FLORIDA PRISON LEGAL

Perspectives

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FDOC Corruption Probes Continue: New Secretary Cracks Down On Employees Clubs

If what has occurred recently is a good indication of what will continue, Gov. Jeb Bush may have finally picked the *right* person to clean up what has now been exposed to be corruption throughout the Florida Department of Corrections (FDOC).

In February Gov. Bush abruptly fired the former head of the state's prison system, James Crosby, after months of a steady barrage of scandals involving corruption and illegal activities by top prison officials became public. Named by Gov. Bush to replace Crosby, Col. James McDonough, 59, a former Army commander, hasn't wasted any time since he took over in getting rid of the most obvious bad apples and launching his own investigations into areas where more corruption may be hiding.

McDonough has said that his first job is to restore a code of ethics in the prison system that includes "honesty in all things." He's got a big job ahead of him to do that. As is coming to light, corruption and good old boy cronyism permeates the Florida prison system and has for many decades. McDonough has, however, faced tough problems before. Prior to coming to the FDOC he served in the Army for almost thirty years. He was the commander on a mission to Rwanda in the 1990s whose job wasn't just to try to stop genocidal killing, but also to figure out how to keep refugees from dying of cholera. He also led troops into battle in the Balkans. He finished up his Army career as commander of the Southern European Task Force Infantry Brigade. Most recently he had been a part of Gov. Bush's administration as the state's director of drug control policy.

McDonough admits that he doesn't have experience working in a prison system. "But I do have experience in leadership," he said. He has promised that he is going to go over the department from a management standpoint from top to bottom, thoroughly examining practices, budgets and contracts. Something many feel is long overdue.

For several months now a dark cloud has been hanging over the prison system. There are state and federal grand jury investigations underway into wrongdoing by top officials at the agency, and investigations being conducted by the Florida Department of Law Enforcement and FBI. So far the problems that have been made public include allegations of theft and misuse of prisoners and state property by prison guards and officials, a steroid trafficking ring of prison guards, phantom employees, assaults and intimidation by prison guards and top officials, employee-on-employee sexual assaults, and questionable contract bidding practices. See: FPLP, Vol. 11, Iss. 5 and 6, and Vol. 12, Iss. 1, for more details.

As of mid-March it still hadn't become clear why former FDOC secretary James Crosby was forced to step

ON THE INSIDE

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down, although Bush said it would be clear soon why he had to go. The speculation is that with the ongoing grand jury probes, there could be state or federal criminal indictments coming, and not just against Crosby. A Bush spokesman has confirmed that Crosby is the target of an ongoing investigation, but about exactly what nobody is saying.

Not Wasting Time

Only thirteen days after being appointed to replace the ousted Crosby, on February 22, McDonough stunned FDOC officials and employees by ordering all employee club activities to immediately cease and ordering that such clubs' financial accounts be frozen. McDonough cited a need to evaluate the use of controversial fundraising tools used by the employee clubs to supposedly raise money for charitable work. The clubs are run by employees at most FDOC facilities and have been operating without effective oversight for years, leaving them open to corruption some employees now claim.

Prior to 1999, each prison had its own business office and the staff would usually manage employee club funds also. When Michael Moore was appointed secretary that year the business offices were consolidated into regional offices and the employee clubs were let to manage their own finances, supposedly with oversight by individual wardens. That didn't work out very well.

Allen Clark, a high school dropout, but a buddy of James Crosby, and who was forced to resign his $94,000 job as Region I director last year when accused of wrongdoing, was the subject of a 1999 FDOC internal investigation concerning his misuse of employee club funds at New River Correctional Institution.

That investigation followed accusations that Clark, then a captain at New River, improperly used employee trust fund money to pay for travel and equipment for softball and flag football teams that played in tournaments against other prisons' teams. The investigation allegedly found no reason to take action against Clark, even though other employees reported that Clark and a cadre of his henchmen threatened retaliation against anyone protesting how he used employee club funds. Investigators did find that:

- Employee club money had been given to individuals but no receipts obtained for the cash.
- Employee club assets, like a Sam's Club card, were used for personal purchases.
- Clark and another New River captain, Kenneth Lampp (who was later promoted to warden) had improperly taken bolt cutters from the prison to cut locks off ballot boxes during employee club elections in which they were candidates and

coerced staff members into voting for certain candidates.

- New River Warden Michael Rathman was aware the election was likely rigged by ballot box stuffing and coercion but did nothing about it.

And neither did anyone else when all that was found during the internal investigation.

Clark also managed a 2002 softball team of Florida State Prison employees named "The Big House." The team's behavior was called barbaric by opponents at a state tournament and was banned from future participation in Florida Law Enforcement Games. Seven of the 20 "Big House" players have since been arrested or cited in state and federal investigations concerning new allegations.

DOC employees have complained that sports teams, often paid for with employee trust funds, have embarrassed the department with bad behavior and extravagant spending. Others outside the department are criticizing where employees club funds come from.

Club members conduct fund-raisers like raffles and dinners as well as operate employee canteens to raise money for the clubs. Less well known is that prisoners are also used to provide personal services to FDOC officials and staff for which the employees clubs get a cut of what the prisoners are paid. Those services include prisoners being used as staff barbers, nearly every FDOC prison has a staff barbershop. Unlicensed shops, as are the prisoners who work in them. Select prisoners are also quietly paid by employees clubs to wash employees' personal vehicles, shine their shoes and boots, and work in staff canteens. Such prisoners are select, because they are only a handful among the prisoner population who get paid. The majority of prisoners are strictly prohibited from engaging in any activity that might make them money.

Personal Staff Services Shut Down

For decades, however, the $1 haircuts, shoe shines and car washes have been just one more job perk. No one saw anything wrong with using prisoners to do such personal work for FDOC employees. Of course, it was always done out of the public's sight. No one saw anything wrong, that is, until last year when it was reported that there was an ongoing investigation into FDOC officials and staff allegedly using prisoners to work on personal vehicles and possibly using state equipment to build personal items, like trailers and barbeque grills, for officials and staff. Several FDOC employees had vehicles and other items seized from their homes last year, including former secretary James Crosby, as part of that investigation by law enforcement.

In December '05, Florida Prisoners' Legal Aid Organization chairwoman Teresa Burns Posey contacted Crosby about the legality of using prisoners to perform other personal services for staff, such as cutting their hair, shining their shoes, washing their cars and serving them in staff canteens. Burns Posey specifically questioned Crosby about the legality of unlicensed staff barbershops and unlicensed prisoner barbers. Burns Posey has a particular interest in that because she is a licensed barber and owns licensed barbershops. Crosby failed to respond to such questions, prompting Burns Posey to go to the governor's office and state Department of Professional Regulation with her questions and adding allegations that the FDOC is in violation of state law by using paid, but unlicensed, prisoner "barbers" in unlicensed staff barbershops to cut the staff's (who are members of the public) hair. (See, chapter 476, Florida Statutes.)

While awaiting a response from the governor's office and the DPR, Crosby was fired and McDonough took over. Burns Posey immediately gave McDonough and the Department of Insurance notice that unless the staff barbershops and other activities using prisoners to perform personal services for staff were not shut down she would file suit. Within days of that notice McDonough ordered the staff barbershops, shoeshine, and carwash operations closed.

Burns Posey says she hopes, if the staff barbershops are eventually reopened, that the Department will set up a barbering school where prisoners can actually learn the trade and be licensed. And if paid, such prisoner barbers must receive higher compensation, as state law requires deductions to be made anytime prisoners are paid to work to help pay off any restitution or child support that may be owed. The employees clubs were not making such deductions when paying prisoners, contrary to that law.

Burns Posey also wrote to McDonough in February about another serious problem concerning prisoners' families: The extremely high rates they are being charged under the FDOC's contract with MCI to accept collect phone calls from their incarcerated loved ones. She explained how under that contract, which is scheduled to be renewed in May of this year, prisoners families are being charged the highest legal rates possible to stay in contact with someone in prison. The major problem, she pointed out, is the 53 percent kickback commission that the FDOC insisted on before MCI was awarded the contract.

In-state calls average almost $6.00, while out-of-state calls average about $20.00 for a 15 minute phone call, with more than half going to the FDOC, which has little or no costs associated with the inmate telephone system. Burns Posey called on McDonough to look at that contract and consider giving prisoners' families some relief from what can only be considered gouging by a state agency. [FPLAO started the Families Against Inflated Rates (FAIR) Campaign in 2003, which has been working to get the phone rates reduced since then.]

In February, McDonough also ordered all employees clubs' softball activities to shut down, saying the department's name will not be associated with the activities as they have been operating. It seems that some

softball activities were involved in many of the problems now being revealed about the department, as covered in other articles in this issue of FPLP. ■

Striking Out at FDOC Softball

On February 27 the new head of the Department of Corrections (FDOC) placed nine employees on unpaid leave behind brawls at a softball banquet and tournament last year.

Those placed on leave included Maj. James Bowen and Col. Richard Frye, who along with former FDOC Region I Director Allen Clark were charged with felony assault for their involvement in the fight at the Florida National Guard Armory in Tallahassee on April Fools Day.

The felony charges were later reduced to misdemeanors, then dropped altogether in January when prosecutors said too many witnesses had conflicting statements and there was a lack of evidence.

Bowen and Frye were placed on unpaid leave in November when they were charged, but were placed on paid leave in January when the charges against them were dropped. Clark had already resigned in August after a criminal investigation began into steroid use and embezzlement among prison employees.

Another FDOC employee, Brad Tunnell, the correction services administrator for Region I, was placed on paid leave in November. Tunnell, the son of Florida Department of Law Enforcement Commissioner Guy Tunnell, was not charged in the April 1st fight, but was accused of swearing at and threatening another employee who was helping the victim, who got jumped on, from the banquet.

In addition to Bowen and Frye, the FDOC employees placed on unpaid leave Feb. 27 included: Georgia Arnold, Region I assistant warden for programs; James Barton, a lieutenant at Charlotte Correctional Institution; Barbara Durrance, an executive secretary at the Region I office; Donnie Mayo, a sergeant at Washington Correctional Institution; Eric McMillon, a sergeant at Apalachee Correctional Institution; and Ernest Tharpe, a correctional officer at Liberty Correctional Institution.

In a meeting with 300 ranking officials in the FDOC a week before he placed the nine on unpaid leave, McDonough said there will be major personnel changes in the Florida prison system if that is what it takes to redefine the culture of the department.

Among its problems, the prison system is facing federal lawsuits over alleged sexual harassment of female employees and the abusive use of chemical sprays on prisoners at Florida State Prison. The department is also the target of state and federal investigations into misuse of money and prisoner labor, and is under legislative scrutiny concerning no-bid pharmaceutical contracts. Several former employees have been convicted of steroid use and trafficking, some of whom have agreed to cooperate in other investigations into criminal activities and wrongdoing in the department.

In February McDonough also fired Lanyard Owens, warden of Gainesville Correctional Institution. The reason for Owens being fired came out in a department report released March 2. The department investigation showed that Owens used prisoners and state materials to refurbish a trailer holding two barbeque grills owned by Owens. Employees said welding, painting and installation of diamond plating were done on the trailer and grills at the GCI maintenance shop last year. Employees and prisoners who were interviewed said Owens brought the grill to the shop and oversaw the work being done. Owens told investigators that he didn't know prisoners, employees and state material were being used to upgrade the grill, which he said was used in employee events such as softball games.

The FDOC also announced March 2 that two other top-level FDOC employees left the agency shortly after McDonough took over in February and that investigations of those employees continue. Jesse Whitfield was fired from his $71,243-a-year job as an assistant warden at Union Correctional Institution on Feb. 22, Whitfield is a former inspector with the FDOC's central office in Tallahassee.

Ron Jones, who had been making $88,677 as warden of South Florida Reception Center, resigned Feb. 21. Another investigation is being conducted at Hamilton Correctional Institution. It was confirmed on Mar. 2 that Col. David Coleman, who had been overseeing the HCI work camp, was placed on leave, but no details were released.

On Mar. 1st more information was released. The FDOC revealed that some of the nine employees placed on unpaid leave a few days earlier are also accused of being involved in a second fight at a softball tournament in Jacksonville in May of 2005.

The fight in Jacksonville left one employee with a broken jaw. Brad Tunnell is accused of breaking the man's jaw and causing him to be hospitalized, although a spokesman for the Jacksonville Sheriff's office said there was no record of Brad Tunnell being arrested in connection with the incident. McDonough confirmed that Brad Tunnell was involved in both the Tallahassee and Jacksonville fights.

With an FDLE investigation also going on, it is not clear whether it involves the fights too. McDonough said, however, that he has no problem with Guy Tunnell's (Brad Tunnell's father's) agency being involved, and quickly rejected any suggestion that it could lead to a conflict.

McDonough continued his shakeup of the department on Mar. 3 when he fired five of the nine

employees placed on unpaid leave a week earlier and demoted or otherwise disciplined the other four. Those fired were: Maj. James Bowen, Col. Richard Frye, Region I executive secretary Barbara Durrance, ACI Sgt. Eric McMillon and Region I assistant warden Georgia Arnold. An FDOC investigation report found that all five had lied to investigators and that there was sufficient evidence to support allegations that Bowen and Frye, along with former Region I Director Allen Clark, jumped on and beat James O'Bryan at the Tallahassee banquet when he accidentally slipped in a puddle of beer and vomit and knocked Durrance (Clark's secretary) down. McDonough said he has begun the process of decertifying Allen Clark as a correctional officer.

As for the other four: Officer Ernest Tharpe, the employee whose jaw was broken in the Jacksonville fight, allegedly by Brad Tunnell, was suspended for 30 days without pay and transferred from Liberty Correctional Institution; Brad Tunnell was demoted and transferred (he resigned a few days later); Sgt. Donnie Mayo and Lt. James Barton were also demoted to lower rank, and transferred.

Internal investigations continue into allegations that employees clubs, whose purpose is supposed to be supporting local charities, have been using money to throw lavish employee parties, some described as drunken orgies, and to buy expensive goods for employee softball teams, including bats costing hundreds of dollars.

[Sources: *Gainesville Sun*, 2/28/06, 3/3/06; *Orlando Sentinel*, 3/1/06; AP, 3/1/06; *Lakeland Ledger*, 3/2/06, 3/4/06; *South Fla. Sun-Sentinel*, 3/2/06; *St. Petersburg Times*; AP, 3/3/06; FDOC Investigation Reports.] ■

FDOC Contracts Drawing Scrutiny

FDOC interim secretary James McDonough confirmed March 9 what had been suspected for awhile: The state and federal investigations, one involving the Florida Department of Law Enforcement (FDLE) and a state-wide grand jury and the other involving the FBI and a federal grand jury, are focusing on contracts between the prison system and private companies.

McDonough also told the state Senate Justice Appropriations Committee on March 9 that promotions of friends and family within the Department of Corrections was a serious concern and that he will be making personnel changes soon that are related to nepotism and cronyism.

Sen. Rod Smith, D-Alachua (who reportedly is a personal friend of James Crosby, the former FDOC secretary who was fired by Gov. Jeb Bush in February), told McDonough during the committee's hearing that lawmakers are concerned about allocating funds in the next few weeks of the legislative session considering the rumors of problems with contracts between the department and several private companies. Smith, some believe, was fishing for details of what the investigations are looking at.

McDonough said he couldn't give details, but that he would share the information with legislators as soon as possible. "I know what I know," McDonough said. "The hell of it is, I don't know what I don't know. There are some problems with contracts, that does not mean there are problems with all contracts."

The FDOC (at least since Jeb Bush became governor) has expanded privatization in the prison system, including food services, prisoner canteen operations, health-care services for South Florida prisons, and some entire prisons.

McDonough later said that the questionable contracts included construction and services, but wouldn't be more specific. He did say none of the problems being looked at threatened the safety of prisoners or staff. He added that some contracts are being internally reviewed for inefficiency or lack of oversight, while others are the concern of the state and federal investigations.

McDonough also said that the nepotism and cronyism within the department is a problem that he will correct. He said there were more than 100 examples of questionable hiring and promotions that have come to his attention. "It appears to me that the protocol in the department (concerning nepotism and cronyism) have been disregarded in recent years," he said. "I need to fix that immediately and I shall."

He added that he is aware that in the rural areas prisons are the prominent employer, he appreciated the "family heritage" of generations working for the prison system, but said promotions and hirings should always be based on merit.

A few employees in powerful positions had created an unhealthy atmosphere for the bulk of the agency's workers, McDonough said. A "cultural battle" waged by a few rogue employees has hurt the department, he claims. "If you (as an employee) start to exist in a system in places where the other side is advanced, where the definition of prison culture is to be bigger, better, badder, meaner than the prisoners, that (behavior) is where the reward seems to be and that can affect lots of (otherwise) good people," said McDonough.

He also told legislators that he will continue his review of the employees clubs. He froze the clubs' funds, estimated to be $1.5 million statewide, in February.

McDonough was called back to the Capitol by lawmakers on March 13 for an update on contracts with TYA Pharmaceuticals. The FDOC, apparently with Crosby's approval, without soliciting bids from other companies, gave TYA, a Tallahassee company, contracts to split pills for cost savings and repackage them in bubble containers for distribution to prisoners.

Two reports by the Auditor General released over the past year had blasted the contracts for lack of oversight and accounting problems, along with other things.

"I think this was a classic case of mismanagement," McDonough said, adding that he planned to recommend changes within the week. Asked if he thought TYA could do the job, McDonough said he was "dubious."

Keefe and MCI Contracts

McDonough also told legislators that he has concerns about two other contracts between the FDOC and private companies. He told legislators that he is reviewing a contract with Keefe Commissary Network, a private company contracted with to operate the prison canteens where prisoners can buy hygiene items and snacks in October 2003. Since then Keefe, with FDOC's assistance, forced out another private company that had vending machines in the prisons' visiting parks, in which Keefe set up prisoner-operated canteens.

"That (contract) will be scrutinized with great care by me and perhaps others," McDonough said. Asked if the "others" included state and federal investigators, McDonough said, "We'll have to see."

Keefe had been represented by lobbyist Don Yaeger, whom it was reported last year by the *St. Petersburg Times* was treating Crosby to concerts and sporting events. Crosby said he paid his own way. (see, *FPLP*, Vol. 11, Iss. 5 and 6, page. 5-6, "Lobbyist Ties of FDOC Secretary Scrutinized.")

According to the Legislature, Yaeger and two other lobbyists stopped representing Keefe on Feb. 22, less than two weeks after Crosby was dismissed by Gov. Bush.

McDonough told members of the Joint Legislative Auditing Committee, before whom he appeared, that he is also concerned about the contract between the FDOC and MCI concerning the inmate telephone system. He said he is examining the high costs of collect calls that prisoners make to their families. Under the FDOC/MCI contract prisoners can only phone friends and family with collect calls that cost $1.50 as a connection charge and .26 cents a minute—for in-state calls. Out-of-state calls are even higher, a $3.95 connection fee and $1.00 per minute. The calls are automatically limited to 15 minutes and those family members or friends on the outside are charged the high rates. The FDOC receives 53 cents of every dollar charged for the calls under the contract.

"I don't think that's right," McDonough said. He noted that he calls his son overseas for 3 cents a minute. "Why are (the families of prisoners) being punished?," he rhetorically asked. (A question FPLAO and families have been asking for years.)

[Source: *Gainesville Sun*, 3/10/06, 3/14/06] ■

Ten Top FDOC Officials Ousted, Six More Promoted

James McDonough, the former career Army colonel named by Gov. Jeb Bush in February to replace former Department of Correction's secretary James Crosby, dropped another smart bomb on March 15, 2006. That was the day he outright fired nine more top prison officials.

Michael Rathman was fired as warden of Florida State Prison and Lamar Griffis was fired from his position as assistant warden of the Reception and Medical Center at Lake Butler. In all, two regional directors, four wardens and three assistant wardens were given the boot. Secretary McDonough said they were ousted because they "do not have my trust and confidence."

Regional directors Al Solomon (Reg. I) and Brad Carter (Reg. II), along with wardens Kenneth Lampp, Rick Anglin and Dave Farcus and assistant wardens Dale Hughes and Cornelius Faulk were also thrown out of the FDOC's goodold boy club.

Meanwhile, McDonough, who reportedly has Gov. Bush's full support in cleaning up the scandal-ridden Florida prison system, immediately promoted six other FDOC officials, including making Richard Dugger director of Region II. Dugger had once been the FDOC secretary for a couple of years under Gov. Bob Martinez.

Wendall Whitehurst, warden of Union Correctional Institution was promoted to Region I director. Wardens Ronnie Harris and Randall Bryant were promoted to larger prisons, Bryant replacing Rathman at FSP. Assistant wardens John Hancock and David McCallum were promoted to warden.

The firings and promotions came a day after an investigation report released by the Florida Department of Law Enforcement (FDLE) concluded that former FDOC secretary James Crosby tried to stop an FDLE investigation into the department last year by (allegedly) threatening FDOC employee Brad Tunnell, whose father, Guy Tunnell, is head of the FDLE. (Not reported in the mainstream media is that some people from Bay County/Panama City, where Guy Tunnell was sheriff before becoming head of the FDLE, claim Guy Tunnell is corrupt himself and has sent many people to prison on false and fabricated evidence.)

Crosby was forced to resign in February by Bush after he was named as a target in a wide-ranging investigation into possible criminal activity among prison employees. Crosby denies any wrongdoing, but has hired an attorney.

According to part of a report released by the FDOC's inspector general on Mar. 15, Lamar Griffis knew about falsified time sheets for employees who instead of working were practicing or playing softball and he allegedly knew fake FDOC ID's were made for non-

FDOC people so they could play on employee softball teams.

There were also allegations being investigated in mid-March of top FDOC officials throwing parties at their state-owned (heavily taxpayer subsidized) homes where they sold tickets for attendance and charged for drinks as well. FPLP will report more on that story as it develops.

On March 16 McDonough also forced another top FDOC official to retire. Greg Drake, 53, a deputy assistant secretary in charge of security for 128 correctional facilities was told by McDonough to hand in his resignation or be fired. Drake, who had been with the FDOC since 1979 was forced out of his $103,000-a-year job at the department's headquarters in Tallahassee. No reason was given for his departure, although Drake is generally known to have been a crony of James Crosby and deeply entrenched in the system as a "good old boy."

According to a statement made by McDonough on March 15, there are going to be more front page stories about the department before there are fewer, indicating that his efforts to clean up the prison system is far from over.

According to some old time prisoners, McDonough may not realize just how widespread the corruption is in the prison system, but getting rid of corrupt top officials and replacing them with competent, ethical people is a step in the right direction.

And according to one prisoner, who asked not to be identified for fear of retaliation, it all started going downhill for the FDOC good old boys in 1999 when a gang of them stomped death row prisoner Frank Valdes to death, for which karma required a payback. "It just took a little while to get here, Frank," the prisoner said. ■

-US Supreme Court-
Prisoners Can Sue Under ADA

On January 10, 2006, in a unanimous decision, the US Supreme Court held that states can sometimes be sued for damages by disabled prisoners. It was the first case to test how the Court under Chief Justice John Roberts will handle cases involving states' rights, and in this case it went against the states.

The high Court held that Georgia state prisoner Tony Goodman can use the 1990 Americans With Disabilities Act (ADA) to sue prison officials. Goodman claims GA prison officials did not accommodate his disability, that he was confined for more than 23 hours a day in a cell so narrow he could not turn his wheelchair. The ADA is a federal law meant to ensure equal treatment for the disabled. The Supreme Court had already previously ruled that the ADA applied to protect prisoners as well as free citizens, but had left open whether individual prisoners could sue for violations of the ADA. Goodman's case answered that in the affirmative.

Georgia had argued that states should be immune from prisoners' lawsuits brought under the ADA. Not a single justice agreed with Georgia.

Justice Scalia, writing for the Court, said states can be sued under the ADA for violating individual disabled prisoners' constitutional rights. However, the Court put off deciding whether prison systems can be sued for general violations of the ADA, a more significant and contentious issue.

Twelve other states had joined with Georgia in urging the Court to prohibit general suits brought by prisoners under the ADA. The Court, however, refused to consider that issue at this time. Gene Schaerr, a Washington attorney, said that the justices probably didn't want to address that issue with Justice Sandra Day O'Connor there (Justice Alito had not yet taken over from her on Jan. 10).

O'Connor was the deciding vote the last time the Court ruled on an ADA issue, joining the four more-liberal justices in a 2004 decision holding that states could be sued for damages for not providing the disabled access to courts.

Amazingly, Goodman had been supported in his case by the Bush administration, which argued that there was a history of mistreatment of disabled prisoners considered by Congress when it passed the ADA.

It is felt by some that the Court could have used Goodman's case to further shield states from federal interference, which was notable in many cases when former Chief Justice Rehnquist ran the Court.

"This is another step forward moving away from the states' rights and recognizing Congress' power to protect certain groups who are discriminated against," said John Brittain, chief counsel for the Lawyers' Committee for Civil Rights Under Law.

See, *United States v. Georgia*, 19 Fla.L.Weekly Fed. S13 (1/10/06).

Correctional Officer
Attacks Pharmacist

STARKE, FL – On Feb. 23, '06, Starke police say 34-year-old Marcus Henry, a correctional officer at Lawtey Correctional Institution, tried to rob the pharmacy in a Winn Dixie store in Starke in order to steal narcotics such as Oxycontin.

"The pharmacist has blood all down the front of his shirt," a caller to 911 told the police minutes after Henry allegedly jumped over the pharmacy counter and was caught trying to steal pills. When confronted, he pulled a knife and attacked the pharmacist cutting his neck, according to witnesses. Then he ran.

Henry's familiar face made it easy for witnesses to identify him for police who tracked him to his house, were he was coaxed outside by his father where police arrested him.

Although a prison guard, Henry was apparently addicted to drugs, police feel. FDOC records show he was given a drug test when first hired by the department but none since. The FDOC does not randomly drug test its staff and only gives tests for cause after employees are hired. Curiously, although prisoners can only get drugs from someone on the outside, like visitors or staff, the department spends tens-of-thousands of dollars each year to randomly drug test prisoners, many several times a year. ■

Florida Supreme Court Deputy Marshall Under Criminal Investigation

TALLAHASSEE – The top two security officers at the Florida Supreme Court left their jobs in February '06 behind a criminal investigation concerning the theft of ammunition from the Florida Department of Law Enforcement, according to a report in the March 17 *St. Petersburg Times*.

According to that report, officials at the court would not discuss the departure of Marshall Stephen C. Robertson, 53, and Deputy Marshall Ramon Santos, 33, citing a pending criminal investigation.

Santos is a former FDLE agent who spent three years guarding Gov. Jeb Bush before getting the job at the Supreme Court last October after Bush wrote him a glowing job recommendation for the $52,000-a-year position. Santos' former position at the FDLE included purchasing weapons and ammunition for FDLE training classes. Records at the court indicate Santos is the target of the criminal investigation.

Robertson, who was appointed to the $90,000-a-year marshall's position a year ago hired and supervised Santos, resigned Feb. 6. Robertson, who does not appear to be directly involved in any theft, remains on the court's payroll until April 28, unless there are "negative developments related to the Ray Santos incident," wrote Chief Justice Barbara Pariente in a letter obtained by the *Times*. ■

Death Penalty Collapsing

by Richard Geffken

Florida and California are re-examining the death penalty.

Following the execution of "Tookie" Williams in California, officials at California's San Quentin Prison struggled with a court order to execute death row inmate Michael Morales "humanely." The event was scheduled for late February 2006.

They hired two anesthesiologists, but when the doctors realized they may do more than merely watch, both cited ethical concerns to refuse.

For eighteen hours no substitutes could be found, and California's judicial system collapsed. The State discovered it could not force, even by Court order, a physician to kill a human being.

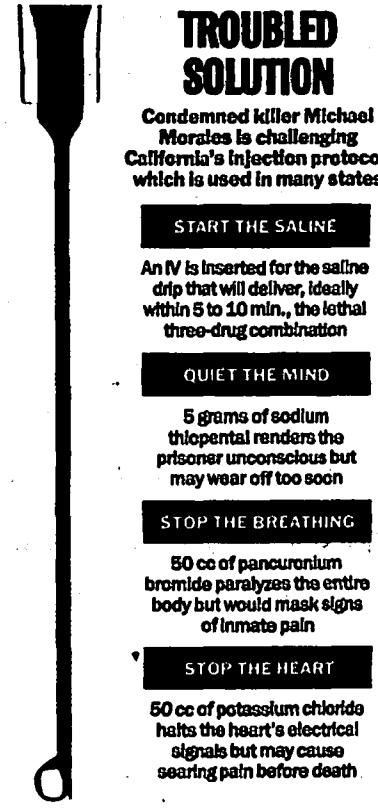
A pivotal matter was a Florida study on the level of anesthetic in the blood of executed prisoners. These revealed the men had, in fact, been tortured to death when the potassium chloride used reached the heart. The study concludes there is no way to kill a healthy human without causing cruel and unusual pain and suffering.

Next, Morales was sentenced to death on the basis of the testimony of a jailhouse snitch informant. It was shown that the snitch had lied. Judge Charles McGarth, who presided over Morales' trial, called for clemency, stating that executing Morales on the basis of perjured testimony "would frustrate the design of our sentencing laws, and would constitute a grievous and freakish injustice."

Securing perjured testimony from snitches has made a mockery of Justice throughout America.

Activist Crystal Bybee of End the Death Penalty stated, "If they want to torture people to death on the basis of lies they are going to have to come right out and say so."

U.S. District Court Judge Jeremy Fogel, who issued the "humanely" order to San Quentin, then ordered hearings on the constitutionality of the death penalty for May 2006. Effectively, this has shut down all executions in California, Florida, and the nation. ■



POST CONVICTION CORNER

by Loren Rhoton, Esq.

Florida Rule of Criminal Procedure 3.850 generally imposes a two-year period of limitations for filing a motion to collaterally attack a judgment and/or sentence. Rule 3.850 provides three exceptions to the two-year period of limitations: (1) newly discovered evidence- the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence; (2) new rule of law- the fundamental constitutional right asserted was not established within the two year period of limitations and has been held to apply retroactively; or, (3) ineffectiveness of postconviction counsel- the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion. This article will address the issue of newly discovered evidence and how to raise such an issue in a 3.850 motion.

In order to be considered newly discovered evidence for the purpose of setting aside a conviction, after trial, the evidence must have been unknown by the trial court and by the defendant or his counsel at time of trial. Jones v. State, 709 So.2d 512 (Fla. 1998). Furthermore, it must appear that the defendant and his counsel could not have known of the evidence by use of due diligence. Id. Finally, the evidence must be of such nature that it would probably produce acquittal on retrial. Id.

In the context of a guilty or nolo contendere plea, though, the standard for withdrawal of a plea due to newly discovered evidence is slightly different. The first to elements of Jones still must be proven (i.e., the evidence is newly discovered and it could not have been discovered through the exercise of due diligence). But, in the plea context a movant must prove that the withdrawal of the plea is necessary to correct a manifest injustice. Bradford v. State, 869 So.2d 28 (Fla. 2nd DCA 2004); Scott v. State, 629 So.2d 888 (Fla. 4th DCA 1993). Said standard is more appropriate for a case where there is a plea since Jones is "virtually impossible to apply because there was no trial and no evidence produced. Any determinations as to the nature and admissibility of the evidence would be speculative." Bradford at 29.

Newly discovered evidence issues which may garner postconviction relief include, but are not limited to:

-Eyewitness testimony which is exculpatory and could not have been discovered through the use of due diligence at the time of trial. Clugston v. State, 765 So.2d 816 (Fla. 4th DCA, 2000).

-A key State witness has recanted his or her testimony. Stephens v. State, 829 So.2d 945 (Fla. 1st DCA, 2002).

-The State suppressed exculpatory evidence or matters which could be used to impeach

prosecution witnesses. Taylor v. State, 848 So.2d 410 (Fla. 1st DCA 2003).

-A codefendant received a life sentence after the defendant received a death sentence for the same offense. Scott v. Dugger, 604 So.2d 465 (Fla. 1992) ["[I]n a death case involving equally culpable codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence."].

-A codefendant admits to refusing to testify on defendant's behalf and refusing to give exculpatory testimony for defendant because of coercion from the State. Roundtree v. State, 884 So.2d 322 (Fla. 2d DCA 2004).

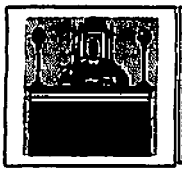
Whether the conviction being attacked is the result of a jury trial or a guilty/nolo contendere plea, the burden on the postconviction movant is substantial. Firstly, the "new evidence" must be something that truly could not have been discovered through the use of due diligence at the time of the original proceedings. Therefore, if something could have easily been discovered by the movant and/or his counsel at the time of the trial/plea, the due diligence requirement will preclude the movant from raising the issue as newly discovered evidence. If anything, such a situation would more properly be raised as an ineffectiveness of counsel claim and, thus, be subject to the two year period of limitations imposed by Rule 3.850.

Additionally, it must be shown the newly discovered evidence would have had a substantial impact on the likely outcome of the case. In the trial context, the movant must show that the new evidence would probably cause an acquittal at a new trial. This is a weighty burden which requires evidence that would strongly refute at least one of the elements of the offense charged at trial. Speculative evidence or witnesses with dubious credibility likely will not sustain the burden.

In the plea context, it is important to keep in mind that withdrawal of a nolo contendere plea, after sentencing, should be allowed when necessary to correct a "manifest injustice." Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1980); Miller v. State, 814 So.2d 1131, 1132 (Fla. 5th DCA 2002). "Manifest injustice [occurs] whenever . . . the plea was involuntarily." Blackburn, 646 F.2d at 891. Thus, any time that the newly discovered evidence has a significant impact on the voluntariness of the plea, it should be alleged that withdrawal of the plea is necessary to correct the manifest injustice.

Trial courts are often skeptical of newly discovered evidence claims, especially relating to recanted testimony. Nevertheless, if a valid newly discovered evidence is available, Rule 3.850 provides a vehicle for presenting a postconviction attack based on the newly discovered evidence. It is important to be aware of the required elements of newly discovered evidence claim (for either a conviction after trial or a plea) and to properly allege each element listed above. Speculative or conclusory allegations will not carry such a claim. But, if there is a legitimate newly discovered evidence issue, this may be a valid way to either withdraw a plea or obtain a new trial.

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. ■



NOTABLE CASES

ANTHONY STUART

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

FLORIDA SUPREME COURT

State v. Frierson, 31 Fla.L.Weekly S81 (Fla. 2/9/06)

The Florida Supreme Court reviewed a decision in *Frierson v. State*, 851 So.2d 293 (Fla. 4th DCA 2003), to resolve a conflict with the decision in *State v. Foust*, 262 So.2d 686 (Fla. 3d DCA 1972).

The background in Anthony Frierson's case was that he had been charged with possession of a firearm by a convicted felon. The charge stemmed from a search of his vehicle subsequent to an illegal traffic stop. However, after effecting the illegal stop, it was learned by the traffic officer that there was an outstanding warrant for Frierson in another proceeding. Thus, the officer had searched the vehicle incident to the arrest for the outstanding warrant. It was later found that Frierson was not the individual the outstanding warrant was for.

Consequently, Frierson sought suppression of the firearm during his trial, arguing that the found firearm should be suppressed because the traffic stop was unlawful and the warrant which provided basis for his arrest was wrongfully issued. The trial court agreed that the traffic stop was unlawful, however, the trial judge denied the motion to suppress by relying upon *Arizona v. Evans*, 514 U.S. 1 (1995), and *United States v. Leon*, 468 U.S. 897 (1984). It was opined that the officer justifiably relied upon the arrest warrant to search the vehicle, although it was later determined the arrest warrant had been erroneously issued. The trial court further opined that the fact Frierson was illegally stopped by the arresting officer, it did not require suppression of the firearm because the firearm was found in a search which was incident to the arrest based upon the outstanding warrant and was sufficiently attenuated from the illegal stop. Thus, Frierson pled nolo contendere to the felony firearm possession offense, reserving his right to appeal the trial court's denial of his motion to suppress.

On appeal, the Fourth District agreed with the trial court in its decision except, based on prior precedent, it was concluded that because the traffic stop was without reasonable cause, the firearm seized in the search incident to the arrest on the outstanding warrant was subject to suppression as fruit of the poisonous tree, notwithstanding the outstanding warrant. As a result of this opinion, the Fourth District certified conflict with the Third District's decision in *Foust*.

In *Foust*, the Third District reversed a trial court's decision to suppress certain evidence that was found after an arrest, it had held in relevant part that "the reasonableness of the search after arrest was not affected by the fact that the original stopping of Foust may have been without probable cause."

On review, the Florida Supreme Court held that the question of whether evidence, seized in a search incident to an arrest based on an outstanding warrant (although the warrant mistakenly identified the defendant—Frierson, the arresting officer was not aware of that mistake) discovered following an illegal traffic stop, is to be suppressed should be answered by analyzing the three factors set forth in *Brown v. Illinois*, 422 U.S. 590 (1975), for application of the rule of *Wong Sun v. United States*, 371 U.S. 471 (1963).

In Frierson's case, the Florida Supreme Court found that the brief amount of time that elapsed between the illegal stop (which was a stop that was not pretextual or bad faith) and the arrest of Frierson weighs against finding the search attenuated, that the outstanding arrest warrant was an intervening circumstance that weighs in favor of the firearm found in the search incident to the outstanding arrest warrant being sufficiently distinguishable from the illegal stop to be purged of the primary taint of the illegal stop, and that the purpose and flagrancy of the misconduct in illegally stopping Frierson was not such that the taint of the illegal stop should require that the evidence seized incident to the outstanding warrant be suppressed.

Accordingly, the Fourth District's decision was quashed and it was directed that Frierson's conviction and sentence of the trial court be reinstated.

Scipio v. State, 31 Fla.L.Weekly S114 (Fla. 2/16/06)

On review in the Florida Supreme Court, the decision in Stephen J. Scipio's case on appeal (See: *Scipio v. State*, 867 So.2d 427 (Fla. 5th DCA 2004)) was found to be in conflict with the harmless error analysis found in *State v. Schopp*, 653 So.2d 1016 (Fla. 1995). However, it was found that the reason the Fifth District's decision conflicted with the *Schopp* case was due to conflicting language that was

discovered within the *Schopp* decision. Consequently, the Florida Supreme Court was prompted to clarify what it had held in *Schopp*.

In *Scipio*, the Fifth District had decided there was a discovery violation committed by the State. In relevant part, Scipio's counsel had planned to use testimony made during a deposition by a State's witness to support Scipio's defense theory that Scipio did not commit the offense he was charged with. However, after the witness reviewed relevant evidence at the prosecutor's insistence, the witness recanted from the testimony he gave in the deposition. This information was not disclosed by the State prior to the commencement of Scipio's trial. Thus, a discovery violation had been committed.

Although the Fifth District had properly found that there was a discovery violation, due to the language it found in *Schopp* it opined that the discovery violation was not sufficiently harmful to require reversal.

On review, the Florida Supreme Court explained it was important to note that prior to the *Schopp* decision, a trial court's failure to conduct an inquiry as to discovery violations (See: *Richardson v. State*, 246 So.2d 771 (Fla. 1971) was considered to constitute such substantial harm as to mandate automatic reversal without any consideration of harmless error. See: *Smith v. State*, 500 So.2d 125, 126 (Fla. 1986). However, while it was decided in *Schopp* that it was possible that a *Richardson* violation could be harmless, the strict procedural prejudice standard set out in *Smith* as the standard prejudice or harm.

In *Schopp*, it was specifically explained and repeatedly reaffirmed of the Florida Supreme Court's adherence to the *procedural prejudice* standard, not substantive prejudice. Thus, it had formulated a strict procedural standard for proving harmless error in place of an even stricter per se rule of reversal. It placed the burden on the State and emphasized that a finding of harmless error should be "the exception rather than the rule." *Schopp, Id.*, at 1023. The decision further noted that "the vase majority of cases" will not have a record sufficient to support a finding of harmless error and that there is a "high probability" that any given error will be found harmful. *Schopp, Id.*, at 1021.

However, included among all the language in *Schopp* affirming the rule of procedural prejudice, there was one statement found that appeared inconsistent with that rule: "This analysis recognizes the procedural prejudice inherent in discovery violations. It also takes into account the fact that errors that reasonably could affect trial preparation or strategy are 'prejudicial,' and therefore harmful for appellate purposes, only when a change in trial tactics reasonably could have benefited the defendant by resulting in a favorable verdict."

The emphasized statement above was what the Fifth District focused on in concluding the discovery violation in Scipio's case was harmless error. That language was held by the Florida Supreme Court to be inconsistent with the overall formulated extensive analysis intended in the *Schopp* decision.

In clarifying the *Schopp* decision, it was held in the *Scipio* case that the harmless error standard does not focus on whether the discovery violation would have made a difference in the verdict. Such an analysis would make the standard for procedural prejudice identical to substantive prejudice. Consequent to its receding from the inconsistent language found in *Schopp*, the Florida Supreme Court reaffirmed its statements that the inquiry is whether there is a reasonable possibility that the discovery violation "materially hindered the defendant's trial preparation or strategy." See: *Schopp, Id.*, at 1020. Under *Schopp*, only if the appellate court *can* determine beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless. See: *Schopp, Id.*, at 1021.

To the extent of finding the discovery violation in Scipio's case harmless, the Fifth District's decision was quashed and the case was remanded for further proceedings consistent with the Florida Supreme Court's decision.

DISTRICT COURT OF APPEALS

State v. Tanner, 30 Fla.L.Weekly D2785 (Fla. 2d DCA 12/9/05)

Amanda Vernell Tanner, in her case, was a passenger in a vehicle that was legally stopped by law enforcement and, due to a 'dog sniff alert,' the vehicle was searched.

What the dog had alerted to inside the vehicle was Ms. Tanner's purse that she was commanded to leave in the vehicle while the dog did its sniffing. Illegal drugs were found inside the purse, and Ms. Tanner was arrested.

At trial, Ms. Tanner sought to suppress the found illegal drugs, arguing that she had done nothing to warrant her individual detention, nor was there an independent reasonable suspicion that her purse contained contraband. The trial court agreed and granted the dispositive motion to suppress evidence.

It was also pointed out and concluded by the trial court, relying on *Matheson v. State*, 870 So.2d 8 (Fla. 2d DCA 2003), that insufficient records of the dog's field performance and its lack of training to disregard residual drug odors had rendered invalid the authorities' search of the interior of the vehicle to begin with. The state appealed the trial court's decisions.

On appeal, the state argued that it was error for the trial court to grant Ms. Tanner's suppression motion. It was further argued that it was error for the trial court, in

granting the suppression, to base it's decision on matters relating to the dog's field performance and training. Thus, the state urged the appellate court to recede from the decision in *Matheson*.

The appellate court disagreed with the state's contentions that the trial court was in error granting the motion to suppress. It opined that competent, substantial evidence supported the lower court's finding that the authorities unlawfully seized Ms. Tanner's purse. Also, the appellate court declined the state's invitation to recede from the *Matheson decision*.

The granting of Ms. Tanner's motion to suppress was affirmed.

Hillman v. State, 30 Fla.L.Weekly D2839 (Fla. 5th DCA 12/16/05)

Paul Franklin Hillman was convicted and sentenced for two counts of burglary and one count of aggravated assault with a firearm, subsequent to a jury trial.

On appeal, Hillman argued that the trial court committed fundamental error when it instructed the jury that it could find the defendant guilty of burglary if it found that the defendant had entered the home with the intent to commit a "burglary" therein.

The trial court had instructed the jury in a circular fashion on the elements of burglary. Consequently, the appellate court pointed out that it and other district courts have held that it is circular to define burglary by indicating the need to show intent to commit a burglary rather than intent to commit an underlying offense. See: *Stone v. State*, 899 So.2d 421, 422 (Fla 5th DCA 2005); *Bruce v. State*, 879 So.2d 686, 687 (Fla. 4th DCA 2004). In *Stone*, such an error was held to be fundamental.

As a result, Hillman's burglary convictions were reversed and remanded for a new trial.

Wencel v. State, 31 Fla.L.Weekly D39 (Fla. 4th DCA 12/21/05)

Timothy Wencel's case involved an issue of whether a lower court was confined only to a sentencing record and cannot consider documentation from the Parole Commission when determining the illegality of a sentence pursuant to Rule 3.800(a).

In 1996 Wencel had been temporarily confined while revocation of his control release supervision was being considered. Although it was decided that Wencel violated conditions of his supervision, the Parole Commission did not revoke the supervision. Instead, the Parole Commission released Wencel and discharged him from supervision.

Apparently, Wencel was later arrested and convicted of a new crime, within 3 years of his release from temporary custody and discharge from the above mentioned supervision. In determining its designating Wencel a Prison Releasee Reoffender (PRR), the lower court used that date of his release from temporary custody and sentenced Wencel with a PRR sentence. Consequently, Wencel filed a Rule 3.800(a) motion arguing that the PRR sentence was illegal because the court could not use the date of his release from temporary custody and discharge from supervision. This, because such is not the equivalent of "releas[e] from a correctional facility...following incarceration" as termed under the PRR statute. Wencel relied on *Brinson v. State*, 851 So.2d 815 (Fla. 2d DCA 2003) (applying the rule of lenity and concluding that "release" as used in the PRR statute means actual release from a state prison sentence, not release from temporary confinement that happens to be in a state prison). Wencel further filed the Parole Commission's order that showed supervision had not been revoked to support his claim.

The lower court denied the Rule 3.800(a) motion opining that Wencel's claim could not be raised under Rule 3.800(a) because the claim was not discernable from the court's sentencing records. Thus, it was opined that an evidentiary hearing would have to be held before the "extra-record evidence" (the Parole Commission's order) could be considered.

On appeal, Wencel argued that the lower court should have taken judicial notice of the Parole Commission's order. However, the lower court believed that it could not take judicial notice of such order.

The appellate court opined that contrary to the lower court's belief, it could have taken judicial notice of the Parole Commission's order because it was an official action by an administrative arm of the executive branch. It was further opined that a lower court is not limited strictly to the record before the court "at sentencing" when addressing a Rule 3.800(a) motion. See: e.g., *Nelson v. State*, 760 So.2d 240 (Fla. 4th DCA 2000) (holding that in a Rule 3.800(a) claim, when considering movant's request for additional jail credit, the trial court should examine not only the court file, but jail records).

Accordingly, it was opined that the lower court in Wencel's case should have taken judicial notice of the Parole Commission's order and addressed the merits of the Rule 3.800(a) motion. Consequently, Wencel's case was reversed and remanded for further proceedings.

King v. State, 31 Fla.L.Weekly D131 (Fla 2d DCA 12/30/05)

In Jerry B. King's appeal of being denied in his effort to retrieve (free of charge) certified copies of documents needed to file an application for clemency, the appellate court opined that he *was* entitled to certified copies of the information, judgment, and sentence documents. However, contrary to King's contentions, he was found *not* to be entitled to copies of the plea agreement form, sentencing

FOR CLEMENCY ASSISTANCE INFO. WRITE TO:

NATIONAL CLEMENCY PROJECT
8624 CAMP COLUMBUS ROAD
HIXSON, TENNESSEE 37343
(423) 843-2235

guidelines scoresheet form, or the sentencing transcripts without charge. See: *Marshall v. State*, 759 So.2d 717 (Fla. 2d DCA 2000).

King's case was reversed and remanded with instructions for the lower court to order the clerk of the court to supply King, without charge and without further delay, the documents described in the appellate court's decision.

Peters v. State, 31 Fla.L.Weekly D267 (Fla. 1st DCA 1/24/06)

Robert Sheldon Peters' case involved a trial court's admission of an independent lab report at his community control revocation hearing without the custodian of the lab's records present to testify. The report was admitted as a Business Record pursuant to 90.803(6) Florida Evidence Code.

Peters was charged with violating his community control by failing drug tests. When the lower court admitted the lab report findings, Peters' defense counsel objected to its admission. It was argued that the written report violated Peters' right to confrontation as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

The argument of the defense was rejected in the appellate court, where it opined that *Crawford* does not apply in community supervision revocation proceedings. To support the opinion it cited *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (where it was held that the revocation of parole is not part of a criminal prosecution, and thus the full panoply of rights due a defendant is such proceedings does not apply to parole revocations).

The appellate court in Peters' case also pointed to a recently decided case in the Washington Supreme Court, *State v. AbdRahmaan*, 111 P.3d 1157 (Wash. 2005), that was faced with the question of whether the dictates of *Crawford* were applicable in a community supervision revocation proceeding. The AbdRahmaan court concluded that Crawford did not apply in such cases and the appellate court in Peters' case quoted a quite lengthy reasoning for its conclusion. It was also noted that in the AbdRahmaan case, the Washington court pointed to an overwhelming majority of federal decisions that have found the *Crawford* rationale to be inapplicable in community supervision revocation proceedings.

The appellate court in Peters; case, based on its findings, affirmed the lower court's admission of the lab report. However, it did opine that in those cases where there is a true dispute concerning the nature of the tested substance involved and the defense can show some lack of trustworthiness in the lab report, then the report would be inadmissible. See: Section 90.803(6)(a), Florida Statutes.

Since it was found that Peters' issue had not been previously decided in Florida, the appellate court certified a question of great public importance to the Florida Supreme Court, "Does The 'Testimonial Hearsay' Rule Set Forth In *Crawford v. Washington*, 541 U.S. 36 (2004), Apply In Community Control And/Or Probation Revocation Proceedings?"

Hampton v. State, 31 Fla.L.Weekly D284 (Fla. 3d DCA 1/25/06)

Johnnie Lee Hampton had filed a Rule 3.853 motion for postconviction DNA testing in the lower court regarding his 1973 conviction of sexual battery. His sentence was for seventy-five years in prison.

Although the postconviction court found that Hampton's identity was a genuinely disputed fact at his trial, it denied the motion stating in part that "[p]hysical evidence that may contain DNA does not exist..." Thus, denying the motion without conducting an evidentiary hearing. Hampton appealed the denial.

Where there is a summary denial of a Rule 3.853 motion, there must be a reversal unless the postconviction record (see, Fla. Rules of Appellate Procedure 9.141(b)(2)(A)) shows conclusively that the appellant is entitled to no relief. See: Fla.R.Crim.P. 9.141(b)(2)(D).

On appeal it was noted that the record in Hampton' case did not conclusively refute his claims that testable material exists. In contrast, Hampton had attached to his motion a copy of a memorandum written by a Dr. Arthur F. Schiff of the office of the Dade County Medical Examiner on May 14, 1973. The state had also supplemented the record with the deposition of Dr. Schiff taken in Hampton's case on November 28, 1973.

According to those documents Dr. Schiff had taken DNA evidence from the victim and Hampton. Furthermore, it shows that that evidence was given over to the investigating officer to take to the Crime Lab where blood typing analysis was to be performed.

In response to the appellate court's findings, the state said, "The Clerk of Courts does not have this item of evidence in their possession.... In fact, it was never admitted in trial. Likewise, the investigating police agency does not have this item of evidence in their possession."

The appellate court opined however, that the state's response did not refute Hampton's claim. The deposition that the state supplemented the record with showed Dr. Schiff indicated he gave the evidence material to the investigating officer to deliver to the Crime Lab. It was noted by the appellate court that the state showed no record that it had even made an inquiry at that lab regarding the evidence.

The state also argued that DNA testing could not exonerate Hampton because there were multiple assailants. The victim had stated that she was assaulted by three males, each of whom had forcible intercourse with her. It was argued

by the state that if DNA testing identified a single subject, that result would not be enough to exclude Hampton as one of the perpetrators.

It was noted however, by the appellate court in Dr. Schiff's deposition, he acknowledged the possibility that material from all three of the assailants could be contained within the sample that he recovered from the victim. Thus, reasoning that if the DNA contains three assailants and Hampton is not one of those three identified by DNA then such evidence could exonerate Hampton.

The lower court's denial of Hampton's motion for DNA testing was reversed and the cause was remanded of further proceedings consistent with the appellate court's findings.

Cox v. Crosby, 31 Fla.L.Weekly D310 (Fla. 1st DCA 1/26/06)

Leo J. Cox's case presented an issue of whether a lien for filing fees should be placed against a prisoner's trust account when the filing concerns complaints of *gain-time not received, but would be receive, if successful*, versus complaints of gain-time received, but has been forfeited.

In the lower court, Cox had filed a petition that argued about the constitutionality of a statute that precluded him from receiving gain-time. If successful, he would have been entitled to more than five-years of additional gain-time. The lower court issued an order which found Cox to be indigent in accordance with Section *57.085*, Florida Statutes, and imposed a lien on his prison trust account to recover the applicable filing fees. Cox moved for a review of that order pursuant to Florida Rule of Appellate Procedure 9.430(a) and argued that his circuit court petition was a "collateral criminal" proceeding as described in *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003). He contended that his indigency should have been resolved under Section *57.081*, Florida Statues, which does not contain a lien provision.

The Appellee, James v. Crosby, in opposition to Cox's contention, argued that the holding in *Schmidt* should be limited to its facts, where the complaining party has challenged the forfeiture of gain-time that has already been received, not challenges to gain-time that has never been received.

The appellate court *did not* accept Crosby's argument in light of the reasoning in the *Schmidt* court. There, the Florida Supreme Court said "it is apparent that an action affecting gain-time does in fact affect the computation of a criminal defendant's sentence, because the length of time the inmate will actually spend in prison is directly affected." See: *Schmidt, Id.* at 366.

Cox's claim, if successful, would affect his time in prison, i.e., the time would be significantly reduced. Therefore, the appellate court opined that I was constrained to conclude that the proceeding in Cox's case was a "collateral criminal" one as defined in *Schmidt*.

Because of the dissent's concerns in this case, the appellate court certified a question to the Florida Supreme Court that it believed to be of great public importance: "Does the holding in Schmidt extend to all actions, regardless of their nature, in which, if successful, the complaining party's claim would directly affect his or her time in prison, so to preclude imposition of a lien of the inmate's trust account to recover applicable filing fees?"

Cox's review was granted to the extent of the imposed lien, reversing the lower court's order.

Canete v. State, 31 Fla.L.Weekly D359 (Fla. 4th DCA 2/1/06)

The Fourth District Court of Appeal in this case withdrew its original opinion at *Canete v. State*, 30 Fla.L.Weekly D1387 (Fla. 4th DCA 6/1/05), and substituted it with its opinion on a rehearing en banc requested and granted from the State.

In Orlando Canete's case, the appellate court has created quite a twist to its own prior opinion it gave in *Roberts v. State*, 874 So.2d 1225 (Fla. 4th DCA 2004), which the majority defined the twist in its *Canete* opinion to be "distinguishable" from *Roberts*.

In *Roberts*, the appellate court opined that a *Miranda* warning is inadequate when it fails to inform one of his right to have an attorney present "during" questioning.

As in *Roberts*, Canete had sought to suppress statements made to authorities because the *Miranda* warning given failed to inform of the right to have attorney present during questioning. Canete's motion to suppress was denied and he was convicted and sentenced for his charges.

On appeal, the appellate court noted the warning, in relevant part, that was given to Canete: "If you decide to answer the questions now, without an attorney present, you still have the right not to answer my questions at any time until you can speak with an attorney." It was opined that this part of the warning given by the authorities *did* cause Canete to "infer" that he had a right to have an attorney present during the questioning.

The appellate court reasoned that Canete's case was distinguished from *Roberts* because in *Roberts* the warning, in relevant part, that was given stated, "You have the right to talk with a lawyer and have a lawyer present before any questioning," *did not* inform or have any "inference" that there was a right to have an attorney present during questioning.

Accordingly, in that the appellate court distinguished Canete's case as distinguishable from the *Roberts'* case, Canete's convictions and sentencing were affirmed.

[Note: To echo a piece of Judge Stevenson's very well written

dissenting opinion: The additional warning as quoted above in relevant part, which the majority concluded that Canete could "readily infer" that he had a right to have an attorney present during questioning, which the majority did not explain why, compared with the opinion given in *Roberts*, it is not seen where one leads the other. If the warnings in *Roberts* were insufficient to inform a person of ordinary intelligence and common understanding of the right to have an attorney present "during" questioning, then the warnings given to Canete were equally inadequate as well.] as ■

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Parole Commission Avoids the Ax, Once Again

by Bob Posey

Several lawmakers in the Florida House of Representatives seem to be determined to pass a law abolishing the Florida Parole Commission, but can't quite bring it off. For the second year in a row now proposed legislation to get rid of the existing Parole Commission, and replace it with volunteer regional parole boards, failed to make it all the way through the legislative process to become law. The losers, once again: Florida's aging parole-eligible prisoners and state taxpayers.

In the last issue of FPLP it was reported that *FPLP* staff had been informed that the legislative proposal from the 2005 session of the state Legislature to abolish the existing Parole Commission, and which had failed to pass, would not be reintroduced this year. (See, *FPLP*, Vol. 12, Iss. 1, pg. 18.) That information was given to FPLP staff by a top aide to Rep. Mitch Needelman (R-Melbourne), the law maker who introduced the surprise bill last year to completely revamp the parole process. That information, for whatever reason, was wrong.

Half way through this year's regular legislative session (which started March 6 and ended May 5), just like last year, a surprise bill was introduced in the House to abolish the Parole Commission and replace it with regional volunteer parole boards and turn the Commission's clemency investigation duties over to the office of the governor. However, unlike last year's similar bill (H.B. 1899), which only concerned the Parole Commission, this year's bill (H.B. 5017) contained provisions concerning the repeal of defunct statutes related to the dissolved Florida Corrections Commission, FDOC probation and restitution centers, and pretrial intervention centers (boot camps). H.B. 5017 was filed on March 31, 2006, by the House Fiscal Council and Rep. Gus Barreiro (R-Miami). A week later, on Apr. 6, the House voted on H.B. 5017 and passed it by a vote of 85 go 30 and sent it to the Senate (generally, bills must be approved by both the House and Senate before they can become law).

On Apr. 19 the Senate passed an amended version of H.B. 5017 by a vote of 39 to 0, which, in essence was nothing more than a "shell" bill that in effect challenged everything in H.B. 5017, including the provisions concerning abolishment of the existing Parole Commission. (See Journal of the House of Representatives, Apr. 19, 2006, pg. 512.) The Senate sent its "amended" version back to the House for approval or appointment of a conference committee to work out differences between the House and Senate. The House refused to concur with the amendment (of course) and a conference committee was appointed on that same day.

Concurrent with the movement of H.B. 5017 through the two legislative chambers was the general budget appropriations bill for the entire state. The House budget bill, in line with H.B. 5017, would not have funded the Parole Commission this coming year, while the Senate's bill would have provided them funding.

Parole Commission Chairman Monica David appeared before the House Fiscal Council to defend the Commission. Relying on a report issued in Feb. by OPPAGA (Office of Program Policy Analysis and Government Accountability), an office of the Legislature that performs audits, David argued that abolishing the Commission in favor of unpaid volunteer parole panels would cost up to $3.2 million more annually than the three full-time commissioners and their staff, but Rep. Barreiro said he expected the move would save money in the long run. Rep. Joe Negron contended that the Commission isn't needed anymore, because the state no longer has parole. David, to no avail, countered that there are still thousands of parole-eligible prisoners, because they were sentenced before the law was changed and that they represent only a small part of the Commission's work.

Shortly after that debate, Florida Prisoner's Legal Aid Organization contacted all state legislators informing them that the OPPAGA report, No. 06-15, relied on by David, appears to have used erroneous data supplied by the Parole Commission and faulty analysis to conclude that the Commission is doing a good job and that it would cost more to get rid of the existing Commission. FPLAO concluded the report is biased and apparently generated for use by legislators opposed to getting rid of the Commission. That effort failed.

On May 2 the House and Senate budget conference committee voted and agreed to keep the existing Parole Commission for another year. H.B. 5017 was amended again to delete the provisions concerning the Commission, then passed by both chambers and sent to the governor. ■

FPLAO Parole Project Will Continue Your Help Is Needed

The Legislature again failed to abolish the Parole Commission this year, the FPLAO Parole Project, started in 2003 to accomplish that goal, will continue. The Commission is facing several very serious lawsuits filed by citizens that FPLAO is assisting with. More suits will be filed in coming months that are going to be even more serious. These suits are designed so that if even one is successful, it is going to result in major changes within the Commission of benefit to those dependant on parole for their freedom. If more than one is successful, as we believe they will be, it will rock the core of the Commission and *force* its abolishment next legislative session.

However, YOUR help is needed, your financial support for filing fees, litigation costs, report preparation for legislators, mailings, supplies, etc. If *You* want positive changes in the Florida parole process, make a donation to the FPLAO Parole Project now. Every parole-eligible prisoner is asked to donate a measly $5. If *You* do that, FPLAO will have a war chest of $25,000 (approx. 5,100 parole-eligible prisoners left) and we *will* change the system. Spread the word. Send donations to: Florida Prisoners' Legal Aid Org., Inc., P.O. Box 1511, Christmas, FL 32709. ■

Bill Introduced in Congress That Would Lower Prison Phone Rates

A bill that was introduced in December "05 to Congress will, if it becomes law, result in lower interstate phone rates charged to prisoners' family members and friends. The bill, H.R. 4466, was filed by Rep. Bobby Rush (D-Ill) and has been referred to the House Subcommittee on Telecommunications and the Internet. The bill, entitled the Family Telephone Connection Protection Act of 2005, has five cosponsors and seeks to amend the Communications Act of 1934 to direct the Federal Communications Commission (FCC) to consider the following types of regulation of inmate telephone service:

♦ prescribing a maximum uniform rate-per-minute (paid to telephone service providers);

♦ prescribing a maximum uniform service connection or other per-call rate;

♦ prescribing variable maximum rates depending on factors such as carrier costs or the size of the correctional facility;

♦ requiring providers of inmate telephone service to offer both collect calling and debit account services;

♦ prohibit the payment of commissions by such providers to administrators of correctional facilities; and,

♦ requiring such administrators to allow more than one service provider at a facility so that prisoners have a choice (and breaking up the monopoly).

Rep. Rush's bill points out several problems with prisoner telephone services that would be addressed by his bill.

It is U.S. policy, Rep. Rush contends, to ensure that all Americans are afforded just and reasonable communication services, including prisoners' families who pay the rates for inmate telephone services. It is clear from various studies that maintaining frequent and meaningful communications between prisoners and family members is key to successful social reintegration of prisoners once released. Such reduces recidivism, which in turn reduces crime and future cost of incarceration.

However, Rep. Rush notes, frequent communications between prisoners and family members is burdened, and in some cases, prevented, by excessive inmate telephone service rates, thus weakening family and community ties that are necessary for successful reentry and the reduction of crime that could otherwise result from successful reentry.

Contributing to the problem is the fact that inmate telephone services in prisons is often limited to collect calling that family members pay for. Even in the few instances where prisoners' calls are paid from a debit account at the prisons, families still typically pay for the calls by making deposits to the debit accounts. And the prison phone rates being paid by families are some of the highest rates in the U.S., with some interstate per-minute charges as high as $1 per-minute, on top of a $3.95 service or connection fee.

The reason for such excessively high rates, in part, according to information compiled by Congress and the FCC is lack of competition between long distance phone service providers, who typically contract with prison officials for a monopoly to provide inmate telephone services. With the contract going to the company promising to pay the highest commission, in some cases over 50 percent of each call, to prison systems.

And due to the lack of competition for telephone services once the monopolistic contracts are awarded, families of prisoners, many in low-income situations, cannot chose the long-distance carrier with the lowest rates and must pay the excessive rates charged by the carrier having the prison phone contract.

Rep. Rush's bill would break up the prison phone monopolies by requiring the FCC to set fair rates and policies governing phone rates at state and federal prisons.

A *new York Times* editorial recently commented that H.R. 4466 would not only help prisoners' families (who often must choose between talking to a loved one in prison or putting food on the table), but also help society by increasing the chances of successful reentry into society by released prisoners who were able to maintain family relationships while incarcerated. However, being realistic, that editorial also opined that the bill will face fierce opposition from phone companies and prison systems "that have grown accustomed to gouging the poorest families in the country to subsidize some prison-related activities" by paying "usurious rates" that are actually a "hidden tax on people who already pay for prisons through their taxes." Beyond that, the *Times'* editorial concludes, "states should not be in the business of bleeding low-income families – and fraying already fragile family ties – to pay for services that the state itself is obligated to provide."

[Sources: H.R. 4466 (available at www.thomas.loc.gov); *New York Times*, 1/4/06]

[Note: Be aware that H.R. 4466 would only direct the FCC to regulate long-distance inmate telephone rates and policy's for interstate calls. In-state phone rates are usually (as in Florida) set by state Public Service Commissions. However, such in-state rates are also usually much higher than what the general public typically pays. Further, in Aug. '05 the Criminal Justice Section of the American Bar Association (ABA) recommended that the ABA formally adopt the position that state and federal prisons should afford prisoners a reasonable opportunity to communicate with those outside prison and telephone services at the lowest possible rates. That recommendation was submitted in the Crim. Justice Section's "Report to the House of Delegates" (Aug. 2005), and contains much useful information on the inmate telephone service topic.]■

State Notified That Feds May Go After Former FDOC Secretary's Retirement, Pension Benefits

In the most telling indication so far that former Florida Department of Correction's (FDOC) Secretary James Crosby may face unspecified criminal charges, on March 8, '06, U.S.

Attorney Paul Perez notified Florida retirement officials that retirement and pension benefits for Crosby, and former Regional Director Allen Clark, may be forfeited because both are targets of federal criminal investigation.

In the highly unusual letter, that was also sent to Crosby's and Clark's attorneys, Perez said that all of their assets, including state retirement benefits, may be subject to forfeiture proceedings and advised both men not to "dissipate, transfer or remove from the United States nay such asset, fund or account." Conviction of a job related felony would cause both Crosby and Clark to lose all retirement benefits, but neither have yet been charged with a crime.

Crosby, 53, stands to lose a $5,500 monthly pension and $215,000 in deferred compensation plus whatever he has invested in homes in Tallahassee and Starke if convicted of serious crimes. The exact amount of Clark's retirement fund is not available as of the time of this article.

State officials say they have no legal reason to hold up pension or retirement payments to either man as long as they haven't been convicted of a crime. But it is widely felt that the federal letter signals that a more serious investigation is underway and that charges are coming.

[Source: *St. Petersburg Times*, 3.30.06]■

FDOC Reorganization

On April 7, 2006, the Florida Department of Corrections announced the following changes.

Realignments:

- The FDOC will have only two Assistant Secretaries instead of five;
- The Assistant Secretary of Institutions and Assistant Secretary of Community Corrections will report directly to the Secretary;
- The Directors of Research-Support Services and of Health Services (formerly Assistant Secretary positions) will report directly to the Deputy Secretary, who in turn will report to the Secretary;
- The Director of Administration (a former Assistant Secretary position), Director of Legislative Affairs and Director of Public Affairs will report directly to the Chief of Staff, who will in turn report to the Secretary.

Promotions of Senior Staff:

- David Pridgen, Region III Director to Deputy Assistant Secretary of Institutions.
- Gerald Abdul-Wasi, Inspector General to Region III Director.
- Valerie Rolle, Deputy Regional Dir., Region III to Regional Director, Region III.
- Don Monroe, Circuit Admin., Cir. 11, Miami to Deputy Regional Director, Region III.

Promotions to Warden:

- Steve Kegerreis, Asst. Warden (Okeechobee CI) to Warden (Martin CI).
- Mary Holcomb, Asst Warden (Tomoka CI) to Warden (Hernando CI).
- Robert Flores, asst. Warden (Liberty CI) to Warden (Century CI).
- Robert Joens, Asst. Warden (Desoto Annex) to Warden (Desoto Annex).

Promotions to Asst. Warden:

- Richard Comerford, Colonel (Liberty CI) to Asst. Warden (Apalachee CI).
- Thomas Reid, Colonel (Hendry CI) to Asst. Warden (Charlotte CI).
- Jerry Long, Colonel (Santa Rosa CI) to Asst. Warden (Franklin CI).
- Jack Howdeshell, Colonel (Charlotte CI) to Asst Warden (Region IV office).
- Arlene Darby, Class. Supervisor (CFRC) to Asst. Warden (Tomoka CI).
- Jeremy Vaughan, Class. Supervisor (Liberty CI) to Asst. Warden (Liberty CI).
- Willie Brown, Class. Supervisor (Apalachee CI) to Asst. Warden (Liberty CI).
- Darlene Lumpkin, CSA State Classification to Asst. Warden (Gulf CI).
- Ken Fleming, CSA Central Office to Asst. Warden (Region I office).
- Ricky Cloud, Inspector to Asst. Warden (Jefferson CI).

Officer Promotions:

- Donnell Robinson, Major (Liberty CI) to Colonel (Liberty CI).
- Perry Humphries, Major (Wakulla CI) to Colonel (Franklin CI).
- Monroe Barnes, Captain (Union CI) to Major (Santa Rosa CI).

Warden Reassignments:

- Bob O'Connor, Desoto CI to Lake CI.
- Melody FLores, Hernando CI to Baker CI.
- Charles Germany, CFRC to Calhoun CI.
- Jeffrey Wainwright, Calhoun CI to CFRC.
- James Freeman, Century CI to Tomoka CI.

Asst. Warden Reassignments:

- John Riggs, Franklin CI to Baker CI.
- Hank Heatherly, Wakulla CI to Lancaster CI.
- Johnny Reid, Jefferson CI to Region II office.
- Greg Archie, Apalachee CI to Hamilton CI.
- Rob Lowe, Hendry CI to Okeechobee CI.
- Mary Ellen Dayan, Liberty CI to Wakulla CI.
- Shannon Varnes, Region I to Gulf CI.
- Jim Tridico, Region IV to Hendry CI.

Colonel Reassignments:

- T.D.Anderson, Columbia CI to Hamilton CI.
- Daniel Brown, F

Retirements (Forced or otherwise):

- Lou Vargus, General Counsel
- Thomas Fortner, Warden (Baker CI).
- Joyce Haley, Comm. Corr. Region III Director

Indictments:

- (To be announced later...) ■

Ex-Prisoners Sue, Claim Jail Guards Put Human Waste In Food

On March 10, 2006, four former prisoners of the Citrus County Detention Facility filed a federal lawsuit against Corrections Corporation of America, the private company that runs the jail, claiming that two former jail guards put human waste in their food and drinks several times during a two-month period in 2004.

The suit, filed by former CCDF prisoners Javon Walker, Jeffrey Young, Larry Robbins and Greg Platt, claims they were subjected to cruel punishment, torture and battery while in the jail's segregation unit when two guards added urine and fecal matter to their food and drink several times between Nov. 1 and Dec. 31, 2004. The suit alleges that the prisoners complained that the food had a foul odor and didn't taste right, but were forced to eat it or go hungry. After eating it, they suffered "vomiting, stomach cramps and nausea," the lawsuit says.

A spokesman for the private company that runs the jail said company officials took immediate action once they heard about the incident. The company fired two jail guards, Kevin Hessler and Alexander Diaz, and a supervisor, Charles Mulligan, who failed to report the prisoners' complaints to the jail warden sooner. Mulligan said one of the fired guards acknowledged putting urine in a prisoner's drinking jug.

Four other prisoners were expected to join the lawsuit, including one teenager whose meals were allegedly laced with glass.

Corrections Corporation of America, accused of negligent hiring in the lawsuit, is the sixth-largest corrections system in the U.S. and has about 60,000 prisoners in more than 60 facilities around the country, according to its Web site. The company runs six other facilities in Florida, including the Bay County Correctional Facility, Bay County Jail and Hernando County Jail.

[Sources: AP, 3/12/06; *St. Petersbury Times*, 3/15/06]■

Prison Health Code Litigation Update

In April 2004 the First District Court of Appeal, in a lengthy, detailed opinion [See, *Osterback v. Agwunobi*, 873 So.2d 437 (Fla. 1st DCA 2004)], reversed and remanded the trial court's order; holding that the repeal of § 10D-7 was the section of the health code which governed health issues in Florida jails, prisons and mental institutions (This was previously reported in *FPLP*, Vol. 10, Iss. 4). Upon remand, Circuit Judge Paul Russmussen issued an order declaring the repeal of 10D-7 an invalid exercise of delegated legislative authority (meaning, in effect, that the Dept. of Health had no authority to get rid of, repeal, such sections of rules).

This seemed to pave the way for the former rules' provisions to be "resurrected" and once again govern health matters for incarcerated individuals. That was the case until the Dept. of Health decided to appeal the order (That too was previously reported on in *FPLP*, Vol. 11 Iss. 5 and 6). The basis for the agency's appeal was three-fold: 1) the trial court lacked subject matter jurisdiction; 2) the rule repeal's invalidity was caused by an "inadvertent miscitation" to the wrong statute; and 3) the trial court failed to accord proper "deference" to the agency in carrying out its delegated powers.

In an April 7, '06, decision that nonsense was soundly rejected by the appellate court in a Per Curium Affirmance of the trial court's order. No opinion was issued on the *merits* of the agency's arguments, but Chief Judge Kahn, in a separate, concurring opinion, sternly upbraided the Dept. of Health's attorney, AAG Lucy Schneider, for pursuing the appeal. Judge Kuhn described the appeal as both "improper" and "professionally indefensible," and closed by stating, "I do not ignore the particular exigencies that face attorneys employed by a state agency. Nevertheless, just as attorneys employed by powerful individuals and corporations are responsible for their professional actions, so are government lawyers."

The 13-plus month delay occasioned by that latest (dare we suggest "frivolous") appeal is currently being redressed. A mandate in that appeal has not yet issued (as of this writing) and it could be several months (although efforts are afoot to try and expedite the case) before action is taken in relation thereto. Likewise, no citation is yet available for this latest DCA opinion. Another update on this potentially important case, that could benefit all prisoners, will appear in the next issue of *FPLP*. Osterback v. François, Case No. 1D05-1848, Apr. 7, 2006.■

News Briefs

• FDOC interim Secretary James McDonough is continuing to revamp personnel. On Apr. 20, 2006, two majors were fired from their prison jobs at New River Correctional Institution. Certified letters were sent to Maj. Colin E. Halle and Maj. Rodney L. Barnett notifying them that they were being dismissed from their jobs at the end of that day. No explanation for the firings were given in the letters, which were signed by Richard Dugger, regional director of institutions. Other changes announced Apr. 20 were the promotion of longtime FDOC attorney to general counsel, replacing Lou Vargus who retired from that position, and the hiring of Anthony Miller, who had been working for the Dept. Of Management Services, as deputy general counsel.

• On Apr. 20 the former executive director for the dissolved Correctional Privitaion Commission, Alan Duffee, 40, was sentenced to 33 months in federal prison and three years probation after admitting he stole $225,000 in state money to help buy houses for him and his girlfriend. Duffee had pleaded guilty to one count each of mail fraud, wire fraud and money laundering.

Florida Prison Legal Perspectives

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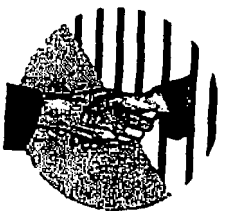

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FLORIDA PRISON PHONE RATES REDUCED

The FPLAO F.A.I.R. (Families Against Inflated Rates) Campaign staff are very pleased to report success in obtaining lower phone rates for prisoners' families and friends who accept collect calls from their incarcerated loved ones. After working to reduce the phone rates for over three years with no success, on Apr. 10, 2006, FPLAO filed suit against the FDOC and Fla. Public Service Commission challenging the exorbitant phone rates. Following negotiations between FPLAO staff, FDOC Secretary James McDonough and the Public Service Commission, on Apr. 21 Secretary McDonough agreed to reduce the collect call rates by 30 percent by reducing the amount of commission the FDOC receives from MCI/Verison on the prison phone contract by $10 million, from $17 million, a year. FDOC had been receiving 53 percent of the rates charged, which resulted in very high charges from the phone company.

Secretary McDonough agreed that the past rates ($5.30 for in-state 15 minute calls, and $19 for 15 minute out-of-state 15 minute calls) were unreasonable and unfairly burden prisoners' families who had to pay such rates to remain in contact with a family member in prison. Additionally, Mr. McDonough said the phone contract will be re-bid in early 2007, and that he would like to see a further reduction in the rates included in that contract.

FPLAO has agreed to drop its lawsuit at this time. FPLAO staff wishes to thank all those who helped and made donations to the F.A.I.R. Campaign, including all FPLAO members and the Unitarian Universalist Fund which provided a grant to the campaign. Thank you all for your much needed support, it was key in achieving this success for all Florida prisoners and their families. FPLAO will be monitoring the phone contract when it's re-bid and working for even lower rates.

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

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

PRISON LEGAL NEWS

Prison Legal News is a 48 page monthly magazine which has been published since 1990. Each issue is packed with summaries and analysis of recent court decisions from around the country dealing with prisoner rights and written from a prisoner perspective. The magazine often carries articles from attorneys giving how-to litigation advice. Also included in each issue are news articles dealing with prison-related struggle and activism from the U.S. and around the world.

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

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

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