FLORIDA PRISON LEGAL

Perspectives

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Seeking Judicial Records

by Melvin Pérez

This article will outline the procedure one must follow when requesting judicial records, dispel many notions prisoners have concerning same, and point out remedies a prisoner can pursue should the judicial branch fail to properly process said request.

Overview

Article I, Section 24(a), of the Florida Constitution provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state... except with respect t o records exempted pursuant to this section." The judicial branch is included in the provision's terms. *Id.*

To implement that provision, the Florida Supreme Court adopted Rule of Judicial Administration 2.051 (renumbered to Rule 2.420), which is the judicial branch counterpart to Chapter 119 Fla. Stat.

Contrary to common belief, the Florida Public Records Act (hereinafter "The Act"), does not apply to judicial records. Namely, the Florida Supreme Court has held that the Act does not apply to judiciary and did not apply to clerk of circuit court. See: *Times Pub. Co. v. Ake*, 660 So.2d 255 (Fla. 1995).

Besides, because the Act does not apply to judicial records from the clerk of court, the clerk is authorized to charge $1.00 per page for non-certified copies. See: Fla. Stat. 28.24(5)(a).

A challenge to the validity of the $1 per page fee charge by the clerk was not successful. See: *WFTV, Inc. v. Wilken*, 675 So.2d 674 (Fla. 4th DCA 1996).

Rule 2.420(6)(1)(A) defines court records which are the contents of the court file as progress dockets and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, video tapes, or stenographic tapes of court proceedings. These documents are $1.00 per page, if they have already been processed to paper form.

But all documents requested from the clerk are not subject to this fee. For example, an applicant for executive clemency is entitled to free certified copies of information, indictment, judgment, or sentence. See: Fla. Stat. 940.04 and *Lane v. Gardner*, 778 So.2d 1071 (Fla. 5th DCA 2001).

Nevertheless, the clerk can require a prisoner to send the application for executive clemency in order to show that he or she is an applicant.

One Florida court has already ruled that such policy is reasonable and does not violate the free of charge clause of the statute. See: *Williams v. Circuit Court, 18th Jur. Cir.*, 862 So.2d 887 (Fla. 5th DCA 2003).

Other records from the judicial branch, which includes The Florida Bar, the Florida Board of Bar Examiners,

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the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice, are the same as section 119.07, Fla. Stat. See: Rule 2.420(f)(3).

Making The Request

Requests for access to records shall be in writing and shall be directed to the custodian. The request shall provide sufficient specificity to enable the custodian to identify the requested records. The reason for the request is not required to be disclosed. See: 2.420(f)(2).

Further, the custodian of all administrative records of any court is the chief justice or chief judge of that court, except that each judge is the custodian of all records that are solely within the possession and control of that judge. See: Rule 2.420(b)(3).

As to all other records, the custodian is the official charged with the responsibility of maintaining the office having the care, keeping, and supervision of such records. All references to "custodian" mean the custodian or the custodian's designee. *Id.*

Moreover, the custodian shall be solely responsible for providing access to records of the custodian's entity. The custodian shall also determine whether the requested record is subject to this rule and, if so, whether the records or portions of the record are exempt from disclosure.

The custodian shall also determine the form in which the record is provided. If the request is denied, the custodian shall state in writing the basis for the denial. See: Rule 2.420(f)(2). For a complete list of exemptions see Rule 2.420(c).

Seeking Review From Request Denial

Expedited review of denials of access to records of the judicial branch shall be provided through an action for mandamus, or other appropriate appellate remedy, in the following manner:

1) Where a judge who has denied a request for access to records is the custodian, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access. Further, upon order issued by the appellate court, the judge denying access to records shall file a sealed copy of the requested records with the appellate court.
2) All other actions under this rule shall be filed in the circuit court of the circuit in which such denial of access occurs. See: Rule 2.420(e).

Duty to Provide Records

In this section we will explore some of the officials who have a duty to provide records requested for mandamus purposes and the law governing such area.

Initially, it is well settled that an official court reporter has a duty to transcribe court proceedings upon a request

and an offer of payment. See: *Turner v. State*, 100 Fla. 100 1078, 130 So. 617, 618 (1930).

Like wise, a person has a right to purchase transcripts of his court proceedings. See: *T.T. v. State*, 689 So.2d 1209 (Fla. 3rd DCA 1997).

Furthermore, Florida courts have found a mandamus petition sufficient when the petitioner alleged that he requested the court reporter to notify him of the cost for transcribing his sentencing hearing and the reporter never responded. See: *Perez v. State*, 980 So.2d 1205 (Fla. 3rd DCA 2008).

Analogously, the clerk of the circuit court has a legal duty to maintain and to provide access to the records contained in its files, unless the records are legally exempt from disclosure. See: Fla. Stat. § 28.13.

The importance of the official's duty is vital to obtain mandamus relief since the petitioner must establish a clear legal right to the performance of a ministerial duty. See: *Orchid Island Props., Inc. v. W.G. Mills, Inc. of Bradenton*, 889 So.2d 142, 143 (Fla. 4th DCA 2004).

In other words, the official duty in question must be ministerial and not discretionary. See: *Allston v. State*, 685 So.2d 1312 (Fla. 2nd DCA 1996).

To illustrate, mandamus will lie only when the petitioner is enforcing a clear legal right and when the respondent has failed to perform a clear legal duty; it cannot be used to compel performance of a discretionary act. See: *Adams v. State*, 560 So.2d 321 (Fla. 1st DCA 1990).

Specifically, a duty or act is defined as ministerial when there is no room for the exercise of discretion, and the performance being requested is directed by law. See: *Town of Manalapan v. Rechler*, 674 So.2d 789 (Fla. 4th DCA 1996).

Filing The Petition in The DCA

As previously stated, where a judge who has denied a request to records is the custodian, the action shall be filed in the DCA having appellate jurisdiction to review the decisions of the judge denying access. See: Rule 2.420(e)(1).

The petition for writ of mandamus in the DCA shall be filed under Florida Rules of Appellate Procedure 9.100(a). DCAs have vested authority under Article V, Section 4(b)(3) to issue writ of mandamus.

The original jurisdiction of the court shall be invoked by filing a petition, accompanied by a filing fee if prescribed by law, with the clerk of the court deemed to have jurisdiction. See: Rule 9.100(b).

If the prisoner is proceeding insolvent, he or she must file a motion for insolvency and attach a six-month bank statement. To request this printout, the prisoner must fill out an affidavit of insolvency, attach it to an Inmate Request form, and address it to the Inmate Trust Fund. The DCA will also provide you with an affidavit of insolvency, if so requested.

Rule 9.100(g) states that the caption of the petition shall contain the name of the court and the name and designation of all parties on each side. For more information on caption and parties see Rule 9.100(e)(1)-(2).

Also, the petition shall not exceed 50 pages in length and shall contain:

1) the basis for invoking the jurisdiction of the court;
2) the facts on which the petitioner relies;
3) the nature of the relief sought; and
4) argument in support of the petition and appropriate citations of authority.

If the petition seeks an order directed to a lower tribunal, the petition shall be accompanied by an appendix as prescribed by rule 9.220, and the petition shall also contain references to the appropriate pages of the supporting appendix.

The purpose of an appendix is to permit the parties to prepare and transmit copies of those portions of the record deemed necessary to an understanding of the issues presented. See: Rule 9.220(a). For more information of the contents of the appendix see 9.220(b).

If the appendix is not sufficient the court can deny the petition. See: *King v. Byrd*, 590 So.2d 2 (Fla. 1st DCA 1991) and *Keene v. Nudera*, 661 So.2d 40 (Fla. 2nd DCA 1995).

Thereafter, if the petition demonstrates a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy, the court may issue an order directing the respondent to show cause, within the time set by the court, why relief should not be granted. See: Rule 9.100(h).

Within 20 days thereafter or such other time set by the court, the petitioner may serve a reply, which shall not exceed 15 pages in length, and supplemental appendix. See: Rule 9.100(k). However, the reply is optional.

Other general requirements such as fonts, margins, footnotes, quotations and certificate of compliance are found in Rule 9.100(l).

There is not time limit to file this petition. But an unreasonable delay in seeking an extraordinary remedy may result in a denial of relief on equitable grounds. See: *Brown v. State*, 885 So.2d 391 (Fla. 5th DCA 2004). See also, *Alma's Italian & Seafood Restaurant v. Jones*, 627 So.2d 605 (Fla. 1st DCA 1993) (denying mandamus relief because of unreasonable delay).

Circuit Court Petition

A request denying judicial records that falls under Rule 2.420(e)(2) must be filed in the circuit court of the circuit in which such denial of access occurs. *Id.*

Circuit courts have the power to issue writs of mandamus pursuant to Article V, Section 5(b) of the Florida Constitution.

Under these circumstances, the petition for writ of mandamus must be filed under Florida Rules of Civil Procedure 1.630(b).

Additionally, this rule provides that the initial pleading shall be a complaint and shall contain the following in order to be facially sufficient:

* The facts on which the plaintiff relies for relief;
* a request for the relief sought; and,
* if desired, argument in support of the petition with citations of authority.

The caption shall show the action filed in the name of the plaintiff in all cases and not on the relation of the state. *Id.*

In the same vein, the petition should include as exhibits all the requests for judicial records that are at issue and any responses thereto..

Rule 1.630(c) states that a complaint shall be filed within the time provided by law, except that a complaint for common law certiorari shall be filed within 30 days of rendition of the matter sought to be reviewed.

Under ch. 95.11(5)(f), Florida Statutes, there is a one-year statute of limitations to file such action.

The writ shall be served in the manner prescribed by law, except the summons in certiorari shall be served as provided in Rule 1.080(b). See: Rule 1.630(d).

The original complaint is filed with the court either before service on opposing counsel or immediately thereafter. See: Rule 1.080(d).

Court's Review

When the trial court receives a petition for writ of mandamus, its initial task is assessing the petition to determine whether it is facially sufficient. See: *Holcomb v. FDOC*, 609 So.2d 751 (Fla. 1st DCA 1992).

If a mandamus petition is facially sufficient, the court must issue an alternative writ of mandamus requiring the respondent to show cause why the writ should not be issued. See: *Radford v. Brock*, 914 So.2d 1066, 1068 (Fla. 2nd DCA 2005). If it is not facially sufficient, the court may dismiss the petition. See: *Holcomb, supra.*

If the show cause order is issued it will set forth a date for respondent to file a response. This response must comply with Rule 1.140. The show cause order should also give the petitioner a set amount of days to reply. However, if no time is set by the court for a reply, the petitioner should file a reply within 20 calendar days from the service of the response. See: Rule 1.140. Once again, a reply is optional.

Notably, if the petition and answer to the alternative writ raise disputed factual issues, the trial court must resolve these issues upon evidence submitted by the parties. See: *State ex rel. Johnson v. Roberts*, 134 Fla. 326, 184 So. 14 (1938).

For instance, if undisputed affidavits are submitted to the trial court, the court may be able to resolve the issues based on those affidavits. See: *Mendyk v. State*, 707 So.2d 320, 322 (Fla. 19970.

On the other hand, if no show cause order is issued or the respondent files an unsworn response, the DCA will likely reverse the trial court's denial of the petition. A good illustration of this issue of found in *Radford, supra.*

In *Radford*, the prisoner petitioned for a writ of mandamus pertaining to his records requests directed to the circuit court clerk and the court reporter. *Id.* at 1067-68. The clerk had filed an unsworn answer to the prisoner's petition for mandamus, indicating that the clerk did not have possession of any of the records requested. *Id.* at 1068. Additionally, the court reporter did not respond to the prisoner's petition and she was never directed to do so by the trial court. *Id.* The second district noted that while the prisoner may have been mistaken in his belief that the requested records were in the possession of the clerk of the court reporter, his petition stated a facially sufficient claim. *Id.* at 1068-69. Accordingly, the court held that because the trial court did not issue an alternative writ requiring the clerk and the court reporter to show cause why the writ should not be issued, and because there was no sworn evidence refuting the prisoner's allegations, the trial court erred in dismissing his petition. *Id.* at 1069.

After the response and reply are filed or the time for filing expires, the court will issue a ruling. If the court denies the petition there are several options the prisoner can pursue.

Motion For Rehearing

One option available is to file a motion for rehearing. Such remedy is sought via Rule 1.530(b) and must be served within 10 days after the filing of the denial. The service of this motion will stay execution on the judgment under Rule 1.550(a).

A motion for rehearing is often used to point out a material mistake in fact or law upon which the denial relies.

Besides, a motion for rehearing may be necessary to get any objections into the record when the court dismisses the case. For instance, if the court dismissed your case before you had the opportunity to be heard in opposition to a motion to dismiss.

Appealing The Denial

Another option is to appeal the denial. An appeal in this type of case is governed by Florida Rules of Appellate Procedure 9.110. Jurisdiction of the court under this rule shall be invoked by filing two copies of a notice, accompanied by filing fees prescribed by law, with the

clerk of the lower tribunal within 30 days of rendition of the order to be reviewed. See: Rule 9.110(b).

As stated earlier, if the prisoner is proceeding insolvent, her or she must file a motion for insolvency and attach a six-month bank statement. Yet, all courts may not require the six-month bank printout even though the statute provides for one. See: Fla. Stat. 57.085.

The notice of appeal shall be substantially in the form prescribed by Rule 9.900(a). The caption shall contain the name of the lower tribunal, the name and designation of at least one party on each side, and the case number in the lower tribunal.

Furthet, the notice shall contain the name of the court to which the appeal is taken, the date of rendition, and the nature of the order to be reviewed. See: Rule 9.110(d).

Moreover, this rule provides that a conformed copy of the order or orders designated in the notice of appeal shall be attached to the notice together with any order entered on a timely motion postponing rendition of the order or orders appealed. *Id.*

Within 50 days of filing the notice, the clerk shall prepare the record prescribed by Rule 9.200 and serve copies of the index on all parties. Within 110 days of filing the notice, the clerk shall transmit the record to the court. See: Rule 9.110(e).

The initial brief shall be served within 70 days of filing the notice. This brief is filed pursuant to Rule 9.210 and must contain:

A) A table of contents listing the issues presented for review, with references to pages.
B) A table of citations with cases listed alphabetically, statutes and other authorities, and the pages of the brief on which each citation appears. See Rule 9.800 for a uniform citation system.
C) A statement of the case and of the facts, which shall include the nature of the case, the course of the proceedings, and the disposition in the lower tribunal. References to the appropriate volume and pages of the record or transcript shall be made.
D) A summary of argument, suitably paragraphed, condensing succinctly, accurately, and clearly the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed two and never five pages.
E) Argument with regard to each issue including the applicable appellate standard of review.
F) A conclusion, of not more than one page, setting forth the precise relief sought.

Generally, an abuse of discretion standard is applied to review a court's denial of a public records request. See: *Overton v. State*, 976 So.2d 536 (Fla. 2007) and *Hill v. State*, 921 So.2d 579 (Fla. 2006).

Similarly, the initial brief shall not exceed 50 pages in length. The table of contents, citations of authorities, certificates of service and compliance, shall be excluded from the computations. Longer briefs may be permitted by the court. See: Rule 9.210(a)(5).

The prisoner shall file the original and three copies with the DCA and a copy to the opposing party.

Rule 9.210(f) requires the appellee/respondent to serve an answer brief within 20 days after service of the initial brief; the reply brief, if any, shall be served within 20 days after service of the answer brief. Once again, the reply brief is optional. But if a reply is filed it shall not exceed 15 pages in length; provided that if a cross-appeal has been filed, the reply brief shall not exceed 50 pages, no more than 15 of which shall be devoted to argument replying to the answer portion of the appellee/cross-appellant's brief. Cross-reply brief shall not exceed 15 pages. See: Rule 9.210(2)(5). Thereafter, the DCA will issue a ruling.

For other brief requirements such as type, margins, paper, footnotes, quotations and all others see generally Rule 9.210.

End Note

Hopefully, the information provided in this article, has cleared many misconceptions prisoners have concerning judicial records, and will be very useful to law clerks providing assistance to a prisoner with this type of issue. ■

Prison Nurses Sue Florida Department of Corrections

More than 100 women are part of a lawsuit filed against the Florida Department of Corrections during the third week of March 2009. The group of 111 women is mostly made up of nurses who work at different prisons throughout the state. They allege that they have been sexually harassed by male prisoners while at work and that the FDOC has done little or nothing to stop such harassment.

The case is being represented by Wes Pittman, a Panama City attorney.

Pittman said he is urging the governor to put a stop to such harassment in the prisons. "We're asking the governor to clean house over there (FDOC)," said Pittman. "Get rid of the good old boys network that has allowed the sexual harassment of women to continue and continue."

Pittman's motivations may be a little less altruistic. He has brought three other similar cases in the past six years, involving 28 women total, and won all three in court, garnering large attorney fees. This will be his most ambitious case yet.

No trial date has been set for this latest case as it's still in preliminary stages. ■

Criminal Conflict And Civil Regional Counsel Not Subject to Appointment in Post-Conviction Proceedings

by Melvin Pérez

In a case of first impression the Fifth District Court of Appeal (hereinafter "DCA") on January 30, 2009, ruled that the Fifth District's Office of Criminal Conflict and Civil Regional Counsel (hereinafter "OCCCRC") is not subject to appointment for indigent defendants in post conviction proceedings.

While the other DCA's have not addressed this issue, regional counsels (hereinafter "RC") from other districts are likely to rely on this ruling to avoid representing indigent defendants in post-conviction proceedings.

The issue came before the DCA after the Brevard Circuit Court appointed RC Jeffrey Deen ("Deen") to represent four defendants in 3.850 proceedings and the RC's motions to withdraw were denied.

Deen filed four petitions for writ of certiorari, or alternatively, a writ of prohibition which the DCA consolidated.

In the petitions, Deen claimed that the orders denying his motions to withdraw constituted a departure from the essential requirements of law.

In support of his claim, Deen asserted that the statutory duties of his office did not encompass post-conviction proceedings.

Besides, that one of the orders denying withdrawal stated that while the enabling statute did not specifically authorize RC to represent indigent defendants in post-conviction proceedings, it did not specifically bar RC from representing indigent defendants in post-conviction proceedings either.

Based on these arguments, the DCA applied the doctrine of *in pari material* (a principle of statutory construction that requires statutes relating to the same subject to be construed together to harmonize the statutes and to give effect to the Legislature's intent) and the doctrine of *expressio unius est exclusion alterius* (a principle of statutory construction that means expression of one thing implies the exclusion of another), thus concluding that the RC was correct that the authority to represent criminal defendants in post-conviction proceedings was not set forth as an assigned duty in section 27.511 (5), Fla. Stat. (2008).

Analogously, the court noted that section 27.511 (5), Fla. Stat., specifies the types of cases where RC may be appointed when there is a conflict.

This ruling is a great victory for many defense lawyers who represent indigent defendants pro bono since a previous challenge to this law failed (See: *FPLP*, Vol. 13, Iss. 5/6).

Public defenders have also challenged their appointment in post-conviction proceedings but have not been successful. See: *Russo v. Akers*, 724 So.2d 1151 (Fla. 1998).

Creation of Regional Counsel

Chapter 2007-62, Laws of Florida (hereinafter "The Act") created five offices of CCCRC to handle representation in criminal cases where the public defender has a conflict. The Act was later codified as Fla. Stat. 27.511.

The Florida Legislature passed the Actin an effort to cut spending due to a 2007 revenue short fall of $1.1 billion.

In the aforementioned statute, the Legislature expressed its intent to provide adequate representation to persons entitled to court-appointed counsel, and to provide adequate representation in a fiscally sound manner while safeguarding constitutional principles.

An OCCCRC was created within the geographic boundaries of each of the five district courts of appeal. See: Section 27.511 (1), Fla. Stat. (2008).

The purposes of the 2007 enabling statute were:

1) To help effectuate Revision 7 to Article V of the Florida Constitution, which shifted the majority of the burden of funding the state court system from the counties to the state; and,
2) To respond to the problem of conflict representation in indigent defense cases.

Moreover, the statute provides that, when the office of the Public Defender, at any time during the representation of two or more defendants, determines that the interest of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without a conflict of interest, or that none can be counseled by the public defender because of a conflict of interest, the OCCCRC shall be appointed and shall provide legal services to indigents in an enumerated list of cases.

These include a person who is under arrest for or charged with a felony, under arrest or charged with a misdemeanor authorized for prosecution by the state attorney, a violation of Chapter 316 punishable by imprisonment, criminal contempt, or a violation of a special law or county or municipal ordinance an ancillary to a state charge, or if not ancillary to a state charge, only if the OCCCRC contracted with the county or municipal to provide representation. See: Section 27.511 (5)(a)(b), Fla. Stat. (2008).

Also, the RC may be appointed based on conflict when a child is alleged to be delinquent pursuant to a petition filed before a circuit court, or when a person is sought to be involuntarily placed as a mentally ill person, involuntarily committed as a sexually violent predator, or involuntarily admitted to residential services as a person with developmental disabilities. See: Section 27.511 (5)(c)(d).

In a similar manner, RC may be appointed to represent persons convicted and sentenced to death for purposes of handling an appeal to the Supreme Court or for appeals in the cases noted above. See: 27.511 (5)(e)(f).

Previous Challenge

As discussed earlier, since the Act was enacted it survived a previous challenge to its constitutional muster. See: *Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, 978 So.2d 134 (Fla. 2008).

This challenge came after attorneys argued that the Act denied the constitutional rights defendants have under the Sixth and Fourteenth Amendments of the U.S. Constitution to effective assistance of counsel.

The Act caused so much debate leading private attorneys to withdraw their names from pro bono list because the Act placed a cap on the compensation attorneys would receive.

These attorneys complained that such caps placed attorneys in a position of not wanting to represent such defendants because they would not be able to effectively represent a client due to the compensation cap as some cases would require much more money than what the state can compensate an attorney working on a case (previously reported in *FPLP*, Vol. 13, Iss. 5/6).

In *Crist, supra,* the Association of Criminal Defense Lawyers filed a petition of *quo warranto* (an extraordinary remedy and proceeding by information to prevent one from usurping an office or using a franchise or privilege that is not rightfully his), contending that the Governor exceeded his constitutional authority by appointing RC pursuant to the Act.

The circuit court for Leon County granted the writ and the Governor appealed. Afterwards, the First DCA certified the following question of great public importance to the Florida Supreme Court:

"Whether the Legislature violated article V, section 18 of the Florida Constitution by enacting Chapter 2007-62, Laws of Florida...."

The Florida Supreme Court in answering the question in the negative concluded that the act did not implicate Article V, section 18, which requires that the public defender in each circuit be elected. Id. at 137.

Furthermore, the court specifically noted that the Legislature's primary intent was to create a backup system to handle those cases in which a public defender has a conflict and to do so in a fiscally sound manner in accordance with constitutional principles of due process. Id at 138.

The Florida Prisoner

For Florida prisoners in need for assistance in post-conviction proceedings the Fifth DCA's ruling does not help them. But this ruling is consistent with U.S. Supreme Court decisional law. See: *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987). Here is what the high court said concerning the right to post-conviction counsel:

"We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their conviction... and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further." (citations omitted).

Finley, however, deals with the right to counsel imposed upon the states by the Sixth Amendment. On the other hand, the Florida cases discussed hereunder are the progeny of *State v. Weeks*, 166 So.2d 892 (Fla. 1964), which is predicated upon a provisional right to counsel generated by the Fifth Amendment and by the Florida Constitution.

In *Weeks*, the Florida Supreme Court ws concerned with an indigent prisoner's entitlement to the assistance of

counsel as a matter of right upon an appeal from an adverse ruling in a collateral assault on his conviction and sentence. The court recognized there was no organic entitlement under the Sixth amendment to have the assistance of counsel as a matter of right in a post-conviction collateral proceeding.

Yet, it also held that "such remedies are subject to the more flexible standards of due process announced in the fifth amendment, Constitution of the United States" where the post-conviction motion presents an apparently meritorious claim for relief and is potentially so complex as to suggest the need for counsel. Id. at 896.

It is important to note that in *Weeks* the due process requirements were considered pursuant not only to the fifth amendment of the United States Constitution, but on the basis of Section 12, Declaration of Rights, Florida Constitution (1885). This due process provision has been retained in Article I, Section 9, of the current Florida Constitution as revised in 1968.

Subsequently, the Florida Supreme Court held that when the application on its face reflects a colorable or justifiable issue or a meritorious grievance, the court has the authority to appoint counsel. See: *Graham v. State*, 372 So.2d 1363, 1366 (1979).

* The adversary nature of the proceeding;
* Its complexity;
* The need for an evidentiary hearing; or
* The need for substantial legal research. Id. at 1366.

Indeed, the question in each proceeding of this nature should be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the defendant's claims. See: *Mann v. State*, 937 So.2d 722 (Fla. 3rd DCA 2006).

Of course, doubts should be resolved in favor of the indigent defendant when a question of the need for counsel is presented. See: *Hooks v. State*, 253 So.2d 424, 426 (Fla. 1971).

Prisoners should also note that section 924.051 (a), Fla. Stat., does not prohibit or preclude appointment of counsel for indigent defendants in seeking collateral review. A statute must be construed so as not to conflict with the constitution. See: *State v. Stalder*, 630 So.2d 1072 (Fla. 1994).

In a like manner, the determination that an evidentiary hearing is necessary in itself implies that three of the four factors set out in *Graham, supra* are involved. See: *Williams v. State*, 472 So.2d 738 (Fla. 1985).

Thus, evidentiary hearings are adversarial in nature, and the rules of evidence and procedure are mystifyingly complex to all but the most sophisticated non-lawyers. See: *Henderson v. State*, 919 So.2d 652 (Fla. 1st DCA 2006).

Therefore, if the prisoner is granted an evidentiary hearing he or she should request appointment of counsel for the hearing. This can either be done by including such request in the post-conviction pleading itself or by filing a motion for appointment of counsel.

If the trial court denies appointment of counsel, the trial court's decision is subject to review under the abuse of discretion standard. However, this issue *must* be raised on appeal along with the denial of the pleading itself. See: *Dobson v. State*, 860 So.2d 1075 (Fla. 3rd DCA 2003) and *Mulis v. State*, 864 So.2d 1246, 1247 (Fla. 5th DCA 2004).

If the DCA finds that the trial court abused its discretion in denying a prisoner's request for appointment of counsel, the court must reverse and remand for a new evidentiary hearing with appointment of counsel. See: *Bynum v. State*, 932 So.2d 361 (Fla. 2nd DCA 2006) and *Johnson v. State*, 711 So.2d 112, 115-16 (Fla. 1st DCA 1998).

Courts have found abuse of discretion in not appointing counsel where prisoners have alleged:

A) That the prisoner had limited education and little understanding of the law or courtroom procedures.
B) That the prisoner had received the assistance of a prison law clerk in preparing the motions.
C) That the prisoner was not capable of properly conducting the hearing.
D) That the prisoner was unable to subpoena and question witnesses. See: *Bynum, supra* at 363

But these assertions may not warrant the appointment of counsel in every case where similar allegations are recited. Id. But see also, *Rogers v. State*, 702 So.2d 607 608 (Fla. 1st DCA 1997) and *Gordon v. State*, 529 So.2d 1129, 1130 (Fla. 5th DCA 1988).

In summary, it is too early to predict the impact that the Fifth DCA's ruling will have on indigent defendants. However, indigent defendants in need for counsel in post-conviction proceedings should continue to request appointment of counsel when needed.

Similarly, researching the authorities cited herein should give the prisoner a solid understanding of the law governing this area.

Remember that any doubt for the need of counsel should be resolved in favor of the indigent defendant. ■

Second DCA Judge Retires Amid Investigation

During the second week of February 2009, second DCA Judge Thomas E. Stringer, Sr., retire amid misconduct investigation.

Stringer's retirement came after the Florida Judicial Qualifications Commission ("JQC") released their findings that probable cause exists for formal proceedings

to be instituted against the judge for his involvement with a stripper.

In March 2008, Christy Yamanaka, an exotic dancer in Las Vegas, publicly accused Stringer of owing her money. When the allegations ere investigated the JQC found that the judge developed a personal and financial relationship with Ms. Yamanaka and that he knew she had filed bankruptcy in Las Vegas Nevada; however, the petition was rejected.

Moreover, the JQC found that while Stringer knew this information, he entered into a series of financial transaction with Ms. Yamanaka, which included opening bank accounts in his name and the name of a friend that the stripper had access to.

Furthermore, Stringer used his accounts to help the stripper hide her assets and income from her creditors, allowed her to make large deposits in his accounts and obtain loans in his name for her benefit, said the JQC findings.

Similarly, Stringer is accused of not reporting two Rolex watches, a customized 2001 Mercedes and of falsely claiming the transfer of the vehicle was zero to avoid paying Florida sales taxes.

David Bogenschutz, who is representing Stringer in the state investigation said that, "his stepping down is more of a retirement than a resignation."

When Bogenschutz was asked about the allegations against Stringer he stated that he, "wants to maintain his privacy" and did not comment further about the matter.

However, Stringer did acknowledge that the two entered into a business partnership to purchase a home in Hawaii in 2004 and sold it in 2007 dividing the profits. Also that he knew Ms. Yamanaka for more than 15 years but was unaware that she worked as a stripper.

While Stringer retired after the JQC made their probable cause findings, he could still face consequences if found guilty of the charges. ■

Former FDOC Guard Sentenced to Prison

JACKSONVILLE- Following a week-long trial, a federal jury in Jacksonville convicted Paul Tillis, a former Florida Department of Corrections prison guard, of violating the federal civil rights of a prisoner at the Florida State Prison while Tillis was on duty as a supervisory corrections officer. That verdict was handed down January 16, 2009.

On July 6, 2009, Tillis was sentenced in that same federal court to three years in federal prison to be followed by two years of post release supervision.

The evidence at trial was damning against Tillis. It showed that he assaulted the prisoner victim by pouring a bottle of scalding hot water onto the prisoner's chest while the prisoner was lying on the floor of his cell in restraints.

The evidence also showed that Tillis did nothing to arrange for medical care for the victim who suffered second-degree burns on his chest from the assault.

This case was investigated by agents from the Jacksonville FBI Division and the Florida Office of the Inspector General. The case was prosecuted by Asst. US Attorney Mac Heavener of the US Attorney's Office for the Middle District of Florida and Department of Justice Civil Rights Division Trial Attorney Douglas Kern.

More info about the Civil Rights Division of the US Justice Department, and the laws it enforces, is available on the Internet at usdoj.gov.crt ■

More Children Were Zapped by Stun Devices

More than 40 children shocked with stun guns while touring Florida prisons in April were not the first ones to be zapped, according to an FDOC investigation report released in early July. (See also, *FPLP*, Volume 15, Issue 2.)

One prison guard told investigators that she observed a similar demonstration at a state prison about five years ago.

The report included hundreds of pages of documents gathered after the FDOC learned that children ages 5 to 17 had been subjected to shocks of 50,000 volts at three Florida prisons on April 23, "Take our Daughters and Sons to Work Day." As a result, three FDOC employees were fired and two resigned. More than a dozen were disciplined by other administrative means.

None of the children, the daughters and sons of FDOC employees, were seriously injured. At one prison to get the children to participate they were told they could be first to get hot dogs and hamburgers for lunch, according to the report.

Some children were shocked as individuals while others were part of a circle where children and prison guards held hands so that the shock of the stun gun would pass around the circle.

FDOC officials learned about one demonstration from a parent, and then held a conference call to find out if there had been others.

Officials also said that children may have been zapped during such demonstrations at Florida prisons in past years, but that the FDOC is taking steps to make sure that it does not happen again.

[Source: Associated Press, 7/09] ■

FDOC Guts Private Prisons' Education, Drug Treatment Programs

by Mark Stevens

Recently the Florida Department of Corrections, through the Department of Management Services, gutted any semblance of rehabilitation in the state's privately-operated prisons by slashing educational and drug treatment programs in the face of shrinking budgets.

In April, Bay Correctional Facility, located in the Florida Panhandle area near Panama City, had its contract with the DMS revised. The revision reduced the private prison's education staff from 24 employees to eight, according to the contract. The revision, apparently enacted to save money, also cut all five of the facility's drug treatment positions.

Officials at Bay Correctional said the cuts were unfortunate but out of their hands.

BCF Warden Bill Spivey said that he was informed that economic factors forced the state to make cuts, and it was determined that programs least affecting security would be cut. Spivey also said that he hopes once the economic situation improves that the programs will be reinstated. "But, that will be a state decision," he said.

Bay Correctional is only one of six privately-operated prisons in Florida. All six experienced similar cuts in their education and drug treatment programs.

State-operated prisons also saw decreases in funding in education and drug treatment. FDOC spokeswoman Gretl Plessinger said cuts in education programs totaled $3.4 million and drug treatment cuts amounted to $6.2 million.

These crucial cuts came as FDOC data indicates that there is a virtual epidemic in illiteracy and drug dependency in the state prison population.

Of the 41,054 prisoners admitted to Florida prisons in the 2007-2008 fiscal year, 45.4 percent did not test above the "functionally literate" level, according to the FDOC's

latest annual report. That report also found that 64,367 of the almost 100,000 prisoners (at that time) in state prisons as "needing substance abuse treatment." However, less than 10 percent of those identified as needing treatment actually received any during 2007-2008 fiscal year.

Yet, statistics also show that education and rehabilitation programs are at least moderately successful when they exist in the prisons.

Approximately 23,000 prisoners reported participated in education courses of some kind in 2007-2008 FY. Of those, 1,733 earned GEDs and 2,037 earned vocational degrees, according to the FDOC's annual report.

Prisoners who receive drug counseling have lower recidivism rates (incarceration of any kind within three years of previous incarceration), according to statistics from the most recent years available. For instance, those participating in out-prison treatment programs have a 2.5 percent lower recidivism rate than the general population, while prisoners participating in in-prison treatment programs have a rate 5 percent lower.

[Sources: News Herald, 7/12/09; FDOC 2007-2008 Fiscal Year Annual Report] ■

FDOC Colonel Charged With DUI

Obstructing the police. Trying to cover up a crime. Drunk and reckless driving. Do these sound like things a high ranking prison official should be doing?

On July 7, '09, a Lee County Sheriff's Office arrest report charged that a Glades Correctional Institution prison officer, who was attempting to get her partially submerged car out of a ditch in South Fort Myers, was arrested and charged with drunken driving.

Lisa Mae Hawkins, 48, of Belle Glade, posted a total of $1,750 bond on charges of driving while under the influence of alcohol or drugs/first offense and DUI resulting in property damage before being released on bail.

The arrest report noted that when deputies went to the area where Hawkin's car was found backed down into a ravine into a drainage canal she ws trying to drive the car out of about two feet of water.

One deputy stated that he noticed that Hawkins had a bulge of some type in her mouth, but when asked about it she told the deputy nothing was in her mouth.

When informed that a DUI investigation was being conducted, Hawkins said she was a colonel with the Florida Department of Corrections.

Hawkins subsequently failed the field sobriety tests and was arrested.

At the jail, the deputy gave her a breath test which resulted in 0.110 and 0.105 readings. In Florida, a person is presumed to be drunk with a 0.80 or above reading.

At that point deputies say Hawkins spit a large wad of tobacco from her mouth "as if to say 'look what you missed.' I believe Hawkins knew that by hiding the snuff from me the test results were invalidated," the deputy wrote.

A second breath test was administered and both results were still over the legal limit. ■

PRISONER BEATINGS UPDATE

In the last issue of *FPLP*, Volume 15, Issue 2, the lead article concerned, in part, several prison guards who worked at Florida State Prison and Union Correctional Institution being either fired or suspended under investigation for allegedly beating prisoners at those facilities. At the time that article was written it was reported that four unidentified UCI guards were under investigation for beating a prisoner at that prison. Subsequently, in May '09, the four guards were arrested by law enforcement officers in Union, Bradford or Clay counties after turning themselves in. According to police reports, UCI guards Daniel Ledwith, 38, of Raiford, Durrell Obrian, 25, of Lake Butler, and Marcel Lizotte, 36, of Gainesville were each charged with one count of battery on a prisoner with great bodily harm. The fourth guard, Clayton Lee, 22, of Jacksonville was charged with aggravated battery and battery on a prisoner with great bodily harm. All four guards had bond set at the ridiculously low amount of $2,500.

ACLU Report

The American Civil Liberties Union of Florida released a report on March 11, 2009, concerning ex-felons voting rights.

The ACLU report states that many of the state's 67 election supervisors don't know the law and give wrong information to those who call their offices.

Further, that there is an erroneous impression that most convicted felons can automatically regain their voting rights, the report said.

Muslima Lewis, director of the ACLU of Florida Voting Rights Project and author of the report, said that the system created is too bureaucratic, too costly to administer, and too confusing.

This is in part because the law also requires that all court restitution costs must be paid first.

Gov. Charlie Crist said that more could be done to help felons regain their rights, but supported the policies he put in place back in April 2007 after convincing the state clemency board to allow most felons to qualify for the restoration of their rights, except people convicted of murder and sex offenders.

"We're on the right path, and I think we've done more in the past two years to restore the rights of former felons than we've done in the rest of the history of Florida," added the Governor. ■

Former Sheriff's Deputy Granted Clemency

The Florida Board of Executive Clemency on March 12, 2009, unanimously voted to commute the sentence of a former sheriff's deputy to time served.

The former Joliet, Illinois sheriff's deputy, Donald Keehn, 88, had been sentenced to five years in prison in July 2006 for a series of drive-by shootings into the home of a neighbor who owed him money.

Keehn's attorney, David Weisbrod, told the panel that his client had no trouble with the law until 2005 when he went "off the rails."

In particular, five times over several months Keehn wheeled his car slowly through the trailer park where he lived and shot at the mobile home of a neighbor, Virginia "Missy" Prittslawton, 66, with a .22 caliber pistol he once used as a deputy. She was not injured during the shootings. However, Prittslawton notified police about the shootings, who in turn began watching her home and caught Keehn shooting the home.

Prior to the shootings, Keehn sued after Prittslawton refused to repay about $7,000 she obtained from him. Keehn obtained a mediation order against her but when she wrote him a check it bounced.

"The bottom line is he got no relief and then acted out," his lawyer said.

"He cannot possibly at this point be viewed as a danger." added Weisbrod after telling the panel that his client suffers from renal and congestive heart failure, diabetes, and skin and prostate cancer.

The panel agreed to release Keehn after his lawyer promised he will live with his daughter in Joliet, Ill. ■

More Prisoner Beating Allegations at UCI

New allegations that a prisoner was beaten by a gang of prison guards at Union Correctional Institution (UCI) between August 15 and August 16 have emerged and sparked another investigation at that North Florida prison formerly known as "The Rock." (For previous articles about prisoner abuse at UCI see the lead article in the last issue of *FPLP* and the Update Notice in this issue of *FPLP*.)

This latest investigation of prisoner abuse at UCI found that on August 15, a 47-year-old white male prisoner allegedly threw feces at a prison guard, following which he was removed from his cell in a mental health unit at the prison and assaulted numerous times by the guards over a two day period.

In a press conference held August 21, Florida Department of Corrections (FDOC) Secretary Walter McNeil said that the beating incident came to light more than a day after the alleged beatings took place when another FDOC employee reported the prisoner's injuries. (Approximately five months ago FPLAO distributed information to UCI prisoners and staff about the legal requirements of FDOC to report abuse of elderly and/or mentally ill prisoners, the criminal penalties for not doing and where to report such abuse.)

The prisoner involved in this latest situation at first claimed that he had been injured in a fall. Only after he was transported outside the prison for medical care did he say he had been beaten.

Four UCI correctional officers and two sergeants were put on leave pending finalization of the investigation. They are: Lt. Bennett Kilgore, Sgt. Aaron Coleman, Sgt. Eugene McLemore, Off. John Carter, Off. Sean Johnson, Off. Derek P. Gibstein and Off. John A. Thomas.

Additionally, one contract and three temporary nurses were fired for failing to report the incident. They are: Catherine Collinwood, Tony Davis, Alicia B. Forsyth and Zelda M. Lee.

McNeil said that he intended to bring the full resources of the agency to bear on the individuals responsible for the violent assault, including prosecution, termination and decertification. He praised the employee who reported the incident for acting appropriately. ■

— New Report —
Abolish Life W/O Parole

Washington D.C. — A new report released during July '09 by The Sentencing Project recommends abolishing life without parole criminal sentences.

Statistics show that right now there are a record 140,610 prisoners in state and federal prisons who are serving life sentences and almost one-third of that number are serving life without parole, meaning they will never be released.

The Sentencing Project, a criminal justice research group that regularly is cited in academic and government reviews examining criminal justice trends and policies, states in its new report that the number of prisoners sentenced to life without parole has more than tripled since 1992. The report, supported in part by the rising cost of imprisonment, strongly recommends that states and the feds take another look at this issue and abolish life without parole.

That recommendation was, of course, met with opposition from some law enforcement officials who say life sentences, including any type of eventual release, are needed as they help to drive down violent crime.

The project's review, entitled "No Exit," found "overwhelming" racial and ethnic disparities for those serving life sentences: 66 percent are non-white and 77 percent of juveniles sentenced to life in prison are non-white.

Among other findings in the report:

* In Alabama, California, Massachusetts, Nevada, and New York at least one in 6 prisoners is serving a life sentence.

* California, Florida, Louisiana, Michigan and Pennsylvania each have more than 3,000 people serving life without parole sentences.

* Pennsylvania leads the nation with 345 juveniles serving life without parole.

* The costs of housing an aging prison population are also increasing. States can expect to spend $1 million for every prisoner who is incarcerated at least 40 years, the report concluded.

Todd Clear, a professor at John Jay College of Criminal Justice, said the cost of maintaining a permanent prison population is daunting. The total price tag to keep today's "lifers" imprisoned for the rest of their lives could cost the nation tens of billions of dollars, said Clear. ■

-- Commentary -- Judge Appalled at FDOC's New Bid Rigging

by Teresa Burns Posey

Tallahassee- No matter how many times that top-ranking personnel within the Florida Department of Corrections are caught red-handed involved in financial corruption, it seems it just can't be gotten rid of.

On June 25, 2009, Leon County Circuit Court Judge Frank Sheffield said that Florida's prison system "blatantly violated the public trust" by secretly negotiating with a new company to provide for some state prisoners' mental health needs.

Judge Sheffield said that the Department of Corrections actions in its secret dealings with Correctional Medical Services, a private company based out of St. Louis, Mo., were "at best, offensive, and at worst, illegal."

However the judge denied a request by MHM Correctional Services, another private medical services provider, for a temporary injunction. MHM wanted to block the award of a five-year contract to CMS through a 120-day purchase order on a contract that starts July 1, 2009.

The judge, in denying the injunction, said MHM still has legal remedies available because it has a bid protest pending before a state administrative hearing officer.

He added that the public interest would not be served by an injunction because MHM's contract with the FDOC expires June 30. To prevent the state from doing business with CMS "would cause confusion, disorder and produce public injury that outweighs the individual right to the relief sought," Judge Sheffield wrote in his seven-page order.

The gist of the problem that led to court was when last February the FDOC received four contract proposals to provide mental health services for 18,000 state prisoners in Region IV of the FDOC (South Florida). Many of those prisoners have serious mental problems and are on psychotropic drugs.

The FDOC determined that none of the four private companies bidding on the contract met the required criteria, then began secret negotiations with CMS, even though its offer was $5 million higher than MHM's, which has had the contract, wrote Judge Sheffield.

Sheffield was particularly critical of a decision by FDOC to back-date an official document by 13 days that set the CMS order in motion, and then "engaging in an old-fashioned shell game of eating a short-term contract with the same company as is currently involved in a bid dispute a 'purchase order.'"

MHM attorney Chris Kise, a former legal advisor to Gov. Charlie Crist, said, "The people lost today due to the worst abuse of power imaginable. The department (FDOC) engaged in secret negotiations, blatant violations of the public trust and unconscionable practices, then hid behind the very laws designed to protect the people."

Secret deals, behind the scene contracts, millions of dollars at stake and floating around loosely, and no accountability. What has really changed since former FDOC Secretary Jim McDonough tried to clean house at the FDOC's central office? ■

IMPORTANT NOTICE

On July 2, 2009, the FDOC amended the routine mail rules governing incoming mail that is sent to prisoners by their families, friends and other routine correspondents. The amendments are positive for prisoners and their correspondents.

Several years ago the FDOC limited the number of "additional written materials" to 5 pages per envelope that could be included in prisoners' incoming routine mail. Exceptions were only allowed for certain "written materials" if the warden gave permission. The purpose of those restrictions was to reduce the amount of mail being received by prisoners, especially to reduce or curtail info off the Internet being printed out and sent to prisoners or discourage prisoners from sending material out to be typed and sent back in 5 pages at a time.

Florida Prisoners' Legal Aid Org., Inc., vigorously opposed that 5-page limitation when it was proposed by the FDOC, however the almost year-long administrative challenge by FPLAO was not successful except in delaying the 5-page limitation for awhile. It was adopted and since then untold numbers of prisoners have had mail returned to senders because it contained more than 5-pages of "additional written materials or more than 5 photographs, etc..."

However, just as FPLAO informed FDOC when it adopted the 5-page limitation, it would cause more work for mail room staff and more time and money for everyone, the FDOC has finally reached the same conclusion.

The July 2, 2009, amendments to Routine Mail Rule 33-210.101 now allows up to 15 pages of "additional written materials" to be included per routine mail envelope (incoming mail). The amendment now also allows up to 15 photographs to be sent through routine mail to prisoners since photos count towards the 15-page additional written material limitation. See Rule 33-210.101(2)(b), F.A.C.

Fifteen pages or photos are much more reasonable and will help reduce the amount of mail that mail room staff must process and reduce costs to both FDOC and

prisoners' correspondents. Prisoners: Inform each other and all your correspondents of this positive mail change.

Note: Currently the FDOC allows prisoners to receive up to 20 First Class postage stamps (or their equivalent) per envelope, for a total of 40 maximum, through the mail. That is a privilege, a valuable one to those who write letters and correspond with people on the outside. FPLAO fought off at least 5 attempts by the FDOC to stop allowing prisoners from receiving stamps through the mail in the late 1990's. Lately, some prisoners have been abusing that privilege, endangering everyone's' privilege to get stamps by using stamps to purchase things through the mail and/or sending stamps out to be sold. Both of those practices violate FDOC rules. You are only allowed to possess 40 First Class postage stamps by FDOC rule. If you try to send out more than 40 stamps for any reason you violate contraband rules. Check yourself. Don't let greed or stupidity ruin it for you and everybody else. All the FDOC has to do is amend its rule to stop ANY postage stamps from coming in through the mail. That privilege is too valuable to lose, use stamps to maintain relationships and guard that privilege when you see others risking it with stupid mailings of stamps. - editor ■

FREE COPY OF FPLP

Prisoners: Have a free copy of FPLP sent to a family member or friend on the outside. Simply send us their name and address on this form. PLEASE PRINT.

Name _____

Address _____

City _____

State _____ Zip _____

Complete and Mail to:
FLORIDA PRISON LEGAL PERSPECTIVES
PO Box 1069 Marion, NC 28752

POST CONVICTION CORNER

by Loren Rhoton, Esq.

After the conclusion of a defendant's direct appeal, the next step that is often taken is the filing of a Florida Rule of Criminal Procedure 3.850 Motion for Postconviction Relief. However, there is another option which is sometimes overlooked. Following the imposition of a judgment and sentence, a convicted person has a small window during which he can file a motion with the trial court asking the court to reconsider/reduce the sentence. Florida Rule of Criminal Procedure 3.800(c) provides that a court may reduce or modify a legal sentence imposed by it:

> (1) within 60 days after the imposition of said sentence; or,
>
> (2) within 60 days after receipt by the court of a mandate issued by the appellate court on affirmance of the judgment and/or sentence on an original appeal; or,
>
> (3) within 60 days after receipt by the court of a certified copy of an order of the appellate court dismissing an original appeal from the judgment and/or sentence; or,
>
> (4) if further appellate review is sought in a higher court or in successively higher courts, within 60 days after the highest state or federal court to which a timely appeal has been taken under authority of law, or in which a petition for certiorari has been timely filed under authority of law, has entered an order of affirmance or an order dismissing the appeal and/or denying certiorari.

Thus, depending on the initial disposition of the case, a sixty day period will be triggered by one of the above-listed events. If a plea was entered and no appeal has been taken, the sixty day period runs from the date of the sentencing. If a direct appeal has been pursued, then the sixty day period begins to run on the date that the mandate is issued by the appellate court. Thus, a motion to mitigate a sentence must be filed within sixty days of the applicable triggering event.

Additionally, the trial court is required to rule on a 3.800(c) motion to mitigate within the sixty day period. If, after filing a 3.800(c) motion, it appears that the trial court will not be able to consider and rule on a 3.800(c) motion within the sixty day period, a motion to extend said period must be filed, pursuant to Florida Rule of Criminal Procedure 3.050. Rule 3.050 provides that a trial court may, for good cause shown, at any time, order that a period of time under the rules be enlarged if a request therefor is made before the expiration of the period originally prescribed. Smith v. State, 895 So.2d 488 (Fla. 2nd DCA 2005), provides that a trial court is authorized, under Rule 3.050, to extend the time for ruling on a motion for modification or correction of sentences filed pursuant to Rule 3.800(c). *See also*, Abreu v. State, 660 So.2nd 703 (Fla. 1995) [Sixty-day period in which motion to mitigate sentence must be ordered may be extended under rule providing for enlargement of procedural time limits upon good cause shown, providing matter is resolved within a reasonable time].

A Rule 3.800(c) motion is a valid vehicle for requesting that a court reconsider the sentence originally imposed. However, under certain circumstances, the trial court will have no discretion to reduce a sentence under 3.800(c). For example, 3.800(c) has no applicability to cases in which the death penalty is imposed. Furthermore, Rule 3.800(c) does not give a judge the authority to impose a sentence below a minimum mandatory sentence. Another such situation where a court lacks the authority to reduce a sentence under 3.800(c) arises when the sentence was the result of a negotiated plea bargain. Arango v. State, 891 So.2d 1195 (Fla. 3rd DCA 2005). Otherwise, though, Rule 3.800(c) is a legitimate postconviction consideration as long as the defendant is within the applicable 60 day window.

If a rule 3.800(c) motion is available to a defendant, it may give the movant the ability to raise sentencing issues which were not previously addressed to the court. A Rule 3.800(c) movant should be familiar with, and argue any statutory mitigating factors which are available under Florida Statutes §921.0026(2). Said mitigating factors are listed as follows:

(a) The departure results from a legitimate, uncoerced plea bargain.

(b) The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.

(c) The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.

(d) The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment.

(e) The need for payment of restitution to the victim outweighs the need for a prison sentence.

(f) The victim was an initiator, willing participant, aggressor, or provoker of the incident.

(g) The defendant acted under extreme duress or under the domination of another person.

(h) Before the identity of the defendant was determined, the victim was substantially compensated.

(i) The defendant cooperated with the state to resolve the current offense or any other offense.

(j) The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.

(k) At the time of the offense the defendant was too young to appreciate the consequences of the offense.

(*l*) The defendant is to be sentenced as a youthful offender.

In addition to the statutorily recognized mitigating factors, mitigating factors which are not delineated in §926.0026 can also be used to justify a reduction/mitigation of a sentence. §926.0026 specifically provides that the possible mitigating factors available to a defendant are not limited to those listed n §926.0026. The list of statutory departure reasons is not exclusive, so departures based on reasons not delineated in §921.0026, which are supported by the record, may be permissible. State v. Tyrrell, 807 So.2d 122 (Fla. 5th DCA 2002) A downward departure sentence for reasons not delineated by statute is permissible if it is supported by competent,

substantial evidence and is not otherwise prohibited. State v. Voight, 993 So.2d 1174 (Fla. 5th DCA 2008). Some examples (but certainly not an exhaustive list) of nonstatutory mitigating factors are as follows:

> -disparity in sentences of equally culpable codefendants- It has long been established that equally culpable codefendants should receive equal punishment. *See* Jennings v. State, 718 So.2d 144 (Fla.1998); Scott v. Dugger, 604 So.2d 465 (Fla.1992); and, Ray v. State, 755 So.2d 604, 611 (Fla.,2000). The sentence a codefendant receives may be considered by judge and jury in determining appropriate sentence. Williamson v. State, 511 So.2d 289 (Fla.,1987). As a general principle, defendants should not be treated differently on the same or similar facts. Slater v. State, 316 So.2d 539 (Fla.1975). It has been recognized by Florida Courts that upward departures cannot be justified solely in order to match the sentence of a codefendant. Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA), *remanded on other grounds*, 478 So.2d 1071 (Fla.1985); Thomas v. State, 461 So.2d 274 (Fla. 5th DCA 1985). However, the Florida Supreme Court has held that the downward departure sentence of a codefendant can provide a legitimate downward sentencing departure factor for a defendant. Sanders v. State, 510 So.2d 296, 298 (Fla.,1987). *See also* State v. Fernandez, 927 So.2d 939, 941 (Fla. 3rd DCA,2006).
>
> -positive behavior of the defendant subsequent to sentencing- Davis v. State, 166 So.2d 189 (Fla. 1st DCA, 1964) [court recognized, in mitigation, defendant's good behavior in prison prior to sentencing]; McDonald v. State, 743 So.2d 501, at 502 (Fla. 1999) [court considered nonstatutory mitigation factor of appellant's prison behavior]; Davis v. State, 698 So.2d 1182, at 1187 (Fla. 1997) [sentencing court considered nonstatutory mitigation factor of "good behavior while in jail and prison" and participation in GED and "other self-improvement programs."]; Almeida v. State, 748 So.2d 922, at *fn.* 8 (Fla. 1999) [court considered nonstatutory mitigation factor of defendant's "good behavior while incarcerated."].
>
> -victim's consent in regard to charge of sexual activity with a minor- On remand for resentencing for engaging in sexual activity with a minor, trial court was not precluded from considering victim's consent as a basis for imposing a downward departure from the sentencing guidelines. Knox v. State, 814 So.2d 1185 (Fla. 2nd DCA 2002).

The above are merely examples of nonstatutory mitigating circumstances. Any applicable statutory and nonstatutory mitigating circumstances should be presented to the trial court in support of a Rule 3.800(c) motion. If presented properly and supported by competent and substantial evidence, a 3.800(c) motion presents the possibility of reducing a previously imposed sentence. Any attempt to pursue 3.800(c) relief should be timely presented in a motion to mitigate the sentence. A motion filed pursuant to 3.800(c) is a sometimes overlooked postconviction option that should not be disregarded. It is but one more weapon that can and should be used (if available) to attack an excessive sentence.

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

BRADFORD L. EDWARDS

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.

FEDERAL

U.S. Supreme Court

SPEEDY TRIAL
FUNCTIONAL ANALYSIS

Vermont v. Brillon, 21 Fla. L. Weekly Fed. S702 (01/13/2009)

Michael Brillon, a Vermont state prisoner raised a Sixth Amendment claim based on a violation of his right to speedy trial in Vermont state courts. In July, 2001, he was tried by a jury, found guilty as charged, and sentenced to 12 to 20 years in prison. During the time between his arrest and his trial, at least six different attorneys were appointed to represent him. Brillon "fired" his first attorney, who served from July, 2001 to February, 2002. His third lawyer, who served from March, 2002 until June, 2002, was allowed to withdraw when he reported that Brillon had threatened his life. His fourth lawyer served from June, 2002 until November 2002, when the trial court released him from the case. His fifth lawyer, assigned two months later, withdrew in April, 2003. Four months thereafter, his sixth lawyer was assigned, and she took the case to jury trial in June, 2004.

The trial court denied Brillon's motion to dismiss for want of speedy trial. The Vermont Supreme Court, however, reversed, holding that Brillon's conviction must be vacated, and the charges against him dismissed, because the state did not accord him the speedy trial required by the Sixth Amendment. Citing to the balancing test in *Barker v. Wingo*, 407 U.S. 514 (1972), the Vermont Supreme Court concluded that all four factors described in *Barker* – "Length of delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant." Id., at 530 – weighed against the state. Weighing heavily in Brillon's favor, the Vermont court said, the three-year delay in bringing him to trial was "extreme." In assessing the reasons for that delay, the court separately considered the period of each counsel's representation. The court acknowledged that the first year should not count against the state. But the court counted much of the remaining two years against the state. The court determined that delays in that period were caused, for the most part, by the failure of several of the assigned counsel, over an inordinate period of time, to move the case forward. As for the third and fourth *Barker* factors, the court fond that Brillon repeatedly and adamantly demanded a trial and that his lengthy pretrial incarceration was prejudicial.

The U.S. Supreme Court held that the Vermont Supreme Court erred in ranking assigned counsel essentially as state actors in the criminal justice system. Assigned counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent.

The Brillon court further stated that the "primary issue [at bar] is the reason for the delay in Brillon's trial. In applying *Barker*, the court asked 'whether the government or the criminal defendant is more to blame for the delay.' *Doggett v. United States*, 505 U.S. 647, 651 (1992). Delay 'to hamper the defense' weighs heavily against the prosecution, *Barker*, 407 U.S. at 531, while delay caused by the defense weighs heavily against the defendant, Id., at 529. Because 'the attorney is the defendant's agent when acting, or failing to act in the furtherance of the litigation, delay caused by the defendant's counsel is charged against the defendant, *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). The same principle applies whether counsel is privately retained or publicly assigned, for 'once a lawyer has undertaken the representation of the accused, the duties and obligations are the same'" *Polk County v. Dodson*, 454 U.S. 312 318 (1981)

[Note: A caveat... while the Brillon Court affirmed "the Sixth Amendment guarantees that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy...trial' the speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative.'" *Barker*, 407 U.S., at 522 (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). Potential speedy-trial litigators would be well advised to thoroughly study Fla. R. Crim. P. 3.191 and 3.251; Sec 918.015, Fla. Stat., and the plethora of case law that follows those authorities.]

U.S. Court of Appeals, 11th Circuit

ONE-YEAR FEDERAL TIME TOLLING CLARIFICATION

Hollingsworth v. Florida D.O.C., 21 Fla. L. Weekly Fed. C1713 (11th Cir. 04-09-2009)

Leo C. Hollingsworth filed in the 11th Circuit, a motion to vacate the Federal District Court's order dismissing his Federal Habeas Corpus Petition as time-bared as a result of Holingsworth's delay in filing his federal habeas Petition which was caused by a belated appeal proceeding. As well as the fact that Hollingsworth did not receive the 90-day credit for the period in which he could have filed a certiorari petition in the U.S. Supreme Court but did not. The 11th Circuit's prior holding in *Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000) stated that the one-year filing period was *not* tolled during the 90-day period in which a state prisoner could have but did not file a petition for writ of certiorari in the United States Supreme Court.

On January 13, 2009, the U.S. Supreme Court issued its decision in *Jimenez v. Quarterman*, 129 S.Ct. 681 (2009) which held that, "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet 'final' for purposes of 28 U.S.C. 2244 (d)(1)(A). In such a case, 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review' must reflect the conclusion of the our-of-time direct appeal, or the expiration of the time for seeking review of that appeal.." Id. 686-687.

Jimenez further held, "direct review of the out-of-time appeal concludes when the Supreme Court affirms a conviction on the merits on direct review or denies a petition for whit of certiorari, or, if the prisoner elects not to pursue certiorari review, when the time for seeking certiorari expires." Id., 685-686.

The *Hollingsworth* court held that the holding in *Jimenez* pursuant to belated appeal applies to the 90-day certiorari credit. As a result, on April 9, 2009, the 11th Circuit granted Hollingsworth's motion to vacate the district court's dismissal order of his federal 2244 habeas petition and remanded to proceed with the 2244 petition on its merits.

[Note: This decision seems to clarify two benefits for 2244 petitioners in that the one-year period for filing a 2244 petition appears to commence at the conclusion of a belated appeal under Fla. R. App. P. 9.141 (c) when the petitioner has not otherwise had a timely direct appeal, and the 90-day credit for filing a certiorari petition in the U.S. Supreme Court is now affirmatively provided to all 2244 petitioners.]

FLORIDA SUPREME COURT

SEXUAL PREDATOR DESIGNATION CHALLENGE.

Breitberg v. State, 34 Fla. L. Weekly S 245 (Fla. 02/26/2009)

Murray Breitberg, petitioned the Florida Supreme Court along with numerous other cases under Supreme court review on the Question of whether a challenge to the sexual predator designation must be by a civil action as held by the court in *Saintellien v. State*, 937 So.2d 234 (Fla. 4th DCA 2006) or by Rule 3.800 (a) motion to correct illegal sentence is proper "when it is apparent from the face of the record that the defendant did not meet the criteria for designation as a sexual predator."

FDOC RELEASES CONFIRMATION LETTER DEEMED INADMISSIBLE HEARSAY.

Vittorio v. State, 34 Fla. L. Weekly S291 (Fla. 03/19/2009)

Rudolph Vittorio was granted discretionary review as the lead case along with numerous other cases on the DCA conflict pursuant to admissibility of FDOC issued release-date letters of confirmation in support of the imposition of HVFO sentence enhancement. DCA conflict was established by *Yisrael v. State*, 938 So.2d 546 (Fla. 4th DCA 2006) which held that a letter from FDOC administrator confirming a release date for a previous offense *was* admissible under hearsay exception and *Gray v. State*, 910 So.2d 867 (Fla. 1st DCA 2005) which held that the very same FDOC letter *was not* admissible under the same hearsay exception, the *Vittorio* Court stayed proceedings pending disposition of *Yisrael v. State*, 993 So.2d 952 960-61 (Fla. 2008), in which the court approved the holding in *Gray* and stated the FDOC release-date letters are *not* admissible under business records *or* public records exception to the hearsay rule, *but* the FDOC "crime and time" reports are admissible under the hearsay exception for Public Records. [for the same purpose].

District Courts of Appeal

PLEA OFFER FAILURE TO COMMUNICATE

O'Brien v. State, 34 Fla. L. Weekly D 453B (Fla. 5th DCA 02/27/2009)

John D. O'Brien, Jr's appeal from his summary denial of his eleven claim 3.850 motion was affirmed as to all issues except the tenth claim, which alleged that his trial counsel failed to communicate a plea offer to him that he would have accepted, resulting in a lesser sentence. See, *Wright v. State*, 892 So.2d 1209, 1210 (Fla. 5th DCA 2005). The court held, "although it appears from the State's response below that his claim also lacks merit, the response relies on non-record documents and statements that cannot sustain a summary denial."

See, e.g., *Harick v. State*, 484 So.2d 1239, 1240 (Fla. 1986) [holding a reviewing court must treat the properly sworn 3.850 allegations as true unless they are conclusively rebutted by the record]. The O'Brien Court reversed with instructions to hold an evidentiary hearing.

[Note: An unrevealed plea offer can sometimes be discovered via a public records act request for a copy of the state attorney's file under §119.07, Fla. Stat.]

CONVICTION ON UNCHARGED CRIME.

Moseley v. State, 34 Fla. L. Weekly D453C (Fla. 5th DCA 02/27/2009)

Jeffrey Wayne Moseley's Rule 3.850 appeal was affirmed as to all claims including his claim that he was convicted of an uncharged crime. This case involves unlawful sexual activity with a minor after which Moseley allegedly absconded with the victim to Las Vegas, Nevada and back to Florida where the Defendant was apprehended. The State then amended the information, adding a charge of interfering with child custody in violation of §787.03, Fla. Stat. (2003) which contains two relevant subsections.

Inexplicably, the State's amended information charged the Defendant with violating the wrong subsection, yet the judgment reflected the correct subsection meaning the defendant was convicted of an uncharged crime. The court agreed that as a General Rule, Due process is violated when an individual is convicted of a crime not charged in the charging instrument" citing to *Castillo v. State*, 929 So.2d 1180, 1181, (Fla. 4th DCA 2006). The court further held, "technical deficiencies in a charging instrument are waived if the defendant does not raise them before the state rests its case." Id., citing *McMillan v. State*, 832 So.2d 946, 948 (Fla. 5th DCA 2002). With respect to untimely challenges to technical deficiencies in the information or indictment, Florida Courts have consistently held that a defendant is *not* entitled to relief; "(1) where a statutory citation for the crime is given, but all elements of the crime are properly charged. (2) where the wrong or no statutory citation is given, but all elements of the crime are poperly charged."(quoting *State v. Burnette*, 881 So.2d 693, 695 (Fla. 1st DCA 2004) and also citing *Cuevas v. State*, 770 So.2d 703, 705 (Fla. 4th DCA 2000). Ultimately , the "test for granting relief based on a defect in the charging document is actual prejudice to the fairness of the trial.." State v. Gray 435 So.2d 816, 818 (Fla. 1983).

MAIL-BOX RULE REVERSAL

Faller v. State, 34 Fla. L. Weekly D482 (Fla. 2nd DCA 03/04/2009)

Douglas H. Faller challenged the summary dismissal of his pro se motion to withdraw his no contest plea to 19 third degree felony counts. The trial court dismissed the motion on the ground that it was untimely filed. The State conceded that the trial court erred in dismissing the motion in Mr. Faller's circumstances because his motion was timely filed under Florida's "Mail-box" Rule.

Since Mr. Faller was incarcerated at the time he placed his motion into the hands of prison officials he needed only to state in his certificate of service that his motion was given to prison officials for mailing on the date of service. In addition to the certificate of service declaration, Mr. Faller's motion was date-stamped by a prison official which is now the practice at most F.D.O.C. facilities which provides an extra layer of protection for the inmate even though prevailing law *only* requires the certificate of service declaration. See, Fla. R. App. P 9.420(a)(2). The *Faller* Court reversed and was remanded for the trial court to consider Mr. Faller's motion timely filed.

[Note: *Florida's prison "Mail-Box" rule was originally created by pro se inmate litigation in Haag v. State, 591 So.2d 614 (Fla. 1992), and later codified by Fla. R. App. P., 9.420(a)(2).]*

INMATE LAW-CLERK MISADVISE.

Evins v. State, 34 Fla. L. Weekly D722 (Fla. 4th DCA 04/08/2009)

Anthony Evins filed a sworn petition for writ of habeas corpus seeking belated appeal claiming that his counsel failed to file an appeal from his plea and sentence, although requested to do so by Evins. The state discovered the attorney Evins listed in his petition did not represent Evins. A fact Evins Admitted in his response, albeit, Evins stated a prison law clerk/paralegal advised him to list a false name as the attorney which "did not matter as the court would find the correct attorney." The court dismissed the petition stating, "Petitioner knowingly swore to false allegations' and "he [Evins] cannot rely on the misadvise of a prison paralegal to excuse his intentionally false statements of fact."

[Note: In this case, the inmate law clerk/paralegal exposed Evins to perjury sanctions since Evins is acting on his own under "pro se" status despite the law clerk's false and misleading advice].

NO BAR TO SUCCESSIVE RULE 3.800(A) MOTIONS

Moss v. State, 34 Fla. L. Weekly D 732 (Fla. 3rd DCA 04/08/2009)

Derrick Moss filed a rule 3.800(a) motion to correct illegal sentence which was denied as successive. In its denial order, the trial court pointed out that Moss filed "numerous previous postconviction motions" and that he "provides no explanation for why these claims could not have been raised in his previous motions." The Third District reversed and in so doing, stated while Rule 3.850(f) contains a provision baring

successive motions, there is no such bar in Rule 3.800(a) motions which allows defendants to file a 3.800(a) motion at "any time" which is not successive *if* the motion does not raise the same issue as was raised in an earlier rule 3.800(a) motion which would be barred by the doctrine of collateral estoppel where the earlier motion was denied on the merits. Citing, *Mims v. State*, 994 So.2d 1233, 1235 (Fla. 3rd DCA 2008); *Pleasure v. State*, 931 So.2d 1000, 1002 (Fla. 3rd DCA 2006)

DEFECTIVE MIRANDA WARNINGS DURING QUESTIONING

State v. Soloman, 34 Fla. L. Weekly D533 (Fla. 2nd DCA 03/11/2009)

The State of Florida appealed an order granting Jesse Soloman's motion to suppress statements Soloman gave to the police. The trial court suppressed the statements after finding that Soloman was not informed that he had the right to an attorney during questioning. The trial court agreed the Miranda warnings were defective under *State v. Powell*, 998 So.2d 531 (Fla. 2008), although the appeal court held that the trial court never addressed whether Soloman was "in custody" when he made the statements. The district court held that even if the Miranda warnings were insufficient, Soloman's statements to police are admissible if Soloman was not subjected to custodial interrogation when he made the statements. The District Court reversed and remanded with instruction to the trial court to address the voluntary nature of Soloman's statements.

RIGHT TO REMAIN SILENT POST ARREST.

Cowan v. State, 34 Fla. L. Weekly D534 (Fla. 4th DCA 03/11/2009)

Johnny Cowan appealed his conviction for burglary raising the claim that the trial court erred in allowing admission of Cowan's post arrest statements to his co-defendant while sitting in the rear seat of a patrol car while they were recorded by a concealed video monitor. The trial court allowed the prosecutor to admit excerpts of the video recording at jury trial, reasoning that Cowan was not being interrogated by police at the time. Moreover, no Miranda warnings had been administered; nor was Cowan's statement a response to police interrogation. Cowan asserted, he did not say anything to his co-defendant even though his lips appeared to be moving on the video. The prosecutor reportedly emphasized Cowman's alleged silence in closing arguments. The District Court held that the prosecutor's cross-examination and closing arguments were "fairly susceptible" of being interpreted by the jury as a comment in defendant's silence and the state failed to demonstrate beyond a reasonable doubt that the error had no effect on the jury. The District Court reversed for a new trial.

PRO SE MOTIONS AND MANDATE RECALL TIMELINESS.

Rigueiro v. State, 34 Fla. L. Weekly D806C (Fla. 4th DCA 04/22/2009)

Andres Rigueiro handed his pro se motion for rehearing and rehearing en banc to the prison officers [Mail-Box Rule] on February 15, 2006 following a per curiam affirmed decision without a written opinion on direct appeal while he was still represented by counsel. The district court's decision was issued on February 01, 2006 and mandate issued on February 17, 2006. The District Court received the pro se rehearing on February 21, 2006 and denied it on March 21, 2006. On March 13, 2008, defense counsel filed a rule 3.850 motion in the trial court which denied it as untimely since the mandate issued on February 17, 2006. The District Court noted conflict with *Robins v. State*, 992 So.2d 878 (Fla. 5th DCA 2008) which reached a different conclusion under similar circumstances in that *Robins* held the court should have recalled its mandate before ruling on a prisoner's motion for rehearing that had been timely delivered to prison officials before the mandate was issued. However, the court also held that point was moot since the rehearing motion was filed pro se while Rigueiro was still represented by appointed appellate counsel thereby rendering the rehearing motion a nullity. See, *Logan v. State*, 846 So.2d 472, 475-76 (Fla. 2003) [a pro se filing by a party represented by counsel "cannot be entertained on the merits" unless it is adopted by counsel]

[Note: This case is instructive for pro se prisoner litigants on several points; one, a pro se inmate may *not* file motions while represented by counsel *unless* counsel agrees to adopt the motion or the pro se inmate moves to dismiss counsel contemporaneously with his motion in which case he would be wise to move for an extension of time to file rehearing. Additionally, the *Rigueiro* court issued mandate in lightening speed at 16 days while most districts issue mandate in 20 days to allow "Mail-Box" filing. This court explained in a footnote that its own policy has changed since Rigueiro to allow for "Mail-Box" rule filings so the court did recognize and remedy its own mandate issuing policy defect. Finally, the court noted in a foot-note that "'an appellate court's power to recall its mandate is limited to the term during which it is issued." See *State v. Cameron*, 914 So.2d 4, 5 (Fla. 4th DCA 2005)

CLOSE MANAGEMENT RELEASE – HABEAS CORPUS PROPER – FILING FEES IMPROPER

Kendrick v. McNeil, 34 Fla. L. Weekly D501D (Fla. 1st DCA 03-05-2009)

Kenneth James Kendrick and another inmate were involved in an altercation after which Kendrick received a DR for fighting and shortly thereafter ICT recommended that he be placed on CM-I status which proceeded to conclusion as well as Kendirck's exhaustion of administrative remedies. Kendrick then filed a petition for writ of habeas corpus in the circuit court in Leon County seeking release from CM. The circuit court entered an order which determined that mandamus, not Habeas Corpus, was the proper remedy. In so doing, the circuit court then considered the "mandamus" action to be purely civil and assessed filing fees and imposed a lien on Kendrick's trust account pursuant to section 57.085 (5), Fla. Stat, when it was made to appear that he was indigent.

The First District has consistently held that an inmate who seeks release form close management back into general population is entitled to proceed through a petition for writ of habeas corpus. See, *Ashley v. Moore*, 732 So.2d 498 (Fla. 1st DCA 1999); *Norris v. F.D.O.C.*, 721 So.2d 1235 (Fla. 1st DCA 1998); *Taylor v. Perkins*, 654 So.2d 1019 (Fla. 1st DCA 1995); *Guess v. Barton*,, 599 So.2d 770 (Fla. 1st DCA 1992); *Roy v. Dugger*, 592 So.2d 1235 (Fla. 1st DCA 1992); *Thompson v. Dugger*, 509 So.2d 391(Fla. 1st DCA 1987); See also *Holland v. State*, 791 So.2d 1256 (Fla. 5th DCA 2001).

The *Kendrick* court stated, "the circuit court departed from the essential requirements of law by converting the habeas corpus petition to mandamus. It should have determined whether it was the proper court to consider the petition for writ of habeas corpus under *Murray v. Regier*, 872 So.2d 217 (Fla. 2002) and thereafter proceeded to resolve the case on its merits or transfer it."

The court further held, "no filing fee may be assessed in a true habeas corpus proceeding. See, Art. I §13, Fla. Const.; *Bocharski v. Circuit Court of Second Judicial Circuit*, 552 So.2d 946 (Fla. 1st DCA 1989). We therefore direct that all orders of the circuit court placing a lien on Kendrick's trust account to recover fees for the circuit court proceeding be vacated and any funds taken from his trust account pursuant to a lien issued in this case be refunded to him."

FAILURE TO OBJECT TO IMPROPER JURY INSTRUCTIONS IS PROPER 3.850 ISSUE.

Perera v. State, 34 Fla. L. Weekly D554B (Fla. 3rd DCA 03-11-2009)

Ismael Perera was found guilty on 22 counts of sexual battery and received life in prison on each count to run consecutively. His direct appeal was affirmed, after which he filed a rule 3.850 motion alleging 10 claims for relief including a claim that defense counsel was ineffective for failure to object to the trial court's erroneous jury instructions on sexual battery which he claimed was fundamental error. The trial court instructed the jury that Perera could be found guilty of sexual battery if he committed an act of penetration or union. The information against him alleged sexual battery by penetration. Perera's defense counsel failed to object to the above jury instruction. The *Perera* Court reversed and remanded for an evidentiary hearing.

AMENDING DR MANDAMUS

RESPONSIVE PLEADINGS.

Lovette v. McNeil, 34 Fla. Weekly D605A (Fla. 1st DCA 03/19.2009)

Roger Lovette challenged the Circuit court's denial of his petition for writ of mandamus wherein he challenged a DR for disrespect of a prison official and the subsequent loss of gain time. On December 3, 2007, Lovette was issued the subject DR after which he was found guilty and subsequently exhausted his administrative remedies. On or about March 25, 2008, Lovette filed his mandamus petition in the circuit court. On April 3, 2008, the circuit court ordered FDOC to show cause why the mandamus petition should not be granted. On May 21, 2008, Lovette filed an amendment to his mandamus petition raising additional claims, after which FDOC filed their response to the show cause order, but failed to address the additional claims contained in the amendment. The circuit court denied the mandamus petition without addressing Lovette's additional claims contained in his amendment.

Lovette argued in his certiorari petition in the district court that the circuit court improperly failed to address the claims raised in his amended petition. The district court agreed and explained that the Florida Rules of Appellate Procedure are applicable to extraordinary writ proceedings involving an appellate remedy in the circuit court. See, *Newell v. Moore*, 826 So.2d 1033 (Fla. 1st DCA 2002). An exception to this rule is an extraordinary writ proceeding that did not seek review by quasi – judicial administrative action which is governed by the Florida Rules of Civil Procedure. See *Surratt v. Freeman*, 924 So.2d 905 (Fla. 1st DCA 2006).

The Lovette court went on to state, "the rules of appellate procedure include a broad amendment provision stating that, 'at any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits.' Fla. R. App. P. 9.040(d). Thus, [Lovette's] amendment to his petition was properly before the court, and the trial court improperly declined to address the claims therein."

The FDOC attempted to argue that Lovett's amendment was improperly before the court and relied on Fla. R. Civ. P. 1.190 (a) which provides that a party may amend a pleading once prior to the filing of any responsive pleading, and further asserted that the trial court's order to show cause constituted a

responsive pleading. The Lovette court rejected both contentions in stating the instant petition was not governed by the Rules of Civil Procedure and the show cause order was not a responsive pleading. See, *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 566-68 (Fla. 2005). The *Lovette* court reversed and remanded for the trial court to address Lovette's additional claims contained in the amendment.

[*Note: Lovette, proceeding pro se, established two important points in this case with the frequent need for pro se inmates to amend their petitions which are governed by appellate rules when administrative remedies have been exhausted and the fact that a show cause order is* not *a responsive pleading.*]

CONFLICT-FREE COUNSEL REQUIRED

Harvey v. State, 34 Fla. L. Weekly D 617 (Fla. 5th DCA 03-20-2009)

Tharin Harvey pled no contest to a VOP and related charges after which he attempted to withdraw his plea prior to sentencing. His defense counsel asked the trial court to appoint conflict-free counsel after informing the court he could not effectively advise Harvey and Harvey related dissatisfaction with his defense counsel. The District court reversed and remanded and in so doing, stated the trial court erred in that conflict-free counsel *must* be appointed under such circumstances.

THEFT DEFINED, HANDCUFFED BANDIT

J. B v. State, 34 Fla. L. Weekly D553E (Fla. 3rd DCA 03/11/2009)

J. B. was at a public library doing his homework, when a Miami-Dade police officer, working off-duty library security, recognized J. B. because she had previously issued him a "trespass" warning in the public library. Seemingly determined to get this criminal off the street, the officer proceeded to arrest him and placed handcuffs on his left wrist at which point J. B. fled. The police later found J. B. still with handcuffs on, and arrested him.

The state attorney came down hard on this juvenile, charging him with: (1) Battery on a "LEO"; (2) Resisting arrest with violence; (3) Trespassing on property after warning; and, (4) petit theft of the handcuffs. At the adjudicatory hearing, the court viewed the government's harsh treatment of J. B. a different way and reduced the battery on a "LEO' to misdemeanor battery; dismissed the resisting arrest with violence and the "trespassing" in the public library. After the hearing, the trial court also found J. B. not guilty of misdemeanor battery, but guilty on the only remaining charge of petit theft of the handcuffs, after which J. B. appealed.

The District Court explained that, since a person commits "theft" when he or she knowingly obtains or uses another person's property with the intent to temporarily or permanently, (a) deprive the other person of the right to use the property or benefit from the property or (b) appropriate the property for his or her own use. See, Section 812.014 (1) (a)-(b), Fla. Stat. (2007). Further, because petit theft is a "specific intent" crime, the state is required to prove that J. B. intended to deprive the officer of her right to use the handcuffs or benefit from them, or that he intended to appropriate the handcuffs for his own use. See, *C. G. v. State*, 981 So.2d 1224, 1225 (Fla. 1st DCA 2008).

The J. B. Court in its conclusion, held the state did not present any evidence that J. B. intended to steal the handcuffs or deprive the police officer of her property. Instead, J. B.'s act of taking the handcuffs was incidental to his flight from an officer's unlawful arrest. Finally, the court stated, "we are sure that J. B. would have gladly relinquished any dominion, control, or possessory right to the handcuffs if he only had the key to release them."

[Note: This case is a quintessential example of governmental powers gone amuck, albeit, justice finally prevailed for this juvenile "criminal" after depletion of considerable taxpayer's resources.]

PD AND RCC CONFLICT RCC STRUCTURE

Johnson v. State, 34 Fla. L. Weekly D596 (Fla. DCA 03/18/2009)

Christian Johnson sought a direct appeal after a jury trial in which he and his co-defendant Mayfield were charged and convicted of robbery with a firearm and carjacking. The Co-defendants established conflict at jury trial and the trial court permitted the public defender (PD) to withdraw from representing Johnson. The same conflict flowed on to appeal which prompted the PD to once again motion to withdraw, although this time, the regional conflict counsel (RCC) objected to the withdrawal. Thus, in addition to the co-defendants' conflict, a conflict between the PD and the RCC was created. The district court noted such conflicts between the PD and RCC have been frequently presented since the new RCC legislation was passed in 2007. See, Section 27.511, Fla. Stat. (2007).

This case provides great detail as to the statutory structure and obligations of RCC vis-à-vis the PD's office. The district court concluded that section 27.511 (8), Fla. Stat. (2008) requires RCC to assume representation when the PD certifies that conflict exists, subject to RCCs duty to certify their own conflict at which time private counsel will be required.

[*Note: Inmate litigators should become familiar with the provisions of the new RCC statute, (above cited) as is becoming more prevalent in Florida*

conflict litigation as more fully described in the above case.]

ABUSING THE PROCESS OF POSTCONVICTION RELIEF

Hedrick v. State, 34 Fla. L. Weekly D593 (Fla. 4th DCA 03/18/2009)

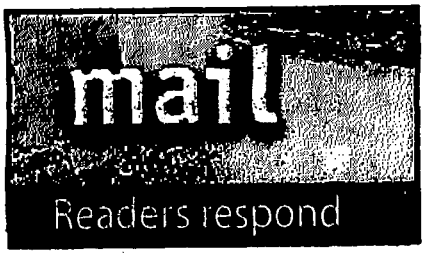
Alan Hedrick filed an appeal of the denial of his Rule 3.850 motion raising 24 claims in 109 pages of "argument." Worse yet, a supplemental motion raising 3 more claims for a grand total of 27 claims over a span of 130 pages *plus* hundreds of pages of exhibits prompting the court to comment that it was "a legal forest in which even a valid claim could easily be lost." Id., at D594.

The district court observed that, in recent history, trial courts have imposed reasonable page limitations on motions for postconviction relief. See *Gidney v. State*, 925 So.2d 1076 (Fla. 4th DCA 2006); *Schwenn v. State*, 958 So.2d 531 (Fla. 4th DCA 2007) [trial court has authority to place page limitations on postconviction filings and 50 pages is a reasonable benchmark]. Even death penalty cases are limited to 75 pages on postconviction relief motions. See, Fla. R. Crim. P., 3.851(e)(1). The Hedrick court further stated, "postconviction litigants need to understand that, when seeking postconviction relief, less is more." A legitimate claim that may merit relief is more likely to be overlooked if buried within a forest of frivolous claims. In postconviction proceedings, the search for injustice is like the search for a needle in a haystack. See, *Brown v. Allen*, 344 U.S. 443, 537 (1953) [observing that one "who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search"].

The *Hedrick* court further held, "Rule 3.850 was intended to provide relief for a very narrow class of serious errors that could not be corrected on direct appeal." See *Ives v. State*, 993 So.2d 117, 121 (Fla. 4th DCA 2008); *Baker v. State*, 878 So.2d 1236, 1239-40 (Fla. 2004) [discussing the history of Rule 3.850]. "Instead, convicted defendants now file Rule 3.850 and 3.800(a) motions as a matter of course in almost every case. In many instances, the movant persists on filing successive motions." The legislature has provided a mechanism for courts to sanction abusive postconviction litigants by referring them to prison authorities for disciplinary proceedings. See, Section 944.279(1), Fla. Stat. (2008). However, DR procedures may not be effective to deter those serving life sentences without eligibility for parole. The sanction of dismissal and refusal to accept further pro se filings from the abusive litigant is the only efficacious remedy to conserve the judiciary's limited resources. See. *State v. Spencer*, 741 So.2d 47 (Fla. 1999).

In its conclusion, the *Hedrick* court stated, "this case presents a compelling reason for the Supreme Court of Florida to consider an amendment to the rules of criminal procedure to provide a reasonable page limitation for postconviction motions in non-capital cases."

[Note: This case also provides very compelling reasons to utilize all due diligence to limit number of pages and minimize verbosity in postconviction motions. While it is tempting to cite and quote many cases in composing claims for relief when lengthy sentencing exists, pro se litigants do so at their own peril as described above. See also, Florida Appellate Practice, by Philip J. Padavano, "Effective Brief Writing," Section 15:15 –15:19] ■



Dear FPLP: I have been reading about other prisoners writing FPLP about prisoner abuse and how DOC staff cover said abuse. I want to share what happened to me recently at Mayo CI. On November 9, 2008 at 11:15 a.m., I was a t the East side canteen window waiting to get a sandwich when officer Jerry Terrill started yelling "get away from the canteen area!" He yelled a second time before approaching me. I told him that I was waiting for my sandwich. He then responded, "if you ever talk to me like that again I will kick your mother ---- ass, do you understand?" I replied "Yes Sir" and I apologized. He did not respond. About five seconds later officer Terrill grabbed my head with his right hand and slammed my head into the wall three times while cursing me. He then handcuffed me, I was taken to confinement and given a false DR. Officer D. Folsom was also present when this took place. Thereafter I filed several grievance about this incident, however, nothing was done to the officer. Also the prisoners that saw the incident when called as witnesses were too coward to write a statement. Hopefully, one day these punks and cowards that abuse prisoners will be brought to justice or disciplined for abusing prisoners. Until then, thank you for exposing prisoner abuse. GR MCI

Dear FPLP: The popular "lock 'em up and throw away the key" approach to crime in Florida will never change as long as inmates continue to be used as free labor to build more and more prisons. Nobody, not the legislature, the governor, the FDOC, the parole commission, etc. are going to convert mandatory 85% sentences to 65% until inmates stop providing "free labor" to build their own cages. The new age inmates who gleefully build prisons are not only digging their own graves but are also digging the graves, so to speak, of every prisoner confined by the FDOC, 2nd those waiting to enter the FDOC. The collaborators who recently provided their labor to build P-dorm at SCI, and who are serving a mandatory 85% of their sentences (no extra gain time for their labor) were rewarded with an extra tray of Aramark garbage and an occasional , good boy, pat on the back by their keepers. The new age inmates who never worked a day in their lives prior to entering the FDOC worked like beavers solely to benefit the state, i.e., so that the state could continue to incarcerate them under the mandatory 85% sentencing scheme. The new age inmates aren't noted for any great degree of intelligence. The 85% sentencing law will never change until inmate collaborators wise up and refuse to provide the state with their free labor to build new prisons. Logic dictates that if the state had to hire, at tax-payer expense, skilled workers to build new prisons then it just might have a change of mind concerning the "lock 'em up and throw away the key" approach to crime. Inmate collaborators need to wise up and stop building your own cages. More importantly stop building mine. KR SCI

Dear FPLP: I recently was granted a Petition of Writ of Certiorari from the 1st DCA, Leon County, Florida, the Mandate was sent to the 2nd Judicial Circuit on January 20, 2009. Richard T. Parent v. Walter A. McNeil, FDOC case no: 1D08-1483 L.T. case no: 2007-CA-003262. I was hoping if you publish this case in an upcoming issue of FPLP , that I may be sent a copy of that issue. I am not able to afford to subscribe to FPLP or I surely would, although I have been reading it every chance I get. As a matter of fact I have used many case l aws and tips from FPLP including the most recent Certiorari. It was great to finally overcome a D.R. that I should never received in the first place, not to mention getting 334 days of gaintime back. So thank you for a great publication and keep up the great work. RP GWC

Dear FPLP: Please note that I was delighted to again renew my subscription to your essential publication. Thank you for the information and support that the FPLP gives us and our families. In furtherance of your May/June 2008 Vol. 14, Issue 3 page 8, Letters to the Editor, from G GCF , there needs to be a serious State-Wide Published Alert for prisoners to not get tricked into voluntarily transferring to the misery, torture, torment and turmoil of dysfunctional Disgraceville corruption facility. Breakfast at 4:00 a.m., lunch at 10:30 a.m., dinner 3:30 p.m. maybe one hour a day outside rec. There is a reason that GEO is the first two letters and last letter in Gestapo and this place is not to be compared and or confused with the progressive, rehabilitative environment of South Bay. Everything stated in the above referenced letter in the May/June issue is true and now, six months later is actually worse. Lockdowns, shakedowns, restricted movement, two hour counts. All is SOP of this place on a daily basis. GRCF is on its 3rd Warden, 2nd AWP, 2nd Colonel, 4th librarian and 3rd grievance coordinator. There is no such thing as health care or medical treatment here. A prisoner is forced to wait 3, 4 or more hours to be seen in a disease infested medical lobby only to be re-scheduled. One prisoner had to wait nine months for surgery on an obviously broken foot which was finally performed only after we filed a 42 u.s.c. 1983

complaint for cruel and unusual punishment. See Kirby v. Charlie Christ, case no: 508 cv 369/RS/MD, U.S. Dist Court Fla. And even contrary to Singletary v. Costello, 665 So.2nd 1099 (Fla. 4th DCA 1996) (Constitutional Right to refuse Medical Care), I was given a DR by medical staff for refusing to consent to the nonexistent medical care and avoid hours waiting in the MRSA/STAPH infected medical lobby. The DR was dismissed in the investigative stage and never went to a hearing. The alleged law library for 1900 prisoners is smaller than the law libraries at either ACI West or Zephyrhills CI and there is really not a general library. Likewise the visiting park is grossly overcrowded with only 46 prisoners and their families present at count time with only two microwave ovens available. Martin CI, with half the population had five microwaves. The canteen situation is deplorable. The prices are outrageously high, there is only one canteen on the yard which has only soft drinks, a few sandwiches, ice cream and tobacco. All other items have to be ordered with a wait of one week before receipt. Then you never know if or when you'll receive your order. There are no water fountains in the dorms nor hot water but one micro wave for 104 man wing which the officers are always taking as mass group. punishment. So Florida prisoners beware of dysfunctional Dis Graceville. Transfer at your own risk. WGH GCF

Dear FPLP: My name is Howard and I am a Juvenile Lifer (JVL) 1st time offender. The first part of my incarceration I thought I was one of a very few. I've met many JVL during my 20 something years of incarceration. I'm urging all JVL to tell family and friends to log on to http://HR4300.com. That is the petition site that's trying to get 500 signatures to end juvenile life and provide better defense for juveniles facing life. This is any one who has a life sentence that was 17 or under when they did their crime. Petition site has more information. RH SBCI

FPLP Staff: First off thank you for your devotion to us in the prison system. You keep us pretty well informed of what's going on. I myself am glad that we have people like you on our side. Now, with all the short falls Fla. is experiencing, the budget cuts and the debt that Fla. is in, DOC still does things to use up more unnecessary money. I was moved to WCI Annex to open it up. Then after two ½ months moved to Wakula Annex to open it up, now rumor has it we'll be moved to Suwannee CI to open it up. It would seem that all the many hours and money it takes to keep moving us from one place to another could be better spent else where. I keep seeing where they keep taking money from Education and giving to DOC so that tells me that "The great state of Florida" could care less if our children get an education, because as I hear guards saying all the time, "We have a place for them". Wake up Florida and stop standing for anything. Bones WCIA

Dear FPLP: In past issues years ago you used to put the names of inmates that passed away or that were killed. How come you stopped doing that? That is about the only way us inmates know when our friends passed away or were killed and I would like to see it brought back in the issues. Also I noticed that other prison subscriptions like PLN tells when inmates get killed in different states, or when inmates get stabbed, but yet your paper rarely tells when a inmate in the Florida prison system gets killed or stabbed. I have been in prison going on 29 years and I know how often Florida prison inmates get killed or get stabbed but as rarely as your paper tells about it a person is lead to believe that Florida prisons are peaceful. I enjoy your paper and have received it for years, but I feel that you sugar coat how bad Florida prison really are. Please consider adding these issues to your paper. DAM NFRC

Dear FPLP: I read the column written from inmates all over Florida sharing their experience and the hideous acts that are taking place at different institutions. And no one from the free world has gotten together to make a change. There is no need for trying to clean up the corrupt DOC staff in the system because once they are removed, they are just given a higher rank. Within one or two months the staff who were Sgt., Lt., Capt. are now Asst. Warden, Wardens and Region Directors. If someone were to do a investigation on all the staff who have moved up in rank since Florida Governor Christ took office and forced Mr. McDonough to resign. You would find over 200 hundred staff who have moved up 2 and 3 ranks in less than a year. Since Mr. McDonough resigned the physical abuse has started back and even worse in region 1 and 2. I am housed at FSP and every day I walk down the hall here I watch a inmate walk by me with blood all over his face from where he was beaten by staff. They sometimes put the inmate on a call-out to medical for bogus reason, once he's up there they take him into a room in medical where there will be 5 or 6 officers there waiting on him. The nurse's cover up the abuse and hideous acts toward inmates and the beating continues. Staff here at FSP and the rest of the institutions in region 1 and 2 beat inmates like it's legal. If I could count the times I was jumped on by staff during my 18 years I've been incarcerated, I would probably lose count. Bambam FSP

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

Florida Prison Legal Perspectives

MOST FREQUENT MISTAKES MADE IN PRISONER §1983 LAWSUITS:

By Brett Fenster

1) Mistake #1 is making your complaint too long and trying to "sound" like a lawyer.

All the Rules of Civil Procedure require is a "short and plain statement" entitling you to relief. (See: Fed R.Civ.Proc 8) The proper time to *prove* your claims is at trial – not in the initial claim or complaint. In order to "state a claim" upon which relief can be granted it is rarely necessary to use more than one or two paragraphs. The following elements of a statement of claim are all that is necessary to allege: ***Who*** injured you; ***What*** constitutional or statutory right was violated; ***Where*** (proper venue); ***When*** (within statute of limitations period).; ***How*** (causation) they did it; ***While*** acting under color of state law or apparent authority; ***Injury/Damages.*** In other words, it is sufficient to simply state your legal theory of causation together with the minimal amount of factual allegations necessary to show that some state employee intentionally (or recklessly) deprived you of a right or privilege guaranteed by the U.S.Constitution.

Make all your mistakes in your *rough* draft not in your final proof copy. Do your research now!

2) Mistake #2: Claiming negligence in a §1983 suit.

Negligence lawsuits such as Medical Malpractice; Legal Malpractice, Slip/Fall; negligent loss of property, etcetera, etc. must be argued in the *state* county or circuit courts under *state* law. Only intentional or reckless torts may be argued in a §1983 suit. The one exception to this is if you are invoking the *supplemental jurisdiction* of the court to hear your state law claim simultaneously with the federal claim. These are called "pendent claims." This is like a two-in-one suit.

3) Failure to "State a Claim."

The most frequent cause of dismissal of prisoner lawsuits is the "failure to state a claim." This is an *affirmative defense"* that the defendants may raise in a Motion to Dismiss early on in your suit. If the court dismissed your complaint w/o prejudice you may re-file a new *amended complaint.* This affirmative defense is sometimes referred to as the *"so what"* defense because you have no claim for which relief may be granted even assuming everything you allege is true. See #1 above for the required elements to state a claim.

4) Claim based upon Respondeat Superior theory of supervisory liability.

Supervisors may be named as defendants if they have *personal involvement* in injuring you. They are not liable simply *because* they are supervisors. Minimally, you must allege the supervisor was deliberately indifferent or a malicious or reckless disregard to a known risk of injury. Negligence or good faith mismanagement is insufficient to state a claim. Frequently Wardens or higher-ups are brought into a suit based upon a theory of "failure to train, supervise, discipline or control" their subordinates. A supervisor may not escape liability because he is willfully blind to a state of affairs or because he has delegated the task of injuring you to his underlings.

5) Failure to exhaust your administrative grievances.

You must complete all the steps of any *available* grievance procedure at the prison until a final decision is received. This will be attached to your initial complaint. Failure to exhaust is an affirmative defense that must be plead and proved by the defendants in order to get your claims dismissed.

6) Asking for multiple millions in damages.

You are not going to win the lottery this way. Please do not clog up the court with your frivolous, incredible claims. You are only hurting yourself and other legitimate plaintiffs by doing this.

7) Using "Class Actions" when an individual suit will do.

You are not going to be able to maintain the pace of litigation as a class representative *pro se* . Moreover, any mistake you make will be imputed to the class of prisoners. These are more complex and expensive than 99% OF PRISONERS CAN HANDLE. Leave the class actions to the ACLU National Prison Project – This is *their* specialty. This is not to say that your suit will not be picked up by the ACLU later and made into a class or the court could consolidate a number of similar suits together.

8) Failing to perfect service of the summons(es) and complaint.

In federal court you have 120 days from the date of filing to serve each defendant with the summons/complaint. Alternatively, they can sign a waiver of service form. The return of service will be reflected by a dated entry on the progress docket at the courthouse. You may view the progress docket using the PACER (Public Access to Courthouse Electronic Records) on the internet or by buying the docket (50 cents/page) from the clerk of the court. The court has no jurisdiction over the defendants until service is perfected. If the Defendants are evading service at the prison address then you may send the process server to their home address. You may obtain this address by searching public records in the county courthouses. The Grantor/Grantee Name Index of the Deed Book will have the family name and the Deed itself provides the address. Additionally, Driver License records are available from the state for less than ten dollars, through the mail or via online at the courthouse or driver licensing office. Voting Registration records may have an address, D.L. #, S.S.# or other identifier that will put you on the trail. Often a phone # is listed which can be looked up in the Cross Directory at the county library to give you an address. Sometimes calling 411 and asking for the address will do. The Process Servers use various fee based information services such as Autotrak™, Intellius™, Experian™, TransUnion™ which are also available to anyone through the internet.

9) Missing the 10 day deadline to file your "*Objections to Magistrate's Report & Recommendation.*"

Once you have completed discovery and the Judge has a motion for Summary Judgment filed by the Defendants and/or Plaintiff the assigned Judge will usually refer your case to a Magistrate Judge for a recommendation as to whether to have a trial or to dismiss your case by granting the Defendant's Motion for Summary Judgment. Once the Magistrate Judge has filed his *Report & Recommendation* to the Judge you will have only 10 days to file *Objections to the Report & Recommendation.*

10) Delaying your discovery requests when you're on a FastTrack case management docket.

Because you will seldom get the defendants to comply voluntarily with your discovery requests in a timely manner you must leave yourself enough time to file Motions to Compel. Because prisoner cases are frequently assigned to fast track case management dockets you will run out of time *before* the defendants run out of excuses. Most Judges are complicit in this shoddy practice and second-rate justice for prisoners. *Serve* your requests for Production and Interrogatories *with* the Complaint/Summons. (Check Local Rules for your Federal District Court – some Courts will want you to wait 30 days after service before allowing discovery).

11) Not taking the time to type your Complaint and pleadings.

Devote as much time to your complaint as you want the Judge to devote to your complaint. Handwritten *legible* complaints are permitted but typewritten is more professional.

12) *Mis*handling Summary Judgment Motions.

More lawsuits are lost at this stage than at any other point in the progress of a case. Read Fed.Rule Civil Procedure 56 and also 12(b). Summary Judgment is a fast and dirty way of managing the overwhelming caseloads of the courts where a trial is not needed. *"Trial by Summary Judgment"* tactics are frequently used (abused) by courts wanting to quickly dispose of prisoner cases clogging their dockets even where a trial on the merits is warranted. Summary Judgment is premature when discovery is incomplete and is *not* proper where there are material fact questions and proof issues to be tried. A classic swearing contest between witnesses, for example, cannot be resolved on the pleadings and *should* warrant a trial. Be sure to read several dozen summary judgment cases in the law books before venturing into this territory. The defendants will probably file a Motion for Summary Judgment based upon a claim of Qualified Immunity (good faith immunity). Be ready for this. The defendants may take an Interlocutory Appeal from an adverse decision on the qualified immunity question. Plaintiffs may also ask for Summary Judgment or Partial Summary Judgment whenever they feel that there are no issues to be tried and the pleadings support their claim. Be sure to support your Plaintiff's response to Defendant's Summary Judgment Motion with necessary affidavits. Be wary of the court *converting* the defendant's pleadings into a Summary Judgment proceeding on their own initiative.

13) Get your medical records *before* initiating a suit.

14) Request your Theory of Defense Jury Instructions *before* your trial date.

15) Do your background searches on the Defendants *before* your trial date to locate prior bad acts, disciplinary problems, past lawsuits and internal affairs investigations.

Florida Prisoners' Legal Aid Organization Inc.

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YES ! I wish to become a member of Florida Prisoners' Legal Aid Organization, Inc.

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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.

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