FLORIDA PRISON LEGAL

Perspectives

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BACK FROM THE DEAD:
Revival of the Prison Health Code

by Mark Osterback

Were you aware that prior to 1996 living conditions in the Florida Department of Corrections (FDOC) were regulated by administrative rules enforced by the Department of Health and Rehabilitative Services (HRS)? Did you know that no such rules, enforceable in the state's courts, now exist to regulate these living conditions? If you didn't, don't despair. The overwhelming majority of prisoners haven't a clue as to the previous existence of Chapter 10D-7, Florida Administrative Code (10D-7). It was repealed, effective February 8, 1996.

Recently, in *Osterback v. Agwunobi*, 29 Fla.L.Weekly D1031 (Apr. 26, 2004), the Florida First District Court of Appeal issued an important, albeit somewhat unappreciated, opinion on the validity of this repeal. Unappreciated because most won't immediately grasp what the court's holding represents due chiefly to ignorance of 10D-7's former provisions and the far reaching implications of their potential resurrection and enforcement. Hopefully this article will serve to enlighten prisoners and help them to understand the catalyst for change 10D-7 could be.

While in effect, 10D-7 was a rule which the FDOC hated anyone to know about. It's existence, even among the more legal savvy prisoners, was not widely known, because it appeared nowhere in FDOC rules, and it was not easy to locate. Whenever its existence *was* discovered, and the authority of its provisions invoked, the FDOC would engage in all manners of shenanigans and make up the most outlandish stories to keep from having to obey them. Many times, the prisoner making such a complaint was merely transferred to moot same. This is because some of these provisions could cause massive changes in the prison's operation, if followed.

Two such provisions previously contained in 10D-7 bear closer scrutiny here as they are as relevant today as they were when repealed. The first, 10D-7.007(3) states:

"Sufficient space shall be provided in all living and sleeping quarters to satisfy sanitary needs. Every bed, cot or bunk shall have a clear space of at least twelve (12) inches from the floor. There shall be a clear ceiling height of not less than thirty-six (36) inches above any mattress and there shall be a clear space of not less than twenty-seven (27) inches between the top of the lower mattress and the bottom of the upper bunk in a double-deck facility. Single beds, cots or bunks shall be spaced not less than thirty (30) inches laterally or end to end, and double deck facilities shall be spaced not less than thirty-six (36) inches laterally or end to end. Sleeping arrangements shall ensure a minimum of six (6) feet between inmate heads."

The second, 10D-7.005(7), states the following:

"In secure housing areas there shall be at least one lavatory and one toilet in each cell. Dormitories and

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is more than double what Corrections Secretary James Crosby receives to run the entire prison system.

Crosby, who as head of the prison system automatically has a seat on PRIDE's board of directors, has also questioned operations. "The problem I've had as a board member is not understanding the relationships between PRIDE as clearly defined in statute and the various companies that have spun off using PRIDE money primarily," said Crosby.

PRIDE's interconnected companies have also flummoxed state auditors, who complain it's impossible to determine whether PRIDE has received any real return for it's investment.

What was once a simple string of prison factories making shoes and clothes for prisoners or making license plates, processing food to be served to prisoners, printing forms, and making furniture for other government agencies is now a collection of corporations with overlapping interests that sometimes have nothing to do with providing jobs for Florida prisoners.

- One PRIDE spinoff paid $2.5 million for Northern Outfitters five years ago, hoping the cold weather clothing manufacturer would expand to Florida. That hasn't happened. Instead, while the company's goods are stitched by prisoners, none of them are in Florida. They are prisoners at Utah State Prison.
- A citrus processing partnership between PRIDE spin-off ITC and a subsidiary of South Florida citrus grower, Bernard Egan, owes PRIDE more than $3.5 million from a failed venture. And PRIDE is now stuck covering a $2 million mortgage for the factory building where the venture was to be housed at Okeechobee Correctional Institution.
- A former PRIDE enterprise, turning documents into digital files, was shifted to another spinoff company that bids for and receives contracts for jobs that are too sensitive for prisoners, so nonprisoners are hired.
- The north St. Petersburg building where PRIDE and its affiliates share offices was sold, and the money went to the spinoffs instead of PRIDE.
- Another venture included private investments by members of the PRIDE board and staff (including CEO Davis) that would have returned them personal profits, but the venture failed.

Even before Bush called in his inspector general, an attempt was made to bring the PRIDE board to heel. Minutes of the April board meeting show that Bush's senior staff called on the entire board to voluntarily resign and apply for reappointment. Bush's staff also suggested that PRIDE's by-laws be changed to allow the governor, not the board, to pick the chairman. The 14-member board refused. Though most are appointed by the governor (12), each current board member has been vetted and approved by Davis and the rest of the board before his or her name ever gets sent to the governor for appointment.

Davis and other PRIDE staff continue to claim they have done nothing wrong. As the 1990s came to a close, Davis said, she and the other board members had to adjust to the inevitable: Offshore manufacturing, combined with Bush's own push to privatize government operations made it harder for PRIDE to get customers. One of the biggest blows was the 2001 privatization of the state's prison food services, which were outsourced to Aramark Corporation. PRIDE, who had been acting as a middleman to supply prisons food (at a large markup for taxpayers) saw its revenue drop $30 million the following year. However, PRIDE's latest annual report (2003) claims that last year PRIDE had $65.3 million in sales and assets of more than $38.7 million.

Regardless of the outcome of this latest in a string of scandals at PRIDE going back to the mid-1980s, the prisoners who work for the company will continue to be the losers. While PRIDE rakes in millions in (non) profit each year, those who make it possible for the company to cook up schemes to try to circumvent federal laws intended to prohibit exploiting prisoner labor at the expense of private sector jobs and for the PRIDE CEO to bring in almost a quarter-million-dollar salary each year must try to subsist on third world wages.

PRIDE prisoner workers (never call them employees, they might then be entitled to benefits or even minimum wage, heaven forbid) earn only $.20 to $.55 an hour, barely enough to survive from one paycheck to another, having to buy necessities from the privately-operated prison canteens at inflated prices. And nevermind that Florida law requires a portion of any wages prisoners may receive in prison to be set aside as release reserves or that a portion of wages must go to help with costs of the dependent children of prisoners. PRIDE has no intention of ever paying prisoners enough so those laws are complied with.

It's sad to see that many PRIDE prisoner workers are fiercely loyal to the company, which can be directly attributed to the pittance PRIDE gives them when the vast majority of prisoners are paid nothing. They also fail to understand that although it is suppose to be PRIDE's primary

of 14 cells on each floor and 56 inmates on each wing. Each row of cells has two showers.

Inmates are allowed outside two times a week for two hours to exercise in one of four caged courtyards. Inmates have a basketball and volleyball net as well as a pull-up bar. Inmates enter one at a time and up to 30 are allowed in the yard at one time.

Union Correctional Institution is about 10 miles outside Starke and covers more than 98 acres and holds 1,950 inmates at different security levels. Death row prisoners are in their own facility within the main unit. Of the 364 inmates sentenced to death in Florida, 334 are held at Union. Thirty are held at nearby Florida State Prison, and one woman is held at Lowell Correctional Institution. The death chamber is located at Florida State Prison.

Florida administers executions by lethal injection or electric chair at the death chamber. A three-legged electric chair was constructed from oak by DOC personnel in 1998 and was installed in 1999. It replaced the original chair, which had been in use since 1923. In January 2000, the Florida legislature passed a bill allowing lethal injection as an alternative method of execution. Terry Sims became the first inmate to die by lethal injection, on February 23, 2000. Prisoners convicted after 2000 do not have the option of electrocution. Before 1923, executions were carried out by each county, usually by hanging.

Death Row Milestones:

- First executed inmate – Frank Johnson was the first inmate executed in Florida's electric chair on October 7, 1924. In 1929 and from May 1964 to May 1979 there were no executions in Florida.
- First woman executed – on March 30, 1998, Judias "Judy" Buenoano, known as the "Black Widow," became the first woman to die in Florida's electric chair. On October 9, 2002, serial killer Aileen Wuornos became the first woman in the state to be executed by lethal injection.
- The Executioner – a private citizen who is paid $150 per execution to serve as the executioner. State law allows for his or her anonymity.

By the Numbers:

- 12.01 years – the average length of stay on death row.
- 28.2 years – the average age at time of offense.
- 48.06 years – the average age of inmates on death row.
- 43.67 years – the average age at time of execution.
- $72.39 – the cost to incarcerate someone on death row for a day.
- $26,422.35 – the cost to incarcerate someone on death row for a year.

By Race and Gender (as of 4/30/04):

- 229 white males.
- 125 black males.
- 10 others.
- 1 white woman.
- Oldest death row inmate: William Cruse, Jr. (76)
- Youngest male on death row: Randy Schoenwetter (23)
- Oldest inmate executed: Charlie Grifford (72) (2/21/57)
- Youngest inmate executed: Willie Clay (16) (12/29/41)
- Longest prisoner on death row: Gary E. Alvord (30 yrs.) ■

Database Technology Tracks Prisoners' Tattoos

Recently the Florida Department of Law Enforcement implemented a new database complied by Ed Ricord that contains information of over 372,644 tattoos on current and former state prisoners.

With the database officials can identify the most popular tattoos and their location. Law enforcement praise the technology because the information, when combined with other information, such as height, weight, hair, and eye color, will aid officers in their search for possible crime suspects.

Ricord created the database after fielding numerous inquiries about tattoos on criminal suspects.

For the record, the most popular tattoo among Florida prisoners is the cross. "Mom" tattoos are favored by 543 current and former prisoners. And 812 have tattoos on their buttocks. But only one has "Mom" tattooed on his butt, a guy from Tampa, Florida. ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Oftentimes when a criminal offense is charged, the specific date of the offense can be pinpointed. In such a circumstance, it is easy to determine which set of sentencing guidelines will apply to the offense. However, sometimes the offense is alleged to have occurred within a period of time which spans several sets of sentencing guidelines. When it is charged that a criminal offense occurred over a period of time during which sentencing laws have changed, the defendant should be sentenced under the more lenient version of the sentencing laws. Cairl v. State, 833 So.2d 312 (Fla. 2nd DCA 2003). Sometimes in such a situation, though, the court and defense counsel fail to recognize which set of guidelines should actually apply. If an attorney fails to have his client sentenced under the proper set of guidelines in the above scenario, then the attorney's representation is ineffective, the sentence should be vacated, and a new sentence should be imposed under the proper, more lenient guidelines. See, Torres v. State, 2004 WL 1460706 (Fla. 3rd DCA, June 30 2004).

In Cairl v. State, 833 So.2d 312 (Fla. 2nd DCA 2003), the defendant, Charles Cairl, was convicted of several sexual offenses relating to a person under the age of sixteen. The trial court originally sentenced Cairl under the 1995 sentencing guidelines. Cairl was resentenced under the 1994 sentencing guidelines pursuant to Heggs v. State, 759 So.2d 620 (Fla. 2000). However, the trial court denied Cairl's claim that he should be sentenced under the most lenient guidelines in effect during the time frame alleged in the information, and, instead, applied the sentencing guidelines in effect on the end date alleged in the information. Cairl at 312.

Cairl was charged with two single offenses alleged to have occurred on or between January 1, 1991, and February 4, 1997. Id. Cairl argued that because the dates straddled three different sentencing guideline time frames and because neither the evidence nor the verdict pinpointed the date of the offenses, he was entitled to be sentenced under the most lenient version of the three sentencing guidelines. Said most lenient version was the one in effect between January 1, 1991, and April 7, 1992. Id. The Second District Court of Appeal of Florida

pursuant to Rule 3.800(a)]; and, Carpenter v. State, 870 So. 2d 955 (Fla. 1st DCA 2004)[Defendant raised facially sufficient claim for relief that his sentence was in excess of statutory maximum, where trial court record contained sentencing guidelines from incorrect year which did not reflect year in which defendant committed offense, and thus, postconviction court was required to grant relief or attach portions of record conclusively refuting claim of illegal sentence].

Thus, there are a number of ways in which one can raise a Rule of Lenity issue after the Judgment and Sentence has become final. Each case is different and one procedural vehicle may be more appropriate than another depending on the circumstances. One will need to consider the specific facts of his or her case to determine which of the above addressed collateral attacks would be most appropriate for his or her sentence. But, if a sentence has been improperly applied due to a violation of the Rule of Lenity the problem possibly can , if addressed properly, be corrected and a reduced sentence may result.

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. ■

Is This Thing On? Recorded Interrogations

Most of the early arguments by civil libertarians about recorded police interrogations appear to be gaining steam. These advocates argue that a videotape or audio recording of police interrogations would deter coercive questioning and reduce the number of false confessions. In addition, requiring probation and parole officers to record interviews would eliminate questionable (if not nonexistent) admissions to violations. Many prisoners have been returned to prison based solely on alleged admissions to crimes and technical violations. One such prisoner, Mark O. Ellis, remains imprisoned on a 30-year sentence based on such unverifiable testimony of corrections officials, despite the fact the official had in his possession an audio recorder yet it was never used.

A new study has found that in the small number of jurisdictions that record interrogations and interviews, law enforcement has softened its position of utilizing such equipment. They claim it enhances integrity. The study makes a strong case that the states and localities that do not require recorded interrogations now should start to do so.

Although it seems to defy common sense, false confessions are quite common, even in capital cases. There are a wide array of reasons. For example, juveniles are often manipulated into confessing. Tricky questioning, physical coercion, or suggestions that a confession is the best way to avoid a lengthy sentence, or the death penalty, persuades many individuals to admit to crimes they did not commit. Or, when such tactics fail, officers will issue a statement that the individual made an admission when in actuality, no such admission occurred.

Only four states have decided to require recorded interrogations or interview, though several other states are considering such measures. The Center on Wrongful Convictions at Northwestern University recently surveyed 238 law enforcement agencies around the country that currently record the questioning of felony suspects. It found that virtually every officer who had gave recorded interviews a try was enthusiastically in favor of the practice.

In summary, recorded interrogations are a powerful tool for both sides of the criminal justice system. Florida should enact laws adopting this win-win practice. ■

lock technique. Schembri, who was appointed by Gov. Bush to take over the troubled agency in June, said he intends to create a new mind-set at the agency that is under fire behind the death of two juveniles and allegations of guards having sex with locked up girls. More than 600 cases of abuse or neglect have taken place in state detention centers in the past decade, with nearly two-thirds occurring since 2000.

MS - The Mississippi DOC laid off 90 employees in June '04 in an effort to save the state about $3.5 million a year. The state has about 3,800 employees overseeing 44,000 prisoners.

[**NOTE**: In contrast, Florida's DOC has over 25,000 employees overseeing 80,000 prisoners - editor.

National - A new report released by the American Bar Association during June '04 says that get-tough approaches to crime, such as minimum mandatory sentences, generally don't work and should be abolished. The report documents that existing requirements do not account for differences among crimes and criminals, resulting in more people behind bars for longer terms without necessarily keeping society safer.

National - According to a report issued by Congress on July 7, 2004, the nation's juvenile detention centers have become warehouses for an increasing number of mentally ill youth, including many who have not committed any crimes. The mentally ill children are being sent to the detention centers because they are unable to receive mental health services in their communities, according to the study by the Democratic staff of the House Government Reform Committee.

PA - In July '04 a federal appeals court in Philadelphia ruled that prisoner Daniel Decker who has been held in solitary confinement for 31 years can remain there as long as prison officials occasionally review his status. Decker, an alleged white supremacist who helped two other prisoners' torture and kill a corrections captain at a Pittsburgh prison in 1973, is too volatile to be released to the prison population, claim prison officials. A prisoner's rights group, The Institutional Law Project, had sued on Decker's behalf, saying his seemingly permanent solitary confinement was unconstitutional.

VT - In May '04 the Vermont Legislature passed a law that prohibits the VT DOC from housing any prisoner in a cell where the temperature is below 55 degrees. Legislators noted it's a shame that they had to pass a law to prohibit something that should be common sense, but felt it was necessary to control such abuse by prison officials. The law was a result of the freezing confinement that Florida interstate compact prisoner James Quigley had been subjected to before he allegedly committed suicide in a VT prison in October of 2003. (See: *FPLP*, Vol. 9 Iss. 6, "Florida Prisoner's Death in Vermont Sparks Legislative Investigation.")

WA - July 1,'04, was the deadline for Washington State prisoners to get rid of their sexually-explicit magazines and books. WA prison officials say they hope the ban will reduce aggressive behavior among prisoners and help in the treatment of sex offenders. Prisoner officials will further reduce prisoner aggression in November when smoking will be banned in the state's prisons.,

Florida Cost of Incarceration Statute Constitutional, But Defenses Appear Viable for Some

by Glenn Smith

In *Goad v. Florida Department of Corrections*, 845 So.2d 880 (Fla. 2003), the Florida Supreme Court resolved district courts of appeal conflict to find that §§ 960.297 and 960.293, Fla. Stat., which create a cause of action for "the state and its local subdivisions" to collect damages from criminal offenders for their costs of incarceration, could be applied to those convicted before the statutes' July 1, 1994, effective date because those sections "do not violate the constitutional provisions against ex post facto laws, nor...the right to substantive due process." *Goad* at 881.

Previous challenges to the constitutionality of the statute (the enactment encompasses §§ 960.29 – 960.298, Fla. Stat.) have also failed. *Ilkanic v. City of Fort Lauderdale*, 705 So.2d 1371 (Fla. 1998) (finding § 960.292(b)(3), Fla. Stat., does not violate substantive due process or equal protection and that the lien provisions of §§ 960.292 and 960.294, Fla. Stat., do not violate procedural due process, but "no such lien exists as to such homestead property," citing Article X, § 4, Fla. Const..)

However, in a little known decision out of the Nineteenth Judicial Circuit Court, Okeechobee County, Florida, in *Florida Department of Corrections v. Jacobson*, Case No. 2001-CA-210, on May 10, 2002, Circuit Court Judge Burton C. Conner found that where the defendant was convicted of a life felony in July 1985, and § 960.293(2)(a), Fla. Stat., provides for one liquidated sum of $250,000.00 in damages for those convicted of a capital or life felony, that the claim of the FDOC ripened and became liquidated, and the limitations period provided by § 95.11(3)(f), Fla. Stat., governing actions founded on statutory liability began to run on the date the statute went into effect. Since the FDOC's action against Jacobson was not filed within the four-year limitations period it was barred, Judge Conner held. The bar, however, would not have applied had the claim against Jacobson been based upon the liquidated damage amount of $50.00 per day of an offender's sentence for offenses *other than* capital or life felony (§ 960.293(2)(b), Fla. Stat.). (In Florida, capital and life felonies for which specific sentencing parameters are prescribed pursuant to § 775.082(1) and 3.(a), Fla. Stat..) The decision in *Jacobson* was not appealed by the FDOC.

It has been the practice of "the state and its local subdivisions" not to file an action for costs of incarceration until an offender files a suit against the state, a local subdivision, or individuals acting under color of state law. While the decision in *Hankins v. Finnel*, 964, F.2d 853, 866 (8th Cir. 1992) (finding that "section 1983 preempts the Missouri Incarceration Act as it is applied in this case...the Act is invalidated by the Supremacy Clause") provides a legal basis against seizure of monetary awards under a 42 USC § 1983 civil rights action, defenses other than that delinated in *Jacobson* have yet to be fully litigated.

However, in another interesting case, *Smith v. Florida Department of Corrections*, filed February 23, 1998, in the Nineteenth Judicial Circuit Court, Martin Co., under Florida's Tort Claims Act, the assistant attorney defending the FDOC filed a counterclaim for cost of incarceration lien which was mailed on June 12, 2002, only a few days after Smith had rejected a ridiculously low monetary settlement offer on May 28, 2002. The counterclaim was filed even though Judge Conner had just ruled in *Jacobson* a couple of weeks earlier (which the same attorney general's office had prosecuted) and Smith was similarly situated to Jacobson in regard to the application of the statute of limitations, making *Jacobson stare decisis* regarding the issue in *Smith* in the Nineteenth Circuit.

Before discovering *Jacobson*, Smith had moved to dismiss the FDOC's counterclaim for retaliation in violation of his right to access to the courts. That defense appeared to have some merit from case law. In *Re Apportionment Law, Senate Joint Res. No. 1 305*, 263 So.2d 797, 808 (Fla. 1972), the Florida Supreme Court interated "that a statute may be valid as applied to one set of facts, though invalid as applied to another set of facts," in regard to the constitutionality of a statute. And in *Crawford El v. Britton*, 523 U.S. 574, 588 n. 10, 118 S.Ct. 1584, 1592 n. 10 (1998), the U.S. Supreme Court explained that "[t]he reason why...retaliation offends the Constitution is that it threatens to inhibit the exercise of a protected right." Thus, in claiming retaliation as a defense to a counterclaim for a cost of incarceration lien, discovery would be a valuable tool to compile information about the actual application of the costs of incarceration cause of action to offenders litigating against "the state and its local subdivisions" compared to the total number of offenders subject to such possible action.

When Smith got a hearing on his amended motion to dismiss the FDOC's counterclaim (citing *Jacobson*) on January 9, 2003, the assistant attorney general announced to the Court that the FDOC was withdrawing its counterclaim. ■

Prisons Fueling Rural Economies

So many prisons have been built in rural areas in recent years and so many prisoners housed in them that the impact is showing up in census figures, and in local, state, and federal aid allocations based on those census figures. According to a study released April 29, '04, by

bring finality to state judgments.

The question in Haley's case was whether a prisoner who missed a deadline or was otherwise procedurally barred from bring in a claim could still get a federal hearing by asserting "actual innocence." Haley claimed his sentence was wrongfully increased based on a crime that did not qualify under a habitual offender statute.

Legal analysts watched intensely to see whether the court would rule in Haley's favor and give prisoners who are sentenced under repeat offender statutes a new way to challenge their cases.

But the majority opted not to address the key question. Lead by Justice Sandra Day O'Connor, the Court said it would be better to send Haley's case back to be reheard on his separate claim of ineffective trial counsel. O'Connor said the court should avoid creating exceptions to rules that in most cases bar federal judges from second-guessing state court judgments.

On June 24, 2004, the U.S. Supreme Court issued decisions in two cases that are progeny of the high Court's landmark decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi* it was held that, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Since Apprendi was decided it has generated a significant body of litigation testing the limits of the rule established in the case, and whether the rule applies retroactively to cases that became final prior to the rules in *Apprendi* being established.

In the first June 24 decision the Supreme Court rejected a circuit court of appeals decision that had invalidated an Arizona death-sentenced prisoner's sentence by retroactively applying the rule established in *Apprendi*, *Id.*, and as applied to death penalty cases in *Ring v. Arizona*, 536 U.S. 584 (2002). In a 5 to 4 vote, the Supreme Court held that because the conviction and sentence of the prisoner, Warren Summerlin, had already become final on direct review before *Ring* was decided that *Ring* does not apply in his case.

At issue in *Ring* was whether juries, rather than judges, must make the final decision on whether a convicted murderer should receive a death sentence or prison term. The *Ring* Court had held that the Sixth Amendment right to a jury extends to the sentencing phase of a capital murder case, and unless a defendant waives that Sixth Amendment right, a death sentence meted out by a judge rather than a jury would be unconstitutional.

However, writing for the majority in the Summerlin case, Justice Antonin Scalia said that while the right to a jury trial is fundamental, "it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the state faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart."

Thus, the Court held that since Summerlin had exhausted all direct appeals before *Ring* was decided, and since the rule established in *Ring* was procedural rather than substantive because it only regulates the "manner of determining" a defendant's culpability, that *Ring* did not apply retroactively to Summerlin. This decision dashed the hopes of at least 121 death-sentenced prisoners in five states who had hoped the justices would find that *Ring* would apply retroactively. See: *Schriro v. Summerlin*, 17 Fla.L.Weekly Fed. S425 (2004).

In the second June 24 decision the Supreme Court held that the rule established in *Apprendi* applied in a plea bargain case where the facts admitted in the plea supported a maximum sentence of 53 months under Washington state guideline sentencing but the judge imposed a 90 month sentence, based on the pled facts, after finding that the defendant, Ralph Blakely, acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard guideline sentencing range. Overturning a lower appeals court decision that had rejected Blakely's claim that such sentencing departure deprived him of his constitutional right to have a jury determine beyond a reasonable doubt all facts essential to his sentence, the Supreme Court held that because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard range sentence, that *Apprendi* did apply and that a jury would have had to found that Blakely acted with "deliberate cruelty" in order for an upward departure to be constitutional.

The decision in the *Blakely* case resulted in strong dissent from the minority justices who opined the decision would wreak havoc on courts nationwide and sidetrack efforts to use sentencing guidelines to make criminal punishments more uniform. Immediately following the decision it did create a furor among some state and federal prosecutors who claimed it will create turmoil in the criminal justice system. Most notably the federal system, which uses guideline sentencing, could be impacted by the decision. Justice Sandra Day O'Conner wrote that at least 10 states have sentencing guidelines that could be affected, including Florida. See: *Blakely v. Washington*, 17 Fla.L.Weekly Fed. S430 (2004).

[Note: On July 21, 2004, the U.S. Justice Department stated that the *Blakely* decision must be clarified as it has thrown federal sentencing into uncertainty and disarray. The high Court was asked to return before its usual October term opening to distinguish the federal guidelines from Washington state's since some federal judges have already questioned the federal guidelines' constitutionality by applying *Blakely*.] ■

violating the terms of control release to which he expressly agreed. Gaskins filed a petition for a writ of certiorari to the First District Court of Appeals and again was denied any relief. Subsequently, he filed the same argument pursuant to 28 U.S.C. section 2254 to the federal district court which rejected it.

Gaskins on appeal to the United States Court of Appeals, the 11th Circuit ruled that to fall within the ex post facto prohibition a law must be retrospective and it must disadvantage the offender affected by it by altering the definition of criminal conduct *or* increasing the punishment for the crime. Neither the Ex Post Facto Clause nor any other part of the Constitution prevents a state from permitting a prisoner to bargain away earned release credits and Gaskins did just that. He bargained away any right he had earned earlier under other statutes and forfeited under the terms of those earlier statutes.

When a prisoner violates the terms of his controlled release the Parole Commission is authorized to revoke all gain-time, whether it be CR credits, PC credits, or any other gain-time credits possibly received under other statutes. Florida Statutes section 944.28(1) and section 947.141(6).

Gaskins had voluntarily elected to accept the early release program each time he was allowed to do so. In doing so, he agreed to all the terms and conditions therein, including its broad forfeiture provisions. - a.s.

Dill v. Holt, 17 Fla.L.Weekly Fed. C632 (11th Cir. 6/3/04

The 11th Circuit granted David Dill, Jr., an Alabama State prisoner, a certificate of appealability on two issues: (1) whether a state prisoner proceeding under 28 U.S.C. sec. 2241 must exhaust available state remedies, and (2) if so, what steps must be taken in challenging a parole-revocation decision to properly satisfy the exhaustion requirement.

Dill's argument in this case was that a state prisoner using section 2241 to attack a parole revocation need not satisfy the exhaustion requirement of 28 U.S.C. sec. 2254. He further argued that it was the State Board of Pardons and Paroles' decision to revoke his parole and return him back behind bars, not pursuant to the judgment of a state court, but to that of a decision by an administrative body.

The 11th Circuit explained, although the statutory language within section 2241 itself does not contain a requirement that a petitioner exhaust state remedies, it has been held in *Medberry v Crosby,* 351 F.3d 1049 (11th Cir. 2003), that the requirements of section 2254, including exhaustion of state remedies, applies to a subset of petitioners to whom section 2241(c)(3) applies (which Dill used to seek his habeas relief) regarding those who are in custody pursuant to the judgment of a State court.

As explained by Judge Black, in *Medberry*, a writ of habeas corpus is a single post conviction remedy principally governed by two different statutes, section 2241 and section 2254, with the second of those statutes serving to limit authority granted in that of the first one. In other words, a petition seeking habeas relief under section 2241 is nevertheless subject to section 2254's exhaustion requirement *if* the petitioner is in custody pursuant to the judgment of a State court.

In Dill's case, he was in custody pursuant to his original state conviction and sentence, despite the fact he was placed back in custody resulting from an administrative proceeding of an executive branch agency instead of a court.

As found in *Jones v. Cunningham,* 371 U.S. 236, 243 (1963), a prisoner who is placed on parole is still *in custody* under the unexpired part of his state sentence for purposes of the habeas statute.

The steps that should be taken to properly satisfy the exhaustion requirement in the type of situation as in this case is shown in section2254 (b)(1)(A) and which are the ones available in the courts of the State. In *O'Sullivan v Boerckel,* the United States Supreme Court explained that a state prisoner must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's appellate review process. A complete round of the state appellate process includes discretionary appellate review when that review is part of the ordinary appellate review procedure in the state.

Because Dill failed to pursue any state remedy to the fullest extent (or even partially) he did not meet section 2254(b)(1)(a)'s exhaustion requirement. Therefore, the 11th Circuit affirmed the district court's dismissal of his petition for such failure.

[Note: Also see, *Thomas v. Crosby,*17 Fla.L.Weekly C576 (11th Cir. 5/26/04), where it is discussed about James Dwight Thomas' application for writ of habeas corpus filed pursuant to 28 U.S.C. sec. 2241 in the United States District Court for the Northern District of Florida could be converted into one pursuant to 28 U.S.C. sec. 2254 by the District Court. - a.s.]

U.S. DISTRICT COURTS

Faison v. Guerra, 17 Fla.L.Weekly Fed. D626 (N.D. Fla. 3/15/04)

The underlying issue in this case is that prisoner Matthew Levi Faison filed a civil rights complaint and requested to proceed in forma pauperis under 28 U.S.C. section 1915 even though he was aware that he had three strikes against him for filing prior frivolous civil claims in a United States Court.

As it is plainly stated under 28 U.S.C. section 1915(g), a prisoner

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