considering the AEDPA statute of *limitation* to have run before a judgment became in fact "truly final" was *U.S. v. Colvin*, 204 F.3d 1221 (9th Cir. 2000). There a federal district court had issued an "amended judgment." The appeal court in *Colvin* held that the AEDPA clock began when the time expired to appeal the $50 reduction in restitution which had been ordered. The Court established that as a "bright-line rule" regarding finality.

Subsequently, in *Maharaj v. Secretary for the DOC*, 304 F.3d 1345 (11th Cir. 2002), the Eleventh Circuit appeal court formally adopted the bright-line rule of *Colvin*. The appeal court held, "Because Maharaj's resentencing had not occurred at the time he filed his habeas petition, his state judgment had not become final." *Maharaj* at 1346, 1349. Consequently, the Court reversed the district court's decision dismissing Maharaj's petition as untimely.

Citing *Colvin* and *Maharaj*, a district court in the First Circuit expounded a particularly well reasoned viewpoint: "The AEDPA's basic premise is...the state's interest in the finality of its judgments." *Lewis v. Maine*, 254 F.Supp.2d 159, at 165 (D.Me. 2002). That court ruled that Lewis had timely filed his habeas application because it was filed within one year of a revised restitution order being issued changing the sentence, adding, "The onus of making a judgment final under state law and state procedures ultimately must rest with the State, not Lewis and not this court." ■

Sumter Correctional Gavel Club #293838

The First Gold

Toastmasters International is the leading movement devoted to making effective oral communication worldwide reality. In florida's prison system there are only two (2) groups left and those groups are called Gavel Club and Affiliate of Toastmasters International. Through its member clubs, we learn the art of speaking, listening and thinking – vital skills that promote self-actualization, enhance leadership potential, foster human understanding, and contribute to the betterment of mankind. Toastmasters also offers its member many awards with the gold as its highest.

The road to gold is not easy, a member must first give (10) speeches in the club to receive the first award, The Competent Toastmaster, but in prison it's called Competent Gavelier. These 10 speeches help the speaker become more eloquent when speaking to a group, or more importantly, when speaking in front of prison staff while getting your point across without getting an attitude and saying the wrong thing.

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3. The projects supply more information than you need to complete each particular assignment. This will give you idea-starters for future talks.
4. Remember, it is the speech preparation and delivery that teaches you, not just reading the project in the manual.

There are 16 advanced communication and leadership manuals. Each manual cost, $3.00. The prison will help pay for this program. The advanced manual library set cost $35.00.

The next award you receive is called the Advanced Toastmaster Bronze, when you complete two advanced communication and leadership program manuals; each manual has (5) projects.

At this time our club promotes its members ellgibility for the executive committee positions and leadership training. If you are voted to the club board and fulfill a six (6) month or one (1) year term and conduct two programs from the Toastmaster Successful Club Series and/or the leadership excellence series and participate in a district Sponsored Club Officer Training Program, and Achieved Competent Toastmaster Award (Prison Competent Gavelier C.G.) served at least (6) six months as a Club Officer (President, Vice President of Education, Vice President of Membership, Vice President of Public Relations, Secretary, Treasurer or Sergeant at Arms) and participated in a district-sponsored club officer-training program while in office. You will have to participate, in the preparation of a club success plan, then Toastmasters will award you the Competent Leader Award.

From what we know, there's only three Competent Leader Award that have been given to Florida's prisoners. Two of them are here at Sumter Correctional Institution.

1) Alton W. Bell Sr. 2) Frederick Murray 3) David Reutter

The next award you receive is called the Advanced Toastmaster Silver. To receive this award you must complete the above two more manuals and conduct two programs from the better speaker series and/or the successful club series.

Now the Gold, the Advanced Toastmaster Gold Award, the member should have completed 40 manual speeches; coordinated and conducted one of the success/communication, success/leadership, or youth leadership modules and coached a new member with his or her first three speeches. Again, this is more than prison work, this is International, and this will help you in so many ways like employment or becoming a better supervisor and much more.

Here at Sumter Correctional Institution our club has 45 members. Our Board for this year is:

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Vice President Membership-Herman Parramore
Vice President Public Relations-David Keen
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Adviser-Oscar Hanson, AGB

A prisoner with a life sentence here at Sumter Correctional Institution, Alton W. Bell Sr. C.L., A.G.G, is the first member in this club to receive an Advanced Gavelier Gold Award, he has made it to the highest award that Toastmaster International has to give and now he will continue his growth in speaking and helping this club and it's members.

We here say to him "congratulations," thanks for showing us that no matter what sentence you have you should get whatever help prison has to offer?

Now to prisoners all over who are reading this who would like to improve themselves and develop communication and leadership skills, start a Gavel Club at your prison or institution. For more information write:

Toastmasters International
P.O Box 9052
Mission Viefo, Ca 92690-9052

Mr. L. Hamilton (Sponsor)
Gavel Club #293838
P.O Box 667
Bushnell, Fla. 33513

And we will help as much as we can in getting your club started. All of this information is from Toastmasters International Gavel Club # 293838. Vice of public relations David Keen.

Supreme Court Rules Federal Sentencing Guidelines Are Unconstitutional

High Court Declares Guidelines Violate Rights

Federal Judges Are Handed Broad Discretion, and Told To Use Rules as Suggestions

On January 12, 2005, the U.S. Supreme Court in a pair of 5-4 rulings held that the federal sentencing guidelines enacted two decades ago to standardize federal prison sentences nationwide are unconstitutional because they violate a defendant's right to be tried by a jury.

The decisions in *United States v. Fanfan* and *United States v. Booker* hands broader discretion to federal judges in what sentence may be given to defendants by directing them to consider the guidelines merely as a suggestion rather than mandatory. The guidelines had forced judges to boost sentences based on factors that a jury hadn't ruled on. Now judges are permitted, but not required, to do so.

The decision will affect the sentences of the 60,000 offenders sentenced in federal court each year. It may result in lesser sentences also for several thousand federal defendants who have already been convicted but who are still appealing their sentences. The Supreme Court, however, shattered the hopes of tens of thousands of other federal prisoners (and state prisoners who hoped *Blakely v. Washington*, upon which *Fanfan* and *Booker* were decided, would be applied retroactively) by making it clear that its decision will not apply retroactively to cases that have become final. (The *Fanfan*, *Booker* and *Blakely* cases were discussed in *FPLP*, volume 10, Issue 5, pg. 30.)

While the high court's decision on the federal guidelines may give federal judges more power to decide sentences and take into account individual circumstances it may only be temporary. Congress, especially one in which both houses are Republican controlled, is expected to reassert legislative control by pushing through more aggressive mandatory sentences that would effectively overrule the Supreme Court's decision. The Justice Department is already looking at how to revamp federal sentencing to ensure harsher sentences without violating the Constitution.

Frank O. Bowman III, a former federal prosecutor who teaches law at Indiana University, said he believes congressional intervention will follow. He pointed out that in many case, prosecutors persuade defendants to plead guilty and cooperate by rewarding them for "substantial assistance." Under the guidelines, defendants who receive such reward are exempt from the guidelines' strict provisions. However, now with the guidelines only advisory, defendants may not cooperate. "The Justice Department has just lost all of its bargaining leverage," over defendants, Prof. Bowman said. More than 95 percent of federal cases are resolved through plea bargains.

The Justice Department is reported looking at an earlier proposal by Prof. Bowman that Congress take the top off existing guideline ranges, replacing them with the legally prescribed maximum for the crime. That way judges wouldn't have to give a justification for hitting defendants with a tougher sentence, so long as it was below the legal maximum. (Florida already has in effect a similar sentencing scheme, the Criminal Punishment Code enacted in 1998.) ■

Penalty Box

Some statistics related to federal sentencing guidelines

Year guidelines took effect	1987
Criminals sentenced each year in federal courts	60,000
Current estimate of federal prisoners	180,000
Estimated cases currently on appeal	Several thousand
Cases appealed in fiscal 2002*	6,280
Percentage of cases resolved through plea bargains	97%

*Ended Sept. 30.

Sources: U.S. Sentencing Commission; WSJ research

Partners in Prison: Keeping The Flame Alive

by Linda Hanson and Oscar Hanson

They say that absence makes the heart grow fonder, but for many of those caught in a prison relationship this old adage is simply a misnomer. Any relationship these days is a lot of work to maintain and most fail. Just look at the divorce rate. Add the incarceration of a spouse and divorce is usually automatic. But if you're one of the few that believes in maintaining your vows and upholding the values of the institution of marriage, or if you are on the fence struggling with these or other issues, here's some helpful advice from a couple who has endured the turmoil of separation only to grow deeper in love with each other.

Undoubtedly the most important tip of all for both partners is to communicate. For the inmate, recognize that your partner is incarcerated too. While they may not be physically bound, emotionally they are just as jailed as you are. There is a tendency for the newly incarcerated to feel gloom and doom, believing the relationship will not survive such trauma. By claming up and not communicating, you are contributing to the possible demise. Communication is the key to survival. For me, communicating with my loved one has opened up avenues of knowledge about my significant other I may have never discovered otherwise. Communicating through letters and telephone calls forces you to be creative in your dialogue and will lead you into realms previously unchartered. Aside from learning some rather interesting facts about your partner, you demonstrate your confidence and trust in your spouse, an important signal to send to the waiting partner.

For the waiting partner, keep the letters, cards, and pictures flowing. You can never learn to appreciate how important these little things can be to your incarcerated loved one. Mail call is perhaps the most important event of the inmate's day. Your inmate partner looks forward to these things to reassure him that he is still a very important part of your life.

One of the hardest aspects that plagues couples when one is sent to prison is the loss of intimacy. All too often when a partner goes to prison, the waiting partner will be inundated with pressure from outsiders to fill that intimacy void. They may even feel like they are unfairly missing out on intimacy and affection and may seek comfort elsewhere. And, unfortunately, they may grow weak and open themselves up for intimacy only to regret it afterwards. Don't do anything that you wouldn't want done to you. Think long and hard about your commitment before doing something that you will regret later.

For the inmate partner, the temptation to engage in a homosexual relationship or to write to your friend's sister might be too much. Resist it! Remember that you have someone who loves you and who is waiting for you to come home, without disease and guilt.

For both of you, the saying "What they don't know won't hurt" doesn't cut it. Aside from a sense of moral value, eventually someone will find out—and it will hurt.

Trust is the vital thread that holds relationships together. Without trust there is no relationship. Not knowing what the waiting partner is doing on the outside can drive a sane man crazy. It takes a tremendous amount of will power to ward off all the unfounded negative feelings that can harbor themselves in the inmate's mind. If your partner has made a commitment to stand by you then accept that and don't let negative thoughts haunt you. It will only cause you to say or do something that you won't be able to take back. After all, if your waiting partner has assured you she is committed—she probably means it. Otherwise, she would simply move on.

Nevertheless, if you have concerns, talk it over. Remember how we started this topic with communication?

For those incarcerated, you must understand that your imprisonment has created a huge void in your loved one's life. She is basically alone. They must carry on with their lives. Serving as both the mother and father, if you have children. They must pay all the bills on one income, while trying to help the incarcerated partner with comfort items such as shampoo and deodorant—items not provided by prison officials. This is not a time to be demanding. All to often I've witnessed men beg their partner's to send money, only to gamble it away or buy drugs. Don't become a liability.

While the opportunities for paying prison jobs are slim, they do exist. Get yourself into one of these jobs and become self-supportive. And of course I would be amiss not to mention prison "hustles" that always abound. But don't get involved in schemes that will only lead to further trouble.

For waiting partners, you must recognize that your loved one has entered a world of hostility, greed, and unknown dangers. His life will change dramatically. Despite all the rumors about how soft prison has become, this is not summer camp. Your loved one will have a wall built around him that is difficult to break thought. In prison there is no love, compassion or understanding. Most, if not all his street acquaintances will abandon him. Don't be upset if they act a little strange or distant in the beginning. The shock of incarceration can take weeks if not months to overcome. During that period of adjustment, they will be on an emotional rollercoaster. Your emotion support during this time is critical and vital

to his transition.

Each partner must come to grips with the reality of incarceration. You must come together as a team. Your partner is your best friend and there is no room for disrespect, emotional or verbal abuse. There will be days when your patience will run thin and it will be a natural reaction to explode. When such action occurs the other must realize this is just a momentary thing, one that will pass. Show your support by avoiding confrontation. Wait it out.

As the time evaporates and you reach the end of your sentence, you and your partner will have overcome a huge hurdle in your lives. You will appreciate each other in ways you would have never imagined. No otherworldly obstacle will effect you. As a team you have become conquerors. One day you and your waiting partner will look back and make the same observation my partner and I made: Twelve years apart, thousands of letters, hundreds of phone calls and visits, two lonely hearts, and one love—what does that add up to? Total commitment. And with that, nothing else matters. ■

NOTICE
MEMBERSHIP DUES INCREASE

On April 1, 2005, Florida Prisoners' Legal Aid Organization membership dues for prisoners will increase from $9 to $10 a year. Until that date prisoners may still become a member and receive *FPLP* or renew their membership for $9 per year. Membership dues received after that date in the old amount of $9 will be prorated for a 10 month membership instead of one full year. If you are not a member, join now. If you are a member, thank you for your loyalty and support, and encourage other prisoners to join up. FPLAO is Your organization. Help support the work for Florida prisoners and their families and friends.

Litigation Manual
Sold Out

The first edition of the *Florida Prisoner's Litigation Manual: Legal Information on Prison Discipline, Mandamus & Appellate Review*, that has been being advertised in past issues of *FPLP*, has sold out. No more copies of that edition are available. Please do not send orders for that book. We will let you know if and when a second edition of that book becomes available.

Greenlight Executions: Prisoners Volunteering to Die

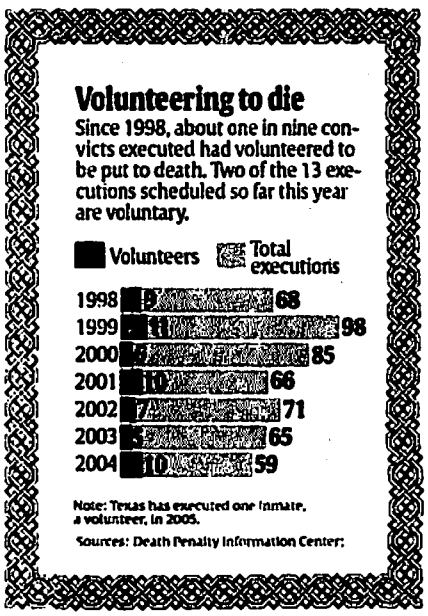
With the average stay on death row hovering at just over nine years, more and more condemned prisoners are opting to forego their appeals and asking to be executed.

Currently this is one of two trends being played out across the nation. While 38 states and the federal government have the death penalty, many are becoming increasingly reluctant to use it. And about one in nine of those condemned are volunteering to die.

According to Richard Dieter, director of the Death Penalty Information Center, an anti-capital punishment group in Washington, D.C., fewer states are seeking the death penalty in criminal trials. Even when death sentences are given, some states are in no hurry to carry them out.

A new report by the center found that death sentences in 2004 declined to about 130, a three decade low. The 59 executions that took place were 40 percent fewer than in 1999.

The report said increased concerns about innocence, fed by exonerations of death row prisoners, produced the declines. In addition, the report revealed that since 1998, 59 of the 513 prisoners executed volunteered. Death penalty opponents say long stretches on death row makes prisoners suicidal. ■



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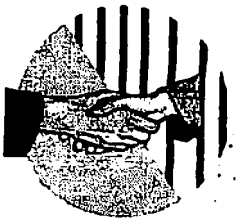

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Moving? Transferred? If so, please complete the enclosed address change form so that the membership rolls and mailing list can be updated. Thank you!

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