FLORIDA PRISON LEGAL

Perspectives

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–Florida Parole Commission– Racism, Cronyism and Discrimination Alleged by Former Commission Chairman

by Bob Posey

In the last issue of *FPLP* it was reported that racial diversity, or rather, the lack thereof, in the makeup of the three-member Florida Parole Commission (FPC) had become an issue when in June Gov. Crist and his Cabinet were faced with picking a replacement for Commissioner Fred Dunphy, whose six-year term on the FPC was scheduled to expire at the end of June. Out of more than 50 applicants for the position, the Parole Qualifications Committee, a committee appointed by the Cabinet, submitted three people for consideration: Fred Dunphy, to retain the position; Tina Hayes, current FDOC Director of Initiatives; and, term-limited State Representative Curtis Richardson (D-Tallahassee). Both Hayes and Richardson are Black, while Dunphy and the other two current FPC commissioners, Monica David and Tena Pate, are White.

For several years now the commission, whose core job is (suppose to be) making parole decisions on Florida's dwindling, mostly Black, parole-eligible prisoners and parolees, has been all White. That has created criticism and calls for greater racial diversity. Calls which have largely fallen on deaf ears, according to some.

Keeping it White

Although a decision was scheduled to be made concerning the FPC opening on June 10, the decision was delayed until mid-August. And then the governor and Cabinet (who are all White), sitting as the Board of Executive Clemency, voted unanimously to give Dunphy a third six-year-term, in effect ensuring an *all-White* parole commission for the next several years.

The Board of Executive Clemency consists of Gov. Charlie "Chaingang" Crist, Attorney General Bill McCollum, Commissioner of Agriculture Charles Brunson, and Chief Financial Officer Alex Sink. Alex Sink is a Democrat while the other three are Republicans.

In addition to voting to retain Dunphy as a parole commissioner, the Board of Executive Clemency voted 3-1 to make him Chairman of the commission. Sink was the lone dissenter in that vote. Earlier in the process she wanted the board to reject all three of the finalists and send it back to the Qualifications Committee for a new list, but none of the other board members would second that motion.

Current Commissioner Monica David, who had been the Chairwoman, was reappointed to a second six-year term in 2006, she now becomes Secretary of the FPC. Vice Chairwoman Tena Pate was appointed to the commission in 2003 by former Gov. Jeb Bush, to fill the vacancy created when former FPC Chairman Jimmie

ON THE INSIDE

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"We were faced with selecting an all-female commission or an all-White commission," said Alex Sink The only Black male finalist, State Rep. Curtis Richardson, had withdrawn his name by the time of the vote because he lacked the law enforcement background that Crist and the Cabinet wanted for the $92,574-a-year position. That left the decision down to a choice between Dunphy or Tina Hayes of the FDOC. No explanation was given why the name of another male applicant wasn't advanced as a finalist once Richardson dropped out.

"The fact that the people coming before the parole board, the majority of the population appealing are African-American applicants they should be judged bya jury of their peers," said Alex Sink. A sentiment more idealistic than realistic. The concept of "judgment by peers" has no role in the parole process as practiced in Florida considering the contrasts between parole commissioners (privileged Whites earning almost $100,000-a-year and who have a vested interest in *not* paroling the dwindling number of parole-eligible prisoners, of which only a little over 5,000 remain) and the parole-eligible population (who are, in the majority, prisoners who have been in prison for decades now, who have little or nothing, who have been branded as pariahs for past crimes, who are disenfranchised, and who are disproportionately Black).

Issues Deeper Than Diversity

Florida law mandates both gender *and* racial diversity in the makeup of the FPC. However, by allowing the parole commission to remain all White, the comments of Muslima Lewis, an attorney with the ACLU and director of the Florida Rights Restoration Coalition, appear to be on point. "CFO Alex Sink made an effort. It fell on deaf ears. It shows the issue of diversity is not a priority," said Lewis.

"They had a sensitivity to gender diversity and that is important too. But racial diversity and its importance in the criminal justice system and especially re-entry (to society) is paramount, especially as it disproportionately impacts minorities. You can find the right candidates. There are plenty of talented, qualified people of African descent," Lewis commented on the Clemency Board's decision to retain a White commission.

Florida State Conferences of NAACP Branches President Adora Obi Nwsze noted, "We are very disappointed with the Cabinet's decision. We would have hoped they would have seen fit to diversify this body."

Yet, while some only saw the issue as one of diversity, at least one person with extensive personal experience and knowledge of the parole commission feels that the real issues go much deeper.

"The more devastating dilemma for the governor and Cabinet is not diversity, but the racism, cronyism and discriminatory practices that have been allowed to exist on the commission, with the knowledge of the governor's

office, though not the governor himself," wrote a former parole commissioner in an op-ed letter recently printed in the *Tallahassee Democrat*.

Charles J. Scriven continued to explain his uniquely informed perspective in his letter.

"The situation started during the Jeb Bush administration, during which the most recent appointment was made to the commission. There was an able black Department of Corrections administrator among the finalists. Mr. Bush persuaded the Cabinet, which included Mr. Crist, who was then attorney general, to support his nominee, Tena Pate (who was the state's top victim advocate at the time). Only former Insurance Commissioner Tom Gallagher dissented, and the commission became all white again," Scriven wrote.

"In 1974, then-Gov. Reubin Askew and the Legislature expanded the Parole Commission from five to seven members, and act designed to make it possible for a black and a woman to be added to the commission at the time. It was a foregone conclusion that some equity was needed in gender and race. I was the first black appointed to the commission, and Anabel P. Mitchell, a DOC prison superintendent, was the first woman."

"I won't try to describe the lack of equity or opportunities for women or blacks at that time except there were no black hearing examiners or black executive secretaries anywhere to be found in the agency. During my 12 years on the commission, some fairness in hiring practices was accomplished, especially when I was chairman (1976-78), and with the support of the entire commission. The presence of equity in gender and race is still essential for the *appearance* of fairness, because the balance is always tilted in favor of people who look like and think like you. Still, the issue around the current appointment is not diversity, but racism and cronyism that I believe has increased in recent years on the commission, which lives and grows when left to itself," wrote Scriven, who then continued.

"I have written Gov. Crist, copying Attorney General Bill McCollum and CFO Alex Sink, regarding what I believe has been an unfair and biased practice of the commission in selecting those (retired commissioners) who are asked to serve on an interim basis (when one of the current commissioners is not available), when needed. As a former commissioner and chairman, for example, I am eligible, but have been called to serve just once since 2003, while others have been in the rotation as many as 20 times (an apparent reference to Judith Wolson, most often asked to fill in for absent commissioners, a white female)."

"I have inquired but have never heard from either the commission or governor's office about this inequity, and when I asked for public information regarding how commissioners are chosen to serve on an interim basis, and what they've been paid, I received a reply nine months later from the commission's general counsel that contained none of the public records I'd requested. A later request to the inspector general's office confirmed that the commission had provided me with 'what information was available.' I am astounded to know that the records of persons who worked for the state, and what they were paid, is unavailable," complained Scriven.

Wrapping up his letter, Charles Scriven posited a question that no one seems to want to acknowledge, much less answer.

"Gov. Crist inherited a Parole Commission that in my view has shown its inability to be fair with a former member of its own who happens to be black. This raises the question of how it can be fair to the disproportionate number of black (parole-eligible) inmates in Florida's prison system? No, the real issue regarding this appointment to the commission is not diversity, but racism and cronyism." ■

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The Researcher's Nightmare

by Anthony M. Gallagher

Imagine being an attorney or an education-trained paralegal working under the supervision of a licensed attorney, having to wade your way through the hundreds of thousands of case decisions currently published in the numerous reporters without being able to research a case's history. A nightmare right? Yet, this is exactly what FDOC expects from its prisoners.

Recently, the FDOC posted proposed rule changes for Chapter 33. A simple review of the proposed changes makes clear that since the FDOC installed the CD-ROM version of WESTLAW, it believes there is no longer a need for the Shepard's Citations, a critical legal research tool.

Previously, 33-501.301(2)(1), F.A.C., required the "Florida and Federal Shepard's indexes." This was echoed in the Procedure Manuel. See: P.M. 501.301(1)(b). However, the department replaced "Shepard's Citations" with "...case status of a court decision over time or to identify related court decisions..." See: 33-501.301(2)(i) (Proposed Rule Changes).

What exactly does this mean? It appears to this writer that this is a generic phrase that means nothing more than you will no longer be able to effectively or adequately update your case research.

In *U.S. v. Beckwith*, the Federal District Court for the District of Utah stated that in order to afford a defendant an adequate opportunity for the preparation of his case, defendant must be allowed access to, among other publications, Shepard's Citations when representing himself. 987 F.Supp. 1345, 1347 (D. Utah 1997).

Legal precedent, as we all know by now, develops in an incremental fashion. When one case is cited by a second decision, appropriate methodology requires that the second decision be read and its history searched. This may in turn require the process to be repeated over and over again. Without a method like Shepard's Citations for checking the history of a case, legal research of any quality is extremely difficult. See: *West Pub. Co. v. Mead Datat Cent., Inc.*, 616 F. Supp. 1571, 1583 n.1 (D. Minn. 1985).

In fact, even the U.S. Supreme Court in *Bounds* considered the failure to include Shepard's Citations in the collection list of a prison law library as a "questionable omission." See: *Bounds v. Smith*, 430 U.S. 817, 827 (1977). (overruled in part by *Lewis v. Casey*, 518 U.S. 343 (1996)).

Moreover, the American Corrections Association (ACA), the American Bar Association (ABA), and the American Association of Law Libraries, require prisons to retain Shepard's Citations as part of its minimum collection for approval. See: *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 856 (9th Cir. 1985).

Notwithstanding the need for continuously up-dated citators, like Shepard's which provide annual; semi-annual; quarterly; bi-monthly; monthly; mid-monthly, and advance sheet updates, keeping the researchers information current to within two weeks, the FDOC has decided instead to install the CD-ROM version of Westlaw's "Keycite" program.

Admittedly, "Keycite" is as updated as the Shepard's if, and only if, you have access to the internet. However, the version us prisoners will be provided will only be updated every three months on January 1st, April 1st, July 1st, and October 1st. This is, if we are lucky enough to have the programmer up-date our individual prisons in a timely manner. Those of us who have spent some time in FDOC know that this is highly unlikely.

Even so, as of February 2008, you will probably have noticed, the Shepard's Citations have not been updated—DOC has implemented its new policy. Believe it or not, this has caused some concern among DOC officials.

In a recent inter-departmental memorandum, some DOC officials have recognized the problems with removing the Shepard's Citators. Could it be that these officials know that if anyone of us is injured in contemplated or existing litigation we may have suit for violations of our constitutional rights? See: *Lewis, supra* at 349.

Shepard's Citations are not specifically required as part of our law libraries collections, however, updated, current legal information is. See: *Bounds, supra* at 827. (stating, "[i]t is particularly important that officials provide inmates with access to a source of *current* legal information.")

Is there anything we can do? Probably not since, as noted, Shepard's are not themselves specifically required in the law library collections and a section 1983 claim does not lie in a prison's refusal to subscribe to and provide Shepard's Citations.

But, keep your eyes open, sometime in the very near future one of us will be injured by either citing bad law or not catching a bad cite by the State as a direct result of the FDOC's decision to rely on the CD-ROM version of "Keycite."

At that time, you may have a constitutional violation for which you can seek redress from the court. Until then, be diligent in your research, check and double-check your case cites, do not allow the FDOC the satisfaction of keeping you locked up one day longer than necessary. ■

U.S. District Court Terminates *Osterback* Injunction

by Melvin Pérez

In a 12 page opinion issued by the U.S. District Court, Middle District of Florida, Jacksonville Division, on

March 25, 2008, the Court terminated the *Osterback* injunction.

As many of us know, this case brought about major changes to Close Management (hereinafter CM) units around the State and other types of segregation units. Some of these changes included:

- Reducing the number of institutions that house CM prisoners from ten institutions to four institutions (one for females at Dade CI and three for males at Florida State Prison, Santa Rosa CI, and Charlotte CI). *
- Conducting staff training on mental health issues relevant to CM population.
- Performing mental health screening before and after placement in CM to help ensure timely access to necessary mental health services.
- Assessing behavior risk for each CM prisoner, in order to provide more objective information to be used for mental health and other service planning and administrative decision-making.
- Providing a full range of outpatient mental health services that are commensurate with clinical need.
- Providing self-betterment/stimulation programming to CM prisoners.

The case was initiated by three prisoners, Mark Osterback, Thomas Gross, and Darryl E. Williams, on August 28, 1997. And later certified as a class action on July 26, 2000, for all prisoners assigned to CM or who in the future will be assigned to CM.

In terminating the injunction under the Prison Litigation Reform Act, the Court held that :

1) CM staff receive adequate training regarding the needs of CM, but some officers occasionally fail to adhere to that training;
2) the DOC provides adequate mental health screening of CM prisoners;
3) the DOC ensures that CM prisoners have timely access to necessary mental health services;
4) there are sufficient qualified mental health staff at CM institutions;
5) mental health staff are able to take meaningful steps to address a prisoner's mental health needs despite any restrictions placed by security staff;
6) CM prisoners are housed in units that are suited for extended confinement;
7) although there are occasions when a prisoner loses privileges for simply speaking to another prisoner, these incidents are isolated and CM prisoners have adequate opportunities to communicate with each other;
8) CM prisoners have adequate access to the day-room and to reading materials, telephones, radios and television;
9) CM prisoners have adequate opportunities to exercise; and,
10) CM prisoners have adequate access to educational opportunities, and have adequate opportunities to make canteen purchases and engage in visitation.

If you are reading this article housed in a CM unit cell, you may find this ruling bizarre. But, despite the fact that these are not isolated incidents as the Court found, many prisoners subjected to abuse on CM units are not speaking out. Many know they will be beaten or even killed if they do.

The beatings, gassings and atrocities that are carried out by some guards in these CM units are known throughout the system.

Prisoners' enforced silence, which ties the Courts' hands on what relief they can provide, gives the cowards who beat prisoners while in handcuffs, torture them with chemical agents (while the prisoner is in the shower or in his cell handcuffed), deny recreation, canteen and other privileges; deprive prisoners of property and food; feed prisoners loaf (an unappetizing substance made by mixing various foods and baking the mixture); have prisoners sleeping on a steel bunk in boxers with 18° temperatures, and write bogus disciplinary reports that up-grade prisoners to other CM levels, the motivation to continue to abuse prisoners.

While the Court strongly encouraged the DOC to keep the "Staff Training," "Mental Health Screening," "Mental Health Treatment," and "Self-Betterment/Stimulation Programming for CM prisoners," it may just be a matter of time before CM units return to pre-*Osterback* and DOC starts opening CM units around the State, as it initially intended.

To read the Court's full opinion, See: *Osterback v. McDonough*, 21 Fla. L. Wkly Fed. D 234 (M.D. Fla., March 25, 2008).

END NOTES

* Actually, the FDOC cheated on the number of CM institutions by housing CM-classified prisoners at Union Corr. Inst. also and designating it a Florida State Prison "annex"—just in relation to the UCI CM units. ■

— Opinion —
Taser Law: Now Judges Change Medical Facts To Tailor-Make Decisions

by Richard Geffken

Since 1999 more than 300 Americans have been killed by tasers used by the police. Some people were merely shopping.

On May 2, 2008, Ohio Judge Ted Schneiderman ordered Dr. Lisa Kohler, the M.D. licensed to be medical examiner for Summit County, to change three death certificates. Moreover, she was ordered to delete any reference which might suggest being shot by tasers contributed in any way to these murders.

The reason is Taser Corporation's net worth rose from $19 million in 2006 to $49 million in 2007. News that the weapon is lethal might hurt sales, especially of their model x26, often called "a sadist's delight" because of the horrors it inflicts while police torture captives.

Judges have been altering the law to arrive at orchestrated decisions for far too long. The reason courts use no longer resembles any known logic. However, it is not rare to find them changing the facts to suit the result they desire.

Until May 2, 2008, it would be up to a jury to decide if Dr. Kohler's professional medical opinion was factually incorrect. Prior to the 21st century that would involve testimony by conflicting experts.

Instead, Judge Schneiderman simply dictated his own explanation for two of the three victims, Dennis Hyde and Richard Holcomb. He invented "delirium syndrome" or "agitated delirium" as the cause of death.

Neither term appears in any medical manual, but Taser Corp. currently funds research on "excited delirium." It hopes to blame victims for contributing to their own deaths due to prior prescription drug use or mental illness.

Nothing was suggested about the third victim, Mark D. McCullaugh, Jr., who was a prisoner in Summit County Jail. There was no history of prior drug use or mental illness. Dr. Kohler, M.D., was simply ordered to delete her findings it was a "homicide" caused while suffering "multiple restraint mechanisms with beating and anal penetration." So much for innocent until proven guilty.

Except for the five deputies charged with sodomy and murder. In that situation the medical facts are changed by the judge before they stand trial on June 16, 2008. ■

FDOC Prison Guards Charged in Drug Conspiracy

MIAMI— During July 2008, five Florida Department of Corrections (FDOC) prison guards who worked at Dade Correctional Institution, located in Florida City near Miami, were indicted on charges of conspiring and attempting to traffic illegal narcotics inside the prison and for accepting cash payments from prisoners in return for helping to deliver narcotics inside Dade CI.

Charged and arrested were Captain Jimmy Lee Love, Jr., and Correctional Officers Shantavia A.L. Johnson, Dennard G. Fluker, Alexander J. Davis, and Ivis N. Grace. Felicia Z. Calloway, a contract employee with the private company that provides food service at Dade CI, was also charged and arrested. Also named in the indictments were six prisoners; Arnold S. Lindsay, Jr., Jose Rodriquez, Henry J. Benjamin, Nilo Penton, Joseph Springer, and Leon O. Montes, as well as Barbara N. Rodriguez, an associate of one of the prisoners.

The four indictments stemmed from Operation Birdcage, an FBI undercover investigation and sting into corruption at Dade CI. The operation involved several meetings in which an undercover police officer posed as a drug dealer. The undercover agent reportedly was referred to prisoners who were connected to Dade CI, and contract, employees. That led to a series of meetings between the agent, certain prison guards, the contract employee, and the prisoner associate, which were surveyed and recorded. As a result of the meetings, the agent supplied the defendants with fake cocaine and heroin for introduction into the prison, and money payment for their services.

If convicted, the defendants face a maximum 20-year sentence on each charge and a $250,000 fine. ■

Private Prison Accused in Prisoner Staph Death

The family of a Florida prisoner who died from a drug-resistant staph infection (MSRA) claims she contacted it because she had been deprived of water for bathing and toilet use at a state prison operated by the private company Corrections Corporation of America (CCA).

A lawyer, Patrick R. Frank, representing the estate of Emma Nobles, who died of MSRA Dec. 15, 2005, in a Tallahassee hospital, made the allegation in notice of intent to sue letters sent to two state agencies during August 2008. According to Frank's claims, water was turned off for days at a time at the women's prison, Gadsden Corr. Facility, apparently as a cost-cutting measure.

Prisoners at the facility, including Nobles and others who contracted MSRA, went without water in restrooms and bathing facilities possibly for up to a week at a time. Investigation has shown that prisoners were forced to defecate in plastic bags instead of using toilets which were then collected in barrels kept in the prison dormitories, alleges Frank.

Nobles, 51, of Wewahitchka, only had 60 days left to complete a drug possession sentence of a little over a year when she died. ■

Dear FPLP: I've been doing time for a long time and just want to express a total lack of respect for those liars who every year roll out the same old tired rumors to get the uninformed and/or ignorant among the prison population all worked up and spreading lies. Let me clarify a few facts: Nobody, not the Legislature, the governor, the FDOC, the Parole Commission, etc., is going to convert old life sentences to 40-year sentences and let the lifers go. First, the public would go ballistic if anyone even seriously suggested such a thing (which, despite rumors, no one ever has). It would be on every front page and the top story on TV news. Victim groups would be all over it in opposition. Second, there is the little matter of the courts. To reduce or lengthen any sentence there must be a resentencing. While way in the past, *in Florida*, it was law that a life sentence was a 40-year sentence, for specific crimes, such law has long been changed to where *life* means life. And don't ever think Florida will reduce previously-imposed life sentences to save money. Prisons are big business, there will always be money for them. Just look at this year, every agency took budget cuts ($900 million in public education alone), except for the FDOC, it was given more money to build more prisons. Concerning another tired, old, worn out rumor-lie, converting 85% sentences to 65% and letting people go. Not going to happen, not as long as politicians want to keep their jobs. Not without a major change in the law—that would be plastered all over newspapers and TV—and not without major court involvement. Come on. That lie is worn out. Are you retarded to keep repeating and believing it year after year? Instead of spreading rumor-lies to make yourself feel important, how about doing accurate research, keep up with the facts, eliminate exaggeration from the information you pass on, and gain respect for only passing on verified, accurate information? Or you can keep on starting or repeating the same old rumor-lies year-after-year and continue being what you are, and what everyone will know you as, a liar. TG DCI

Dear FPLP: I read the column written about Mayo CI and wanted to share an incident that I had with staff at Mayo. I was working in the kitchen wiping tables when a sergeant came to me and loudly told me "don't you see all those inmates coming in the door." Then he said that he thinks that I better get my MFA to the other side so that I could clean tables for them to sit. So I and another prisoner were cleaning and the other prisoner walked away. Then the sergeant walked back over to me and said that he thought that I should get my sorry ass over there and start off where the other prisoner left off. I then asked him if he had a personal problem with me and he got mad and went to the captain. The captain called me over and as I was telling him what happened, the sergeant came behind me about two inches from my back. He then asked the captain "do you want me to lock his F----- ass up." On the way to medical, the sergeant called another officer to help escort me. On the way out of the medical building, the two officers started hitting me in the back of the head. When they were done the sergeant told me that if I was to tell anyone that it would happen again. Then the other officer said that he would kill me if I did. I was then placed in confinement. When the inspector called me I told him what took place. He in turn threatened me about saying anything about the incident and took no action. My classification officer also called me and threatened to place me back in confinement if I said anything else about this. Since I have been at Mayo, I know of three other prisoners that were beaten by one of these same officers that hit me. Nobody seems to take action against these guards that have been doing this to so many prisoners, it has become common practice with them. BW MCI

FPLP: It is unfortunate that a female prison guard was recently killed by a prisoner at Tomoka CI. It is equally unfortunate that in Florida females are allowed to even be guards inside male prisons, and that male guards work at the female prisons. Inside the male prisons, female guards are frequently the cause of male prisoners being beaten and abused. If a female guard claims a prisoner has been "looking" at her, most often the prisoner will be taken to confinement, or another secluded area, and while handcuffed and shackled, he will be beaten by a gang of male guards. Same if a female guard claims a prisoner "disrespected" her, or even questions her often overly-strict or wrong interpretation of a rule or policy that she often has never even read, or one that she just made up because she could. While some female guards are professional, many others are not. Let one be having a bad day, like younger women often have several days each month, and prisoners often suffer the consequences. Let one be going through menopause and it can be like having a demon from hell on a prison compound, especially if she has a little rank. Female prison guards are often insecure and afraid of male prisoners and so overreact to petty infractions by prisoners, or overreact to try to appear "tough," even when such isn't necessary and in itself causes unnecessary problems. It is not uncommon for female guards to curse at and talk to male prisoners like a dog, they are trained that this is intimidating and a way to keep control. Occasionally they pick the wrong one to abuse, lie about, or have beaten, and then the tables turn. Unfortunately. DB WCI

Florida Prison Legal Perspectives

Dear FPLP: I wanted to bring it to your attention that I presently have a Petition for Writ of Certiorari in the 2nd District Court of Appeal [#2D08-2621] that may turn out to be very helpful to quite a few inmates in FDOC. It deals with FDOC acting without statutory authority in placing me on Post Release Supervision, under the Repealed Provisional Release Program. *It's a unique* case because FDOC is claiming that the Provisional Release Program was revived by the "Lynce" & "Gomez" decisions and that gave them authority to release, supervise, violate and return me under that program despite the fact that all the Florida Statutes and F.A.C. rules that govern this program have been repealed since 1993. The FDOC counsel position, claiming revival via the Lynce decision, puts them in a catch-22. If the DCA agrees with their revival claim, then that means the whole Provisional Release Program was revived in 1997 and FDOC owes thousands of inmates, thousands of Provisional Credits now. And if the DCA rules in my favor, FDOC has been putting inmates (under this old system) out on Provisional Release Supervision without any authority at all, since 1997. I believe I am going to prevail on this motion in the DCA and as I said it will affect a lot of inmates under the old system and exposes FDOC's abuse of power in just one more situation. I don't know if you are able to review this Petition on the Internet but I assure you it is very interesting reading indeed. FDOC will file their response to our motion by August 1st, after two extensions of time, and then my Attorney gets to file our reply to their response. Our motion is very strong and as I said earlier a unique case. I urge you to review it if you can. Keep up the good work. JP FSP

Dear FPLP: As we all knew, the corruption and wrongdoing in the Florida prison system wasn't wiped out while former FDOC Secretary McDonough was trying to clean it up, it was just laying low and waiting for him to leave. Since Mr. McDonough was forced to resign earlier this year when he angered state lawmakers by being so outspoken about "rehabilitation" of prisoners, by pushing for reforms that would have actually reduced crime, recidivism, and the need to build more prisons, the corruption and wrongdoing that is at the very core of the FDOC is again rearing its ugly head. The abuse and beating of prisoners, which had almost stopped under McDonough, is once again becoming commonplace at many prisons. Especially those in the Panhandle and North Florida regions, specifically Santa Rosa, Gulf, Washington, Taylor, Mayo and Union CIs. At Union CI the guard-on-prisoner violence has dramatically increased in the past few months. Elderly prisoners are being beaten, some injured requiring hospitalization,as are confinement, CM, and mentally-ill prisoners. In just the past month two elderly prisoners at the UCI open population SW Unit were severely beaten by male guards instigated by female sergeants on the 4-12 shift. One prisoner remains in an outside hospital undergoing facial restructuring. The other was beaten in the face with a metal walkie-talkie while being questioned about why he was sending letters to outside agencies about prisoner abuse at UCI. Both beatings were covered up with bogus charges against the prisoners-as is normal. It's even worse in the mental health units at UCI. Young, pumped up, minimally educated guards frequently beat prisoners in those units who act out, they claim the prisoners are "faking being crazy." Supervisors, who know what's going on, approve and help cover up the abuse. Medical and mental health personnel look the other way and keep their mouths shut to preserve their jobs. Prisoner orderlies are threatened to where they "know nothing and see nothing." And the cancer grows, again. We can stand together or hang separately, to paraphrase Ben Franklin. I don't advocate sacrificing yourself in a no-win situation. But if you see or know of serious abuse of other prisoners or crimes committed by FDOC staff, have your people report it to the FDLE and/or FBI Civil Rights Division. Use the anonymous Crime Tips Hotline available on the telephones to report assaults on fellow prisoners or crimes by staff. Respect yourself, or no one else ever will. MW UCI

FPLP: After reading some repulsive prison cases from around the country that are published in the Federal Reporters dealing with prisoner abuse, it's obvious that a segment of people in society afflicted with profound and severe mental issues are attracted to the prison workforce. In this advanced day and age it seems reasonable to believe that some form of psychological screening, at least a personality inventory, should be a matter of routine before just anyone is able to secure a job in this field. In Florida, for example, psychological testing is not a qualifying factor for a position as a correctional officer. Florida Statutes 943.085, legislative intent with respect to upgrading the quality of law enforcement and correctional officers, nor 943.13, minimum qualifications for correctional officers, refer to nothing that remotely resembles psychological testing. Is this omission intended or an oversight on the part of the Legislature? Who knows? But one thing is for certain, it allows people who are prone to grossly sadistic and unscrupulous behavior to work in an environment they are unsuited and unqualified for. In order to preserve a prisoner's rehabilitative goals and to respect basic human rights, infirm agendas must be eliminated. I believe that psychological testing and evaluation is a necessary qualification component that should be required by law for all potential Department of Corrections personnel. MD LCI

Letters to the Editor from FPLAO members may be printed in this section. The identity of letter writers will be by abbreviation, unless otherwise specified by the writer, for protection against possible retaliation and to encourage freedom of speech. All letters printed are subject to editing for clarity and length. All letters cannot be printed but are invited. Address letters to: Editors, FPLP, P.O. Box 1069, Marion, NC 28752. If your letter also concerns membership, membership renewal, address change, etc., please address that matter at the beginning of the letter to assist staff in processing your mail. ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Recently it seems that I have seen a rash of cases where incarcerated individuals have hired postconviction counsel, in an effort to attack the effectiveness of trial counsel, only to once again receive ineffective assistance at the hands of the postconviction counsel. Unfortunately, for the most part there is no constitutional right to effective assistance of postconviction counsel. However, If an attorney has been retained to pursue a collateral postconviction proceeding and allows the client's two year period of limitations (as imposed by Rule of Criminal Procedure 3.850) to lapse without timely filing a motion, the client should at least be able to obtain the ability to file a belated Rule 3.850 Motion. The following article addresses the above situation.

It is true that a criminal defendant does not have a due process right, pursuant to the Sixth Amendment of the United States Constitution, to effective assistance of counsel in a post conviction proceeding. Lambrix v. State, 698 So.2d 247 (Fla. 1996). However, the holding of Lambrix does not dictate that a post conviction Movant is to receive no due process whatsoever. In fact, it was held in State v. Weeks, 166 So.2d 892 (Fla. 1964), that "[postconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States." Weeks at 896. For example, in Weeks and Graham v. State, 372 So.2d 1363 (Fla. 1979), the Florida Supreme Court held that due process required the appointment of postconviction counsel when a prisoner filed a substantially meritorious postconviction motion and a hearing on the motion was potentially so complex that the assistance of counsel was needed. Thus, although a post conviction movant may not have the right to effective post conviction counsel pursuant to the Sixth Amendment of the United States Constitution, said movant shall still be afforded the more flexible standards of due process.

In Steele v. Kehoe, 747 So.2d 931 (Fla. 1999), the Florida Supreme Court addressed the factual scenario where a defendant was due relief pursuant to the more flexible standards of due process announced in the Fifth Amendment of the United States Constitution. In Steele, the defendant was convicted of first degree murder and sentenced to life in prison. Id. Mr. Steele claimed that he retained an attorney to file a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, and that said attorney orally agreed to file a motion for postconviction relief. Id. at 932. The attorney then failed to file a post conviction

motion on Steele's behalf in a timely manner, i.e., after the two year period of limitations for filing such a motion had expired. Id. Mr. Steele's *pro se* rule 3.850 motions were rejected by the trial court and the Fifth District Court of Appeal because they were filed after the two-year deadline had expired. Id.

As a result of his post conviction actions being barred, Steele filed a legal malpractice complaint against his postconviction attorney. But, since Steele's 3.850 motions had been dismissed, Steele did not have an opportunity to demonstrate that he was improperly convicted as a result of his attorney's negligence. Id. The trial court dismissed Steele's complaint because he could not prove his actual innocence or that his underlying conviction had been set aside. Id.

The dismissal of Steele's complaint was affirmed by the Fifth District Court of Appeal because exoneration is a prerequisite to a legal malpractice action arising from a criminal conviction. Id. However, the Fifth District was troubled by the result, noting that irrespective of its holding, a monetary remedy in a civil action would be inadequate to redress Steele's injury. And, although the court recognized that, pursuant to Lambrix v. State 698 So.2d 247 (Fla. 1996), Steele had no right to effective postconviction counsel, they did consider what other possible remedies were available. The District Court considered what remedies would be available to a prisoner who hired an attorney to pursue postconviction relief and said attorney failed to timely file a motion within the two year period. The District Court held that "[i]f a prisoner is denied the opportunity to challenge his conviction under an appropriate rule only because of the negligence of his attorney, then due process requires a belated filing procedure similar to that allowed in belated appeals." Steele v. Kehoe, 724 So.2d 1192 (Fla. 5th DCA 1998).

On appeal, the Florida Supreme Court in Steele v. Kehoe, 747 So.2d 931 (Fla. 1999), agreed with the District Court, stating that "...**due process** entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner." Id. at 934. As such, the Florida Supreme Court held that the correct procedure would be for the trial court to conduct a hearing on whether the postconviction attorney undertook to file a 3.850 motion on Steele's behalf, but failed to timely file the motion. And, if such circumstances are proven, then the right to file a belated 3.850 motion should be granted.

As a result of Steele v. Kehoe, 724 So.2d 1192 (Fla. 5th DCA 1998), Florida rule of Criminal Procedure 3.850(b) was amended to provide a new exception to the two year period of limitations for filing a Rule 3.850 Motion for Postconviction Relief. Rule 3.850(b)(3) now provides that an exception to the two

year period of limitations occurs when "the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion."

If, as I have been seeing more and more of lately, you have hired an attorney to timely file a postconviction 3.850 motion, and said motion was not timely filed, your case is not necessarily dead. The procedures outlined in Steel should be followed in an effort to convince the trial court to allow you to file a belated 3.850 motion. Thereafter, in the belated 3.850, all issues which should have been raised in the first place can then be argued.

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.

D. R. GRIEVANCES / APPEALS AND JUDICIAL REMEDIES

BY DANA MERANDA AND HOWARD RICHMOND

PART II

The Disciplinary Process

In order to get an understanding of the law that's applied to FDOC disciplinary process, there are some basic concepts to briefly cover first.

FDOC is an Administrative Agency. Administrative Agencies are executive branch entities. Their function in government is to "administrate" the public policy which is more commonly known as statutory law.

Agencies are created by statute and their powers and authority do not extend beyond that provided by statute.

In the realm of Quasi-Legislative Powers the legislature delegates the authority to an agency to create rules. That authority is limited however to implementing a Florida Statute. In other words, just having rulemaking authority is not enough to adopt a rule. A specific law (statute) to be implemented is also required.

An agency's rule making policy is governed by Chapter 120.54 Florida Statutes, and the statute an agency relies on to promulgate a rule must provide adequate guidelines that will establish the extent to which an agency may exercise those powers.

Similarly, quasi-judicial powers are adjudicatory powers and specifically provided for by Article V, Section 1, of the Florida Constitution, which states that the legislature may grant administrative bodies quasi-judicial powers in matters connected with the function of their offices.

An administrative judgment is Quasi –Judicial in nature when notice and a hearing are required and the judgment is rendered upon the showing made at the hearing. Because these administrative proceedings resemble a judicial function, they are called quasi-judicial.

Prison Disciplinary proceedings, while Quasi-Judicial in nature, havemarked differences from the adjudicatory actions taken by the other agencies in Florida.

Chapter 20.315 Florida Statutes creates the Florida Department of Corrections and Section (1) establishes its purpose.

Section (3) expressly provides "The Secretary shall ensure that the programs and services of the department are administered in accordance with state and federal laws, rules, and regulations, with established program standards and consistent with legislative intent."

Chapter 944.09 Florida Statutes gives FDOC the authority to adopt rules pursuant to §§120.536 (1) and 120.54 Florida Statutes to implement its statutory authority. Section (1) (a) – (q) encompasses several categories including the rights of prisoners and disciplinary procedures and punishment.

Chapter 944.275 (5) Florida Statutes states that "when a prisoner is found guilty of violating the laws of this state or the rules of the department gain-time may be forfeited.

Chapter 944.28 (2) (c) describes the method of declaring a forfeiture, therefore the right to hearing is predicated upon the potential loss of gain-time.

Keep in mind – Prisoners are not the only ones required to follow the rules. An Administrative Agency must also comply with its own rules.

Due Process and Prison Disciplinary Proceedings.

It is important to first understand when due process attaches to prison disciplinary proceedings.

Although the Court in Sandin v. Conner, 115 S.Ct 2293 (1995), refined the inquiry into the existence of a state-created liberty interest (later reaffirmed and explained in Wilkinson v. Austin, 125 S.Ct. 2384 2393-94 (2005), the Sandin Court clearly held that state action that effects the length of sentence trigger the 14th Amendment's protections. Malchi v. Thaler, 211 F.3d 953 at 959 (5th Cir. 2000).

The Sandin Court added the additional requirement of an atypical and significant hardship. Under this approach the most common way in which entitlement to due process protections are created after Sandin is when there is a state-created liberty interest which when denied imposes atypical and significant hardships beyond the "ordinary incidents of prison life."

A state-created liberty interest arises when the state through a statute, or rule creates "mandatory rule and regulations to govern disciplinary proceedings". This can occur when the state in its statutes, rules or regulations "uses words like will, shall, or must".

(To establish the right to due process protections an inmate must show (1) the state used mandatory language in its relevant statute or regulation, thus creating a liberty interest; and (2) the punishment ... endured constituted an

"atypical and significant hardship"). *Columbia Human Rights Law Review, A Jailhouse Lawyer's Manual, 622 (5th ed 2000).*

For example, when there is a loss of gain-time during a disciplinary proceeding, due process attaches and the procedures in Wolff v. Mc Donnell, 94 S.Ct. 2963 (1974), apply. The Wolff Court articulated:

(1) The function of the written notice of the charges is that it must be given to the disciplinary-action party in order to inform him of the charges and to enable him to marshal the facts and prepare a defense.

(2) The Court reasoned that there must be a "written statement by the fact-finders as to the evidence relied on and reasons" for the disciplinary action because such proceedings may involve review by other bodies; written records of the proceedings will protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding; and written records helps to insure that administrators faced with scrutiny where constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others.

(3) To call witnesses to present documentary evidence in his defense, if permitting him to do so will not jeopardize institutional safety or correctional goals – balancing the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Wolff, 94 S.Ct. Id. at 2979-80.

The following is a general overview of the Disciplinary Process. References are made to case law when available.

Reporting Disciplinary Infractions 33-601.303

Some infractions can be properly disposed of without a formal Disciplinary Report. This usually occurs with a verbal reprimand or in writing through corrective consultation (CC) Form DC6-117.

Verbal counseling is designed to motivate the inmate to comply with or clarify the rules of institutional regulations / policy, and will be documented on the inmates contact card.

In contrast a (written) corrective consultation (CC) will be provided to the inmate within 24 hours of the writing and a copy will be placed in the inmate's institutional file. A Corrective consultation is not considered a disciplinary action under the grievance process, 33-103.005 (1), yet loss gain-time for the month usually results therefrom.

Preparation of Disciplinary Reports 33-601.304

Only one violation ***shall*** be included in each disciplinary report. Separate disciplinary reports ***shall*** be used for multiple offenses.

Subsection (2) provides what ***shall*** be in the statement of facts on the Disciplinary Report. See Gill v. Crosby, 884 So.2d 442 (Fla. 1st DCA 2004).

Inmate Discipline – Investigation 33-601.305

The investigating officer ***shall*** initiate the investigation of the infraction within 24 hours of the writing of the disciplinary report. The investigating officer has numerous responsibilities under this particular rule.

Pursuant to Wolf v. McDonnell, 418 U.S. 539, 94 S.Ct. 1963, 41 L. Ed. 2d 935 (1974), an inmate charged with a disciplinary infraction is entitled to:

(1), advance written notice of the charges;

(2) an opportunity to call witnesses and present documentary evidence, when it can be done safely; and

(3) a written statement of the evidence upon which the disciplinary team relied and the reasons for its disciplinary action.

Florida Administrative Code Rules 33-601.305 (2) (d) and (3) require the Department's investigating officer to, among other things, ask the inmate if he has any witnesses to offer on his behalf and interview "additional staff, inmates, and other individuals who have information pertaining to the infraction." If the disciplinary team denies an inmate's witness or evidence request, it must explain its reasons for doing so. See e.g. Plymel v. Moore, 770 So.2d 242 (Fla. 1st DCA 2000); Giordano v. Dixon, 744 So.2d 1024 (Fla. 4th DCA 1997); Department of Corrections v. Marshall, 618 So.2d 777 (Fla. 1st DCA 1993); Holcomb v. Department of Corrections, 609 So.2d 751 (Fla. 1st DCA 1992); See generally **Frantz, v. Moore**, 778 So.2d 1003, 1004 (Fla. 1st DCA 2000); Esposito v. McDonough, 971 So.2d 203 (Fla. 1st DCA 2007), and those reasons must be valid, Mariah v. Moore, 765 So.2d 929 (Fla. 1st DCA 2000).

While a disciplinary team may exclude testimony if it is immaterial, irrelevant, or repetitive, they should not prejudge the weight to be given to testimony of evidence prior to it being presented. The Disciplinary team cannot deny prisoner's request for additional witnesses on ground that testimony would have been contrived, Mariah, Supra.

The production of evidence, request for witness statements and related matters are largely dependent on the investigation itself.

This is a highly critical stage in the disciplinary process. The Investigator/Staff member who is assigned to conduct the investigation have been known to impede the investigation process, by noting for example, the inmate failed or refused to complete and sign the relevant witness Form(s); refused investigation, participation etc., etc.

As a precaution to decrease or eliminate the intentions of this type of unethical (official) conduct one is well advised to start a paper trail, using an inmate request addressed to the colonel, Major, Asst. Warden, Head of Classification, etc. alleging (as a formal request) that despite any potential, inconsistencies in the investigative record/process, the inmate is not refusing to participate in the process, is not waiving the right to seek witness statements or the production of evidence, and that the D. R. team acquire and review documentary evidence, daily logs in special housing units, etc. Use a tri-colored DC6-236 Inmate Request if available and keep the pink copy.

Inmate Discipline – Use of Confidential Informants 33-601.3055

The Investigator has some specific obligations when investigating confidential informant (snitch) evidence.

The Investigator ***shall*** interview and obtain a statement from the informant, which ***shall*** be recorded in the disciplinary investigative report. The informant's signature is not required and is only identified by his/her social security number.

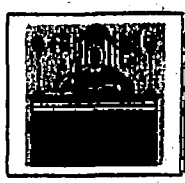
There is specific documentation that is required to be included in the investigative report before confidential informant evidence can be used in D. R. court. (1) the Investigator ***shall*** document whether the informant has direct or indirect knowledge of the case, (2) whether the informant has provided information in the past, and (3) whether the information has been reliable, unreliable, or both.

The informant's history and his/her reliability cannot just be alleged. It must be specifically documented. If the informant has provided confidential information in the past, the Investigator will document to whom and confirm it with the staff member and record it in the disciplinary investigative report.

Due process requires that a confidential informant's credibility must be independently confirmed by officials. Kyle v. Hanberry, 677 F.2d 1386, 1390 (11th Cir. 1982).

It's also debatable whether a D. R. based upon confidential informant's testimony, without other evidence of guilt, amounts to giving one prisoner supervising or disciplinary control over another prisoner. McDuffie v. Estelle, 935 F.2d 682 686 n.6 (5th Cir. 1991). See Chapter 33-602.101 (9) (no Inmate shall be given control or authority over other inmates).

Rule 33-601.307 (3) (h), prohibits the Disciplinary Report Team from basing a finding of guilt on snitch testimony that is uncorroborated by some other evidence. It also requires the Disciplinary Report Team to independently assess the informant's reliability and may not accept assurance from an officer as to the authenticity of the informants information.



NOTABLE CASES

BY BRIAN K. STOLART

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

Florida Supreme Court

State v. Kettell, 33 Fla. L. Weekly S255 (Fla. 4/24/08)

The Second District Court of Appeal had reversed Charles A. Kettell's conviction opining that a violation of Florida Statutes, section 790.19, wantonly or maliciously shooting at, within, or into a building, required more than mere proof of the shooting. See: *Kettell v. State*, 950 So.2d 505 (Fla. 2nd DCA 2007).

The Second District's opinion, however, was directly and expressly in conflict with the Fifth District's in *Holtsclaw v. State*, 542 So.2d 437 (Fla. 5th DCA 1989).

The Florida Supreme Court, upon reviewing the conflict, held that it was error for the trial court to instruct the jury in Kettell's case that the statute is violated by a person who shoots at, within, or into a building per se, and the error was not harmless.

It was held that the wanton or malicious intent element of the crime defined by section 790.19, is not established solely by evidence that a defendant fired a shot at, within, or into a building. The State *must also prove* that the shooting was done wantonly or maliciously as those terms are defined in the standard jury instructions.

There fore, the Second District's decision was approved, and the Fifth District's was disapproved. Kettell's case was remanded for further proceedings consistent with the Florida Supreme Court's opinion.

State v. Johnson, 33 Fla. L. Weekly s265 (Fla. 5/1/08)

The Second District Court of Appeal in Lorenzo C. Johnson's case, *Johnson v. State*, 929 So.2d 4 (Fla. 2nd DCA 2005), opined that the admission of a Florida Dept. of Law Enforcement lab report establishing the illegal nature of substances possessed by a defendant *does* violate the confrontation clause and Crawford v. Washington, 541 U.S. 36 (2004), *when the person who performed the lab test did not testify.*

A certified question as to the Second District's decision was filed and reviewed by the Florida Supreme Court where the decision was approved.

Ey v. State, 33 Fla. L. Weekly S321 (Fla. 5/15/08)

In Robert Ey's case, the Florida Supreme Court held that when a defendant has committed two crimes and informs his attorney about both of them, the attorney's erroneous advice that defendant's plea in one case could not be used to enhance his sentence in the other constitutes ineffective assistance of counsel.

To raise a facially sufficient claim on such an issue, the Florida Supreme Court outlined four things the defendant must plead: Before entering the plea, the defendant informed his defense counsel that he committed another crime for which he had not yet been sentenced; The defendant explained to counsel the nature of the crime; The counsel erroneously advised defendant about the potential use of the conviction to enhance a subsequent sentence for that other crime (explaining why the advice was erroneous); and, Had counsel not erroneously advised defendant, defendant would have exercised his right to trial.

Such a claim must be filed with two years after the conviction based on the plea the defendant is attacking becomes final. It was further noted however, although the defendant in this case, Ey, filed his motion after the two year period, his motion was deemed timely because at the time of the filing district courts had held in similar claims that the clock started on the date defendant discovered the enhancement in his sentence.

Jackson v. State, 33 Fla. L. Weekly S357 (Fla. 5/29/08)

In Bertha Jackson's case, the Supreme Court of Florida held that the denial of counsel at sentencing is not a "sentencing error" under rule 3.800(b).

Denial of counsel at sentencing, while occurring during the sentencing process, is not an error in an order entered as a result of the sentencing process. See: Fla. R. Crim.P. 3.800 court cmt. It was held in this case that to assert such a claim on appeal, no motion under rule 3.800(b) need be filed. Such errors remain subject to the contemporaneous objection rule; if not preserved at trial, they may be reviewed on appeal only for fundamental error.

As to Jackson's case, it was found that the claim did not meet fundamental error status, because counsel was found only to be absent for only part of the victim impact testimony during the sentencing process.

District Courts of Appeal

Evans v. State, 33 Fla. L. Weekly D1066 (Fla. 5th DCA 4/18/08)

Robert L. Evans appealed the summary denial of his rule 3.850 motion where he had claimed ineffective assistance of counsel for failing to object to a vindictive sentence.

The appellate court opined that it was error for the lower court to deny Evans' claim where it failed to conduct a totality of circumstances analysis. Such determination is needed to show whether a sentence is vindictive where a trial court has inserted itself into plea negotiations and imposed a harsher sentence after a defendant's rejection of the plea bargin.

After its own analysis of Evans' sentencing, the appellate court determined the sentence imposed upon him was vindictive. Evans' sentence was reversed and the case was remanded for a re-sentencing before a different lower court judge.

Perkins v. State, 33 Fla. L. Weekly D1102 (Fla. 1st DCA 4/23/08)

Gregory Perkins appealed his conviction of possession of cocaine where it was upheld by the lower court subsequent to denying Perkins' suppression motion.

The background of this case began when police officers stopped the vehicle Perkins was a passenger in. An officer then opened the passenger door to advise Perkins that the vehicle was going to be searched. During that time, the officer observed a pocketknife in the front pocket of Perkins' pants, whereupon Perkins was warned to keep his hands out of his pockets. However, Perkins failed to comply with the officer's warning after being advised twice by the officer to keep his hands away from his pockets. At that point, the officer conducted a pat down search of Perkins to determine whether he was trying to hide another possible weapon. As the officer removed the pocketknife, he felt a lump in the pocket that he believed to be some sort of narcotic. Upon removing the item from Perkins' pocket, the officer observed a folded dollar bill with less than a gram of powder cocaine wrapped inside.

The trial court in denying Perkins' suppression motion, relied upon the "plain feel" doctrine, and on appeal, the "plain feel doctrine" exception was reviewed, citing *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

In Dickerson, it was held that because the object in Dickerson's pocket was not "immediately apparent" as to what the object was and determining that the pocket did not contain any weapons, an officer's continued exploration of the pocket exceeds the scope of the search permitted by *Terry v. Ohio*, 392 U.S. 1 (1968, thus violating Dickerson's Fourth Amendment rights.

Perkins' case was found to be similar. The appellate court noted that it was only after the officer *further searched* Perkins' pocket and ran his fingers over an unknown object did he make a determination as the object being contraband. As such, it was opined that the "plain feel" doctrine did not apply and did not validate the officer's further search and seizure of the object.

Perkins' conviction was reversed and the case was remanded for the lower court to grant the suppression motion.

Harrington v. State, 33 Fla. L. Weekly D1164 (Fla. 5th DCA 4/25/08)

Katrina Harrington appealed her convictions of trafficking in methamphetamine and possession of paraphernalia.

On appeal, it was opined that the state failed to offer any independent proof that Harrington was a joint occupant of the house in which the drugs were located, or that Harrington possessed the knowledge of and the ability to control the drugs. See: *Brown v. State*, 428 So.2d 250 (Fla. 1983). There was no direct evidence introduced at trial to prove Harrington also had access to the locked safe where the drugs were found or the knowledge of the safe's contents.

It was further opined that evidence was in sufficient to show that the alleged paraphernalia items that were found had been used, or were intended for use, for illicit purposes.

Accordingly, Harrington's convictions were reversed.

Gray v. State, 33 Fla. L. Weekly D1261 (Fla. 4th DCA 5/7/08)

Rashion Gray appealed his convictions from a no contest plea and argued that the trial court erred in denying his motion to suppress all physical and testimonial evidence against him.

Gray was convicted of burglary of a dwelling while armed, grand theft of a firearm, possession of a firearm or ammunition by a convicted felon, criminal mischief, giving a false name, carrying a concealed firearm, and carrying a concealed weapon.

The background that led to Gray's arrest began when he was called over to talk to a police officer who had observed him and opined his actions walking down a driveway were suspicious. After Gray consented to questions and a search for weapons on his person, no weapons were found, the officer allowed Gray to go on his way.

Subsequently, however, because the situation seemed a "little odd," the officer returned to the area where Gray was standing before he called to him. There, he found a black powder pistol laying on the wet grass, the pistol was dry. The officer then placed a radio transmission out to other officers in the area to stop Gray, a BOLO. Upon hearing the BOLO, another officer spotted Gray and stopped him. The officer had Gray to place his walking stick on the hood of the police car then handcuffed Gray and read him his Miranda rights.

When Gray responded to the officer asking for his name, the officer told him that he did not believe him, where upon Gray admitted that he gave a false name because he had walked off a work program. Gray further confessed that he committed a burglary, a burglary that the police had no knowledge of prior to the confession. The arresting officer then opened Gray's walking stick where he found a sword inside of it. Gray then led the officer to the location of the burglary he committed which led to the discovery of additional incriminating evidence.

On appeal, it was pointed out that there are three levels of police-citizen encounters under Florida law. See: *Popple v. State*, 626 So.2d 185, 186 (Fla. 1993). The first is a consensual encounter, during which a citizen can either comply with the officer's requests or ignore them and leave.

The second level is an investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968). In an investigatory stop, the officer must have a reasonable suspicion that a person has committed, is committing, or is about to commit a crime.

The third level is an arrest, which must be supported by probable cause that a crime has been or is being committed. Reviewing whether probable cause existed at the time of arrest requires a very fact-specific analysis. See: *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003).

After reviewing these levels and its analysis of the case, the appellate court determined it was error for the lower court to have denied Gray's suppression motion. The initial officer stated at the suppression hearing that he could not see what Gray was doing when he saw him walking on the driveway. The arresting officer presented no evidence that he had knowledge that Gray had committed or was committing a crime. Likewise, the arresting officer did not have sufficient knowledge and information to believe Gray was carrying a concealed firearm or weapon. The pistol was found on the grass after Gray left the area, and the initial search of Gray's person revealed no weapons or firearms. As such, there was a lack of requisite probable cause for Gray's warrant less arrest. See: *Berry v. State*, 493 So.2d 1098, 1100 (Fla. 4th DCA 1986).

Gray's case was reversed and remanded with directions for the lower court to discharge Gray.

Christner v. State, 33 Fla. L. Weekly D1333 (Fla. 2nd DCA 5/16/08)

Brandin Christner appealed from an order in which the lower court denied one ground of his rule 3.850 motion and struck the second ground as facially insufficient with leave for Christner to file an amended, facially sufficient motion within 30 days, should he choose to do so.

The appellate court noted that Christner did not avail himself of the opportunity to file an amended motion within the time prescribed. As such, it was opined that it presented a jurisdictional problem for the appellate court. In reviewing this problem, the Second District noted that the Fifth District opined that an unfavorable ruling on one or more postconviction claims with leave to amend is not an appealable, final order. See: *Howard v. State*, 976 So.2d 635 (Fla. 5th DCA 2008). The Second District, however, could not concur that they should precipitously dismiss such appeals, placing the burden on the defendant to obtain "a denial of the motion that does not include leave to amend." *Id.* at 636.

In Christner's case it was noted that he could not be found entirely to blame for filing a premature appeal of an order that was not yet final. He simply obeyed the circuit court, which its order stated "this is a final order" and erroneously informed him he had 30 days to appeal the ruling. As such, the Second District opined that lower court judges would be well advised to expressly inform movants that such an order is "not appealable at this time."

Having confirmed Christner did not take advantage of the opportunity to amend the second ground, the appellate court elected not to dismiss the appeal as from an order that is not final. Instead, it was directed that the lower court should enter a final order disposing of the motion within thirty days. Such rendition will rescue the premature appeal from the jurisdictional problem. The appellate court could then consider both the lower court's denial of one claim addressed on its merits and review the determination it make on the other claim as being facially insufficient.

It was stressed that movants should understand that when they *elect not to amend* a motion when given that opportunity, the order that will be reviewed is a final order that, if affirmed, *will generally not allow them to relitigate* additional postconviction additional postconviction issues at a later time.

The Second District's opined procedure in this case was adopted by it for all appeals, subsequent *Spera v. State*, 971 So.2d 754 (Fla. 2007), that are brought prematurely to it after it has been confirmed an amended claim was not submitted. Further, if the appellate court determines that an appellant in a similar postconviction appeal has filed an amended claim and has not yet been finally determined by the lower court, the appeal will be dismissed with directions to the appellant to appeal the final disposition and hence capture review of all claims raised in the initial motion and the amendment. If the appellate court determines that an amendment has been filed and finally determined by the lower court, an order will issue for supplementation of the appellate record, summary or otherwise, with the final, appealable order, thus maturing the premature appeal.

Accordingly, the lower court was directed to enter a final order on Christner's motion within thirty days.

Lyons v. Jackson C.I., 33 Fla. L. Weekly D1343 (Fla. 1st DCA 5/21/08)

George Lyon sought a mandamus writ on the grounds that the Jackson County Circuit Court Clerk required him to pay an administrative fee and complete an application for a determination of civil indigence status before processing his tort complaint.

The respondents in Lyon's case conceded error on the basis of the appellate court's ruling in *Musmacher v. McDonough*, 969 So.2d 1101 (Fla. 1st DCA 2007). There, it was held that the tendering of any filing fee is not a precondition to filing a complaint in that the circuit court clerk has a ministerial duty to accept a complaint for filing.

Accordingly, Lyon's mandamus petition was granted, issuance of the writ was withheld, however, because the court clerk will process the complaint in an expedious manner.

Hall v. Officer Knipp, Fla. Dept. of Corr., 33 Fla. L. Weekly D1348 (Fla. 1st DCA 5/21/08)

Wendall Hall, as an indigent prisoner, appealed the dismissal with prejudice of a complaint that alleged an officer of Fla. State Prison wantonly, maliciously, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, withheld blankets, bed sheets, and clean clothing for some four and a half months, causing him injury and illness.

The lower court dismissed the original complaint without prejudice, then dismissed the first amended complaint with prejudice, all pursuant to section 57.085(6), Florida Statutes (2006).

It was opined that sovereign immunity barred the claim against DOC, as such, the lower court properly dismissed that part of the complaint. However, the officer was not immune from suit where amended complaint alleged that the officer wantonly or maliciously chose to breach a common law duty of reasonable care posing unreasonable risk of, and actually causing, physical harm.

In other words, it was alleged that Officer Knipp acted outside the scope of his employment—in the sense of not exercising power lawfully vested in him—and was guilty of "an unlawful usurpation of power the officer did not rightfully possess." See: *McGhee v. Volusia Co.*, 679 So.2d 729, 732 (Fla. 1996).

The lower court's judgment was reversed insofar as it dismissed the amended complaint against Officer Knipp individually and the case was remanded for further proceedings.

Singleton v. State, 33 Fla. L. Weekly D1366 (Fla. 2nd DCA 5/21/08)

Michael Singleton presented a timeliness issue of his rule 3.850 motion to the appellate court that he filed more than seven years after his judgment and sentence became final, when he discovered the ineffective assistance of counsel ground.

Back in 1997, Singleton was told by his counsel that he would be eligible for parole after twenty-five years, if he were found guilty at trial on his capital sexual battery charge. Because of that advice he rejected the state's favorable plea offer of ten years prison, if he plead guilty to the lesser-included offense of lewd and lascivious battery.

Subsequent to Singleton being found guilty at trial, over seven years later, he discovered through information requested and received by the Florida Parole Commission that he would never be eligible for parole. Thus, he filed his rule 3.850 motion.

District Courts have opined that postconviction motions based on such claims of counsel misadvise concerning gain time eligibility or the forfeiture of gain time were timely if filed within two-years of discovering the misadvise. *Galindez v. State*, 909 So.2d 597, 598 (Fla. 2nd DCA 2005), is one of many.

However, the Florida Supreme Court rejected that view in *Ey v. State*, 33 Fla. L. Weekly S144, S146 (Fla. Feb. 28, 2008), [and revised on rehearing at 33 Fla. L. Weekly s321 (Fla. May 15, 2008)—which has been noted within this issue of the *FPLP* under the Supreme Court of Florida's Notable Cases section.] The appellate court noted though, "That... is not the end of the matter." In *Ey* it was recognized that an opined rule contrary to the one adopted in *Ey* had previously been applied by the district courts. See: *Ey*, 33 Fla. L. Weekly at S146 and S323. As such, Ey's motion was deemed timely. Similar circumstances were found to exist in Singleton and the appellate court opined that accordingly, Singleton's motion should be found timely filed.

Therefore, Singleton's case was reversed and remanded for the lower court to consider the claim. On remand, the lower court was directed to either attach portions of the record that conclusively refute the claim or conduct an evidentiary hearing on the issue.

Harley v. State, 33 Fla. L. Weekly D1474 (Fla. 1st DCA 6/5/08)

Damion Harley sought a direct review of ineffective assistance of counsel issues.

The appellate court noted that Harley's claims were cognizable on appeal. It was found to be apparent on the face of the record that counsel was ineffective. However, there was no merit to the claims. Harley failed to demonstrate that. ***but for defense counsel's deficient performance, the results of the proceeding would have been different.***

[**NOTE:** Whether on a rule 3.850 motion or on direct review, one must always show <u>both</u> of the prongs in *Strickland v. Washington*, 466 U.S. 668 (1984), when claiming ineffective assistance of counsel.]

NEWS IN BRIEF

AZ - On May 8, 2008 six prisoners were airlifted for medical treatment from the medium-security facility at the Arizona State Prison Complex-Douglas. Officials say that the prisoners received injuries after a series of small fights broke out at the prison.

CA - On May 27, 2008, the *San Francisco Chronicle* reported that DOC officials are bracing for more prisoner violence as they prepare to obey a mediation agreement and desegregate cells. " We will have a spike in fighting because we have races that don't get along, if it was up to us we'd keep it the way it is," Lt. Rudy Luna, Asst. Warden at San Quentin State Prison, told the *Chronicle*. Prison officials say that they will evaluate each prisoner, and those who qualify for integration, but refuse, may face disciplinary action.

CA - During the third week of June 2008, San Diego jail officials revamped their phone system to ensure that calls between prisoners and their attorneys were not being recorded. This move came after attorneys complained that the jail's policy to record all calls violated their attorney-client privacy rights.

CA - Levar Washington, 30, was sentenced to 22 years in federal prison on June 23, 2008, for plotting while incarcerated at Santa Ana to attack military sites. Officials say that Washington was part of a prison gang cell of radical Muslims who planned attacks and intended to finance them through robberies.

CA - On June 24, 2008, a bus carrying an inmate firefighting crew overturned in Riverside County. The incident left 16 people injured, two critically, said a spokeswoman for the county. Four people were hospitalized while 12 were treated at the scene.

CO - On May 20, 2008, a federal jury in Denver sentenced prisoner Rudy Cabrera Sablain to life in prison. Cabrera was charged with choking and disemboweling Joe Estrella in their cell at the federal penitentiary in Florence. The incident took place in 1999. Prosecutors had asked the jury to sentence Cabrera to death.

CT - Justen Kasperzyk, a former New Haven detective, was sentenced on May 27, 2008, to 15 months in federal prison for planting drug evidence and stealing money from a crime scene. Last year, Kasperzyk pleaded guilty to conspiracy to violate civil rights and theft of government property.

CT - A state prisoner, Waldemar Rivera, 28, was charged on June 11, 2008, with the murder of another prisoner. Officials charged Rivera for the murder of Kevin Cales which took place last month at the Suffield Prison. The motive for the fatal beating has not been determined, said officials.

DE - On May 21, 2008, a retired police officer and former city administrator, John Manning, 61, pleaded guilty to one count of possessing child pornography. Federal agents found the images on computers seized at Manning's home. Manning resigned from the personnel department in April after being on suspension since October 2007.

DE - On June 4, 2008, Gov. Minner signed legislation formally changing the name of the state's largest prison. The name of the Delaware Correctional Center near Smyrna was named in honor of James Vaughn, who served as Delaware Correction Commissioner in the 1970s. Vaughn died last year after he resigned from the state senate.

FL - A judge sentenced a former Coral Springs mayor on June 3, 2008, to 4 1/2 years in prison followed by 30 years of sexual offender probation after pleading no contest to child molestation charges. John Sommerer, 60, was accused of molesting a girl under the age of 12.

FL - Bennett Brummer, the Dade County's public defender, announced on June 4, 2008, that his office plans to refuse most felony cases due to state budget cuts. Brummer said that his attorneys are obligated by the Constitution to provide effective legal representation, however, his office is short-staffed and under funded. This means that his attorneys could not effectively cover their caseloads, said Brummer.

FL - On June 17-18, 2008, the State of Florida held its first statewide Restoration of Civil Rights Summit at the state Capitol building in Tallahassee. The Summit's short-term goal was to gather input from other agencies and community organizations to identify barriers to successful re-entry of ex-offenders to society. The long-term goal is to develop a formal and comprehensive re-entry strategic plan to reduce recidivism. Both Gov. Charlie Crist and FDOC Secretary Walter McNeil attended the Summit, which was funded, along with other re-entry efforts, by a $40,000 grant from the Annie E. Casey Foundation. Florida currently has over 96,000 prisoners, with about 35,000 being released from prison each year. Almost a third of prison releases return to prison within 3 years. In addition to the Summit, in June Secretary McNeil

appointed an Advisory Council consisting of legislators, law enforcement, social and community workers to assist the FDOC in developing strategies to reduce recidivism. The Council, in addition to helping develop strategies, also allows the state to qualify for federal funding under the Second Chance Act that was recently signed into law by President Bush. The Casey grant will also be used to fund the following aids:

- An On-line Resource Directory which will include info from all 67 counties about housing, jobs, education, job training, mental health and substance abuse, clothing, food and more;
- Virtual Case Managers contactable by phone, fax or email during business hours to provide resource info;
- Focus Groups to help ex-offenders reintegrate; and
- A pocket-size resource guide given to prisoners upon release providing info on housing, employment, health care, family issues, etc.

GA - A jury convicted a former Atlanta police officer, Arthur Tesler, on May 20, 2008, of killing a 92-year-old woman after a botched drug raid. The incident took place in 2006 when plainclothes officers used a no-knock warrant to raid Kathryn Johnston's home. When the officers burst in Johnston began firing her gun at the officers, police then fired 39 bullets, said prosecutors. The warrant about drug dealing was based on false information, said authorities. Two other officers have pleaded guilty to charges of manslaughter and federal civil rights charges. Tesler faces up to five years in prison.

ID - An inmate at the Twin Falls County Jail tried to send his father methamphetamine in a letter during mid-June 2008. Guards opened the letter because it didn't have the sender's name. Officials then investigated the name where the letter was being sent and learned that it was Robert Rackham's father. More methamphetamine was found in Rackham's cell, said authorities.

KS - On May 27, 2008, a woman who was a dog trainer and helped John Manard escape from prison in a dog crate in 2006 was released from federal prison. Toby Young served nearly two years in state and federal prison for helping Manard escape from the Lansing Correctional Facility. Young must also serve three years of probation.

KY - The Sheriff's Department announced on June 2, 2008, that a Boyd County Jail guard faces drug charges after allegedly purchasing prescription pills that he planned to sell to inmates. Loval Marshall, 37, met with an informant and bought 13 oxycodone pills. Marshall then led police on a slow-speed chase before throwing the pills out the window, said officials. The pills were recovered by authorities.

KY - The state's Criminal Justice Council began studying the state's sentencing practices after Gov. Beshear called on legal authorities to find ways to ease the prison system's financial burden. Beshear said on June 8, 2008, that the prisoner population was increasing at the highest rate in the nation. By Dec. 1, the council must report back with recommendations.

LA - The National Commission on Correctional Health Care released its findings on May 19, 2008, from a review it conducted in the New Orleans Prison. The commission found that the prison was not doing enough to care for prisoners who suffer from mental illness. The prison lacks enough mental health counselors and fails to complete initial health examinations within the required time, said the commission.

ME - DOC said on June 23, 2008, that a website which will list state prisoners and probationers will be up in about two months. The site will include projected release dates, names, physical descriptions, birth dates, and offenses.

MT - DOC officials say that two female prisoners escaped on May 5, 2008, from the Montana Women's Prison. Alicial Luke, 27, and Jenny Terrell, 31, were kitchen workers and apparently left through a receiving area, said officials. The two prisoners were serving sentences for escape at the time the incident took place.

NV - The Nevada State Prison, which dates back to the 1860's, may close by next January due to budget cuts. Officials said on June 18, 2008, that this would save $19 million a year in operation costs.

NY - The U.S. Attorney's Office announced on May 21, 2008, that the state must pay $972,000 to 23 correction guards who accused the state of pregnancy discrimination. This pay would include back pay, interest, and damages. State officials must also undergo anti-discrimination training. To no surprise, DOC denied the discrimination claims.

NY - During the first week of June 2008, the *New York Times* reported that state prisoners were training service dogs for wounded veterans who have returned from Iraq and Afghanistan. The program is called Puppies Behind Bars. New Jersey and Connecticut prisons also have similar programs. There are about 80 Labradors and Golden Retrievers at four male and three female prisons, said the *Times*. Prisoners teach the dogs 82 commands that can help individuals who are missing a limb or need wheelchairs, the *Times* reported.

OH - A judge, on June 10, 2008, ruled that the state's method of lethal injection was unconstitutional. Judge James Burge said that the state's lethal injection procedure doesn't provide the quick and painless death required by state law. The state uses the same three-drug cocktail held constitutional by the U.S. Supreme Court in Kentucky, however, the procedure is not identical.

OK - Corrections' spokesman Jerry Massie said during a press release that more than a dozen prisoners attacked each other with makeshift weapons at the Oklahoma State Reformatory on May 19, 2008, leaving two dead and 13 injured. Fights broke out in recreation yards of two of the prison's six housing units for about five minutes. Most of the injured prisoners suffered cuts and stab wounds, said Massie. Prison staff were not injured during the incident.

PR - Some Puerto Rico public officials, including the island's former health secretary, said on June 18, 2008, that they will push to legalize marijuana. The groups claim that this move will reduce the prison population as 24% of the 13,500 prisoners in the system have drug charges. These officials say that marijuana would be taxed like liquor and tobacco, with proceeds going toward drug treatment programs.

PR - Federal authorities arrested six Puerto Rican police officers on June 24, 2008, for building false cases and possessing cocaine with intent to distribute. The officers planted drugs on at least three people from 2002 to 2005, said federal authorities. Last year, four officers were arrested on similar charges. The officers in both incidents worked at the Arecibo Unit.

SC - DOC director, Jon Ozmint, said during a brief statement, on May 26, 2008, that lack of funding leaves his officers struggling to prevent escapes or respond quickly to emergencies. It took two hours last week to restore order at maximum-security Lee Correctional Institution, said Ozmint. However, he gave no further details about the incident.

TN - The state's correction commissioner, George Little, announced on June 8, 2008, that the state's 16 prisons will work together growing vegetables best suited to their location. This move came in an effort to reduce the higher costs of buying and transporting food to the prisons. The vegetables will be shared with other detention centers. Officials say that trucks that already carry prepared food to the prisons will be used to transport the produce to the state's 16 prisons.

TX - As of June 1, 2008, about a dozen Texas jails started allowing inmates to receive e-mails, even though they will not have internet access. A Dallas-based website will allow jail officials to print the e-mails and deliver them. Inmates can reply by filling out a reply form which officials will scan and e-mail back.

TX - The U.S. Supreme Court reversed on June 16, 2008, the case of the longest-serving prisoner on Texas' death row. Ronald Chambers, 53, has been on death row for over 32 years. The Court, without comment, remanded the case to the trial court over questions jurors used in deciding Chambers' death sentence.

TX - Prosecutors say that the new DNA tests that freed Thomas McGowan, who did about 23 years in prison for rape, implicated another prisoner. The new tests matched prisoner Kenneth Woodson, who is already serving a 30-year sentence, said officials. McGowan was released during the month of April 2008. Woodson will not be charged because the statute of limitations has expired, prosecutors said.

UT - DOC spokeswoman Angie Welling said on June 16, 2008, that DOC has struggled to keep staff members because many have left to other jobs for higher pay. The system has about 100 positions open. The Dept. has asked lawmakers for $3 million for salary increases.

VA - Following Gov. Mark Warner's order in 2006 to review old cases for DNA tests, on June 18, 2008, the state's Forensic Science Board began searching for volunteer lawyers. These lawyers would help the board locate about 900 felons who were convicted between 1973 and 1988, some wrongly convicted. Warner's order came after a sample test of 31 felons cleared two ex-prisoners of rape charges.

WI - A judge ruled on June 4, 2008, that state prison officials had violated a prisoner's free speech rights by denying him a newsletter critical of their policies. DOC officials had claimed that the newsletter was inflammatory. However, the judge ordered DOC to immediately deliver the now-defunct newsletter to prisoner Lozonzo Johnson at the Waupun Correctional Institution.

Compiled by Melvin Pérez ■

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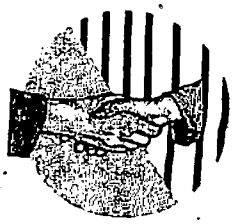

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