FLORIDA PRISON LEGAL

Perspectives

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Florida Adopts Automatic Restoration of Civil Rights For Most Ex-offenders

by Teresa Burns Posey

After enduring years of lawsuits and growing criticism, on April 5, 2007, Florida became the 48th state to, at least in part, allow the automatic restoration of civil rights for ex-felons after they complete their sentence.

Living up to a campaign promise, Florida's new governor, Charlie Crist, persuaded the state's clemency board, made up of the governor and three Cabinet members, to change the clemency rules to let most convicted felons easily regain their civil rights, to vote, serve on a jury, and obtain state issued licenses, after completion of their sentences.

Gov. Crist, in announcing the change, said it was time for Florida to "leave the offensive ranks" of states that uniformly deny ex-offenders such rights. For years, Florida has been one of only three states (including Kentucky and Virginia) that did not automatically restore ex-felons' voting rights.

After some compromises, Crist got two of his three colleagues who make up the Board of Executive Clemency to approve a new policy that allows most Florida ex-felons to automatically regain their rights after serving their sentence and paying any court-ordered restitution.

The change, while not as drastic as Gov. Crist said he wanted, is a major step for Florida, which bans more people from voting than any other state. Gov. Crist initially wanted the automatic restoration to apply to all ex-felons except those convicted of murder or sex crimes. However, two other Republican members of the clemency board rejected that proposal. Under the approved compromise, convicted murderers, and people classified as sexual predators and violent career criminals will still have to go through a protracted process and have their rights specifically restored by the clemency board before they can regain the right to vote. Florida's new attorney general, Bill McCollum, a Republican, was the only board member who did not want any change.

"I did it because it's the right thing to do," Crist said. "Political consequences are not a concern of mine. This is absolutely the right thing to do."

Florida has as many as 950,000 disenfranchised ex-felons, more than any other single state. Even though other states have repealed or scaled back similar voting bans in recent years, an estimated five million ex-felons remain barred from the polls nationwide.

Florida's ban, added to the State Constitution during Reconstruction following the war between the states to, in large part, bar blacks from voting, and readopted in 1968, has been the subject of bitter debate since the 2000 presidential election. A number of legal voters were removed from the state's voter rolls that year (and barred from voting) after being "misidentified" as felons, contributing to giving President Bush a razor-thin victory margin.

ON THE INSIDE

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Parole Commission Roadblock

Until now in Florida, most felons whose sentences had been completed had to go through a years-long review and waiting period in order to have their civil rights restored. The major roadblock in the process was the largely dysfunctional Florida Parole Commission, which was tasked at its own request with conducting the investigation part of the process for the clemency board which made the final restoration decision. The Parole Commission had lobbied to get the job of conducting the investigations after parole-eligible sentencing was essentially abolished in Florida in 1983 in favor of guideline sentencing so that the Commission could continue to exist. However, typically it takes the Commission years to conduct such investigation, leading to a huge backlog.

Under the new process adopted by the clemency board, the roughly 80 percent of ex-felons whose crimes were not violent have their rights automatically restored, so long as they have paid any restitution and have no other pending criminal charges. The remainder of the case files involve varying degrees of violent crimes, 15 percent of which will still be subject to "mid-level" scrutiny and 5 percent that involve murder or sex offenses will still be subject to a full background check and who will have to go before a scheduled hearing before the clemency board for a vote on whether to restore their rights. It is unlikely that many of that number will ever have their rights restored.

Mission Not Accomplished

There is a catch to the new restoration process, the 80 percent of ex-felons who are now eligible for automatic restoration still have to apply to receive their rights back. Because of the incompetency of the Parole Commission (which has claimed for years that 60 percent of its time and budget and one-third of its approximately 160 employees has been devoted to clemency investigations), there is an estimated backlog of 30,000 clemency applications pending review. Added to the estimated 950,000 ex-felons who reside in Florida without their civil rights and you have almost 1-million people eligible for (almost) automatic rights restoration.

"It is unclear whether the Department of Corrections has the capacity to identify and locate almost 1-million ex-offenders short of launching a costly public outreach campaign, and it is an open question whether the Parole Commission...has the capacity to administer the additional caseload," said Mark Schlakman, an attorney and program director for the Rethinking Restoration of Civil Rights in Florida project at Florida State University's Center for the Advancement of Human Rights. Schlakman's comments appeared as an editorial in the *St. Petersburg Times* on April 14, where he expressed that the temptation to declare "mission

accomplished" must be resisted, because the job on rights restoration is not complete.

Pointing out the above fact, that it is not clear how Florida intends to locate and restore the rights of almost 1-million ex-felons who are now eligible for restoration upon application under the new process, Schlakman also noted other barriers. The major one being the requirement that makes restitution payment a condition for rights restoration. If an ex-offender can't get a living-wage job because rights restoration is a prerequisite for almost 100 state occupational licenses and various jobs requiring state certification, then it's improbable they can make restitution payments.

Rather than tying rights restoration to satisfaction of restitution, and since crime victims have historically collected little court-ordered restitution anyway, the Legislature should enhance applicable enforcement to facilitate restitution along the lines of legislation enacted years ago to address delinquent child care payment, Schlakman suggests.

Further, Schlakman argues, the Legislature should also implement the Governor's Ex-Offender Task Force's recent recommendations to decouple employment and licensing from rights restoration. It should also prohibit state agencies and boards from imposing such bars without implementing more meaningful criteria for eligibility, taking into account public safety concerns that might be unique to any given job. (*FPLP* previously reported on the Governor's Ex-Offender Task Force in Vol. 13, Iss. 1).

It is clear that more is going to have to be done to make automatic rights restoration meaningful. Unless Florida puts more effort into developing strategies that promote rehabilitation while incarcerated and successful re-entry upon release from prison the state will continue to have one of the highest recidivism rates in the country and the whole rights restoration issue will remain largely meaningless in the big picture. ■

—Commentary—
A Felon's Right to Vote
by Richard Geffken

Florida recently decided to restore voting rights to "some" ex-felons. Only two states remain which do not, but two more important issues remain.

The first is continuing to not allow prisoners to vote while they are imprisoned. That would place a check on overly harsh laws, encourage fairer treatment of prisoners, and states like New Hampshire have never had a problem with it.

The second involves no one having ever explained why a violation of a *state* law should disenfranchise anyone from voting in *federal* elections.

Pleading states' rights may offer some justification for prohibiting state prisoners from voting in state elections. However, no state court sentence ever added that a prisoner could no longer vote in federal elections. No state court has jurisdiction or authority to do such a thing because it is very much a federal matter involving federal rights.

With 2.3 million voters locked up, and many elections decided by slim margins, addressing this issue could have an impact on the world "our" elected officials created when most of us weren't looking. ■

FDOC Opens Meditation Program at Lowell C I

by Melvin Pérez

The Florida DOC has started a meditation program at Lowell CI. Prison officials say that the program is being adopted with the intention of reducing recidivism. Similar programs have helped other prisoners in other states, dropping the typical recidivism rate of 40 percent to 50 percent to as low as 11 percent in one Texas prison.

The adoption of the program at Lowell C I is good news to Kinlock C. Walpole, who is Director of the Gateless Gate Zen Center, a Gainesville-based group that works with prisoners, and to many others that were interested in the program. Director Walpole has worked very hard for years trying to start the program, which involves the following:

- Mindfulness meditation
- Body awareness and relaxation exercises
- Light stretching and body work
- Brief lectures and discussions
- Daily homework

Prisoners will also learn to: manage everyday stress, take responsibility for their well-being, tune into their breath to calm their body and mind, relax and let go of tensions, and develop skills for controlling pain and gaining a new perspective on healing.

Some female prisoners at the Lowell institution say the program has helped them in their daily prison life. "If a crisis comes along, I can let it go on by me, and I don't have to be involved," said Pamela Hartley, 50, of Augusta, GA., who is doing time on a second-degree murder charge. Another prisoner that has taken part in the program is Ann Cochran, 42, of Daytona Beach. When asked about the program she said, "I see now I can help other people learn the things I've learned." She also stated that the program has helped her remain calm in stressful situations. The program is taught by six volunteers that had to undergo intensive training at the University of Massachusetts Medical School's Center for Mindfulness in Medicine, Health Care and Society to be qualified to teach the mediation program.

The Benefits of Meditation

The practice of meditation has many benefits. Among them are lowering levels of distress (negative stress), relaxing one's mind and muscles, the ability to think better, to remain calm in stressful situations, and an overall improvement in your immune system. The benefits depend on the type of mediation one practices. Some types of mediation where breathing techniques are incorporated also help you with your blood circulation, lowers your heart rate, and develops your inner strength. All important factors to overall health.

Meditation, an Ancient Practice

Meditation techniques have been around for centuries, and have been practiced in many cultures. The Chinese have practiced mediation techniques such as Tai-Chi and Chi-Kung from ancient times. The Hindu also have a long history of Yoga. While in a similar manner, the Japanese have a long history in the practice of Zen.

In summary, Florida DOC by opening this meditation program, has given Lowell prisoners an opportunity to benefit from this ancient practice. Hopefully, DOC will see that the program at Lowell is a start in the right direction, and with time other prisoners may want to benefit from this program at other institutions around the State of Florida. ■

FDOC Prison Guard Assaulted

On April 12, 2007, a prison guard at Jefferson Correctional Institution had to be taken to Tallahassee Memorial Hospital after allegedly being beaten by prisoner Steven Gambles.

FDOC spokeswoman Greta Plessinger said that Correctional Office Randall Handley, 57, was hospitalized in "serious" condition after being beaten by Gambles in an "unprovoked attack."

"This wasn't a fight. It was a completely unprovoked attack," said Plessinger. But when questioned further by reporters, Plessinger refused to provide any details on the circumstances that may have lead Gambles, who only had a 5-year sentence and who was scheduled to be released in September of this year, to attack Handley and severely beat him. Plessinger did say no weapon was involved, clarifying earlier erroneous reports that Handley had been stabbed.

Gambles, 42, who was sentenced to 5 years in 2002 on charges out of Palm Beach County for robbery, resisting arrest, and agg. Battery on a LEO, was immediately transferred to Florida State Prison from Jefferson CI. Plessinger said the FDOC was investigating the incident and will hand its findings over to the State Attorney's Office. Criminal charges were expected to be filed against Gambles. Assaulting a Florida prison guard carries a minimum 15-year sentence.

In Oct. 2004, Gambles was accused of assaulting another prisoner at Calhoun CI. Allegedly a guard came by the cell and saw Gambles' 40-yr-old cell mate with blood on his face. Plessinger said Gambles allegedly told the guard that the other man didn't fight back when he hit him several times in the head and chest.

FDOC Secretary Jim McDonough and Gov. Charlie Crist visited Handley at the hospital the day after he was admitted.

According to the FDOC, in Fiscal Year 2005-06, there were 551 assaults on guards by prisoners, 19 of whom had to receive outside medical attention. The FDOC did not identify in how many of those alleged assaults prisoners were defending themselves when the "assault" occurred (it is common for prisoners to be charged with assault on guards, when in fact it was the prisoner who was assaulted, in order to justify injuries the prisoner may suffer). The FDOC does not release statistics to the mainstream media on how many reports are made by prisoners each Fiscal Year that they were assaulted by correctional staff. ■

Prison Legal News Loses Lawsuit Appeal Against FDOC

In 2004 Prison Legal News, (PLN), a national monthly magazine, filed a federal lawsuit against the secretary of the Florida Department of Corrections (FDOC) and several Florida prison wardens for prohibiting prisoners from receiving the magazine, and for taking disciplinary action against a Florida prisoner who received compensation for writing articles for publication in PLN. The lawsuit alleged that FDOC officials had violated PLN's First Amendment rights by refusing to allow prisoners to receive the publication because it contains advertisement for companies that offer reduced-fee telephone calling services to prisoners' families and by punishing the prisoner who wrote articles for PLN. (Previously reported on a *FPLP* Vol. 10, Issues 1 and 6).

After a bench trial in 2005, the federal district court ruled against PLN, essentially holding the PLN had not suffered any significant injury under the First Amendment for the censorship of the publication sent to prisoners, and will suffer no future injury, because FDOC changed its rules to allow prisoners to receive publications containing advertisements "incidental" to the publication. Further, the court held that no constitutional injury was suffered by punishment of PLN's prisoner writer, David Reutter, because the FDOC had shown that prisoners "do not have a constitutional right to earn a living by conducting business with the outside world, and that includes selling articles for publication." The court found that FDOC has "valid objectives involving prison security" for prohibiting prisoners from engaging in any

type profit-making business while in prison, and that PLN had not shown that it suffered by not compensating the prisoner writer, who continued to have articles published by PLN after being disciplined and having the compensation cut off. (*FPLP*, Vol. 11, Issue 5 & 6, pg. 27; *Prison Legal News v. Crosby, et. al.*, Case No. 3:04-CV-14-J-16TEM (M. D. Fla. 2005.))

PLN appealed the decision of the district court and now, in an *unpublished decision*, the Eleventh Circuit Court of Appeals in Atlanta recently affirmed the lower court's decision. (*Prison Legal News v. McDonough, et. al.*, Case No. 05-14738 (11th Cir. 2006.))

On appeal, PLN raised two issues: (1) whether the FDOC's prohibition against inmates receiving compensation for writing violates PLN's First Amendment rights as a publisher; and (2) whether the district court erred in denying PLN's request for a permanent injunction prohibiting FDOC from impounding PLN's publication based on advertisement content.

The appeal court found that PLN presented no evidence showing the FDOC's "no business" rule had any impact on its ability to publish the magazine, citing *The Pitt News v. Fisher*, 215 F.3d 354, 366 (3d Cir. 2000) (denying injunctive relief because newspaper merely showed that challenged rule negatively impacted its profitability, but failed to show how rule infringed on its First Amendment right), cert. denied, 121 S.Ct. 857 (2001).

The court found that PLN's argument that the rule improperly dissuades inmates from expressing the truth about prison conditions is belied by the fact that Reutter continued to write for publication, despite not having the incentive of compensation. And, wrote the court, PLN has continued to publish on its monthly schedule and Reutter has continued to submit articles for publication, despite his compensation being cut off.

Further, the court determined, that to the *extent* FDOC's "no business" rule infringes on inmates' First Amendment rights, the FDOC has a legitimate penalogical interest in preventing inmates from receiving compensation from outside business activities, citing to *Turner v. Safley*, 91 S.Ct. 2254, 2261, 2263 (1987). In that case the Supreme Court stated that a prison's restriction on First Amendment rights is permissible if it is "reasonably related" to "legitimate penalogical interests" and is not an "exaggerated response" to such objectives. FDOC claimed that it had such legitimate interests in prohibiting prisoners from engaging in business, i.e., that the FDOC would become entangled in the business activities; that such business activities would perpetuate fraud, extortion, and disputes among prisoners and the public; that there would be increased administrative costs (to FDOC) associated with increased business activity; and that FDOC would not be able to effectively control prisoners' interactions. The district court had stated that it was "not willing to override these legitimate penalogical concerns." The appeal court agreed and affirmed the decision of the district court on that issue, stating, "the FDOC was free to invoke the rule preventing inmates from receiving compensation from outside business activities in this situation."

As to the second issue raised, the impoundment/rejection of PLN, the appeal court noted that PLN *"does not challenge FDOC's rules and procedures for impounding and reviewing publications on their face."* Rather, the court wrote, PLN argued that FDOC's practice of impounding publications based on advertisements violated its First Amendment rights and that an injunction was required to prevent further censorship.

The appeal court glaringly avoided addressing whether the past censorship of the magazine violated PLN's rights and instead found that because FDOC had amended its rules after being sued by PLN (to allow prisoners to receive publications containing "incidental" advertisements) that PLN's request for an injunction to prevent future censorship for the same reason was moot. In support the appeal court cited to *Tawwab v. Metz*, 554 F.2d 22, 24 (2d Cir. 1977), and *US v. Concentrated Phosphate Export Ass'n*, 89 S.Ct. 361, 364 (1968). Therefore, the appeal court affirmed the district court's decision on that issue also.

[Note: The Southern Poverty Law Center, The Southern Center for Human Rights, and the Society of Professional Journalists all filed amici curiae briefs on PLN's behalf in the appeal, to no avail.—editor] ■

First DCA Judge Accused of Ethics Violation

On May 3, 2007, Florida's Judicial Qualifications Commission filed an ethics complaint with the Florida Supreme Court against First District Court of Appeal Judge Michael Allen.

The JQC's probable cause complaint indicates that the Commission has reason to believe that Judge Allen may have violated the judicial code of ethics over his suggestion in a published case opinion that a fellow DCA judge violated the public trust by participating in a former Florida Senate president's bribery case appeal although he had a conflict of interest.

Judge Allen's attorney, Bruce Rogow, said he has never heard of an appeal court judge being disciplined in Florida, or anywhere in the United States, over something written in a public court opinion.

Rogow claims that filing the complaint against Allen is an attack on judicial independence. "It really has a chilling effect on appellate judicial independence," Rogow said.

Last year the First DCA upheld the conviction of former Senate President W. D. Childers, 73, which

stemmed from his subsequent service as an Escambia County commissioner.

Childers, who was president of the state Senate in the early 1980s, is currently serving a 3-½ year sentence at the Glades CI Work Camp in Southern Florida for bribing a fellow county commissioner to vote for the county to purchase a defunct soccer complex.

In a concurring opinion to the majority opinion of the appeal court last year, Judge Allen accused fellow District Judge Charles Kahn of misconduct for participating in the appeal because he was a former law partner of Fred Levin, a close friend of Childers. Allen also suggested in his written opinion that Levin has profited in a big way from his friendship with Childers.

The JQC alleged that Allen violated judicial canons by writing comments without regard to the truth based on newspaper articles that were not in the record before the appeal court and that Allen admitted he could not verify.

[Source: *Florida Times-Union*, 5/4/07]

FDOC Revamps Execution Procedure

The botched execution of Angel Diaz on Dec. 13 resulted in all executions being halted in Florida while a commission was created to investigate the state's use of lethal injection. In March the commission released its report and proposed 37 changes to how Florida executes those sentenced to death. During May the Florida Department of Corrections announced that executions could resume shortly under new procedures that adopt the proposals recommended by the commission with some minor modifications.

The changes will include a bigger execution chamber, a narrator to describe the procedure to witnesses as it proceeds, and more training for execution team members.

Diaz's execution lasted 34 minutes, more than twice as long as it was suppose to take. And witnesses reported that he appeared to be writhing in pain, prompting speculation that the chemicals used may cause pain rather than a quiet, painless death. The FDOC, however, claimed that the problem was dislodged IVs, not the chemicals themselves. Under the new procedures the same drugs will be used, although the commission had recommended that they be reevaluated.

Mark Elliott, director of Floridians for Alternatives to the Death Penalty, said no fundamental changes are being made and that the chance for botched executions still exists. "It's trying to fine-tune a flawed procedure," Elliott said.

FDOC Secretary Jim McDonough said that under the new procedures the warden overseeing executions and the execution team itself will no longer come from Florida State Prison where the executions are held. That, he said, will prevent having anyone directly involved in executions who has any prior interaction with those people being executed. ■

- Eight Guards Charged – Torture, Sexual and Physical Abuse Alleged

Arrest warrants were issued May 8, 2007, for eight former Florida Department of Correction's Hendry, Correctional Institution prison guards. The guards had previously been fired over incidents surrounding a prisoner having been beaten and choked unconscious by a gang of guards at the South Florida prison. (See article in *FPLP*, Vol. 13, Iss. 2.) FDOC investigation reports now allege that more than one prisoner was abused and imply that actual torture, sexual and physical abuse of prisoners was common at the prison.

The eight guards charged in the warrants issued by the Fort Myers' State Attorney face a combined 23 state criminal charges, including battery on inmates, failure to report battery on inmates and grand theft.

Those named in the warrants were identified as former sergeants Philip Barger, 30, James Brown, 34, Randy Hazen, 29, William Thiessen, 35, and Stephen Whitney, 33, and former correctional officers Kevin Filipowicz, 24, Ruben Ibarra, 23, and Gabriel Cotilla, 23.

The eight charged had formerly been employed at Hendry CI, a minimum to medium-security, 605-bed men's prison located near Ft. Myers. All of them had been fired in mid-March following an investigation started when another guard, not implicated in any wrongdoing, found and reported fresh bruises on a confinement prisoner's neck.

During a news conference following the issuance of the warrants, FDOC Secretary Jim McDonough described the former prison guards' actions as "improper, illegal, inhuman."

Shades of Abu Ghraib

Invoking visions of the now infamous abuse of Iraqi prisoners by U.S. military personal at Abu Ghraib prison that shocked the world when photographs surfaced exhibiting torture, physical and sexual abuse, the FDOC investigation report on the former Hendry CI guards alleges that similar abuse has been occurring right here at home, in at least one Florida prison.

McDonough said that during the course of investigating the neck bruises on one prisoner other incidents were substantiated by prison investigators and turned over to Ft. Myers State Attorney Steve Russell, whose office then issued the warrants. The other incidents were so bad Secretary McDonough also discussed the department's findings with federal officials because possible federal civil rights violations had occurred at the prison.

"These were heinous acts," said McDonough, a former U.S. Army colonel who was picked last year to run the FDOC by former Gov. Jeb Bush after a string of scandals lead to the former secretary, James Crosby, being forced to resign and later being charged and sentenced to federal prison for corruption. As for the incidents at Hendry CI that are now coming to light, McDonough said, "There was a sadistic level to them."

During the FDOC investigation, several years of reports on use-of-force against prisoners were reviewed. Some guards' names repeatedly showed up in the reports, some more than 50 times.

McDonough said the reports gave investigators a pattern that lead them to interview prisoners who had claimed to have been abused and brutalized by guards in the confinement unit at Hendry CI (those claims had been

dismissed by HCI officials and FDOC grievance personnel when brought to their attention). The reports and interviews resulted in a picture emerging of a group of brutal sadistic guards, said McDonough.

"These were not spontaneous involvements There was deliberate planning," McDonough now says. McDonough had initially claimed that the beating and choking of the prisoner in March that started the investigation was an "isolated incident," a term that his predecessor James Crosby was fond of using to minimize scandals during his tenure as secretary.

FDOC investigation documents and the criminal warrants shed some light on just what has been occurring at Hendry CI. Claims were substantiated that numerous prisoners had been beaten and choked unconscious. Some prisoners had been forced by prison guards to clean toilets with their tongues. In other instances, prisoners were forced to chose between performing sex acts on guards or performing other acts like eating food off the floor like an animal. Often, no matter what choice was made, the prisoners were beat and brutalized by guards.

Although there are video cameras now in most confinement units at Florida prisons, the cameras are usually positioned so that nothing can be seen of what actually goes on inside confinement cells and there are blind spots that the cameras don't cover. Otherwise, there may have been Abu Ghraib-like photos from Hendry CI. To his credit, McDonough has now directed that new policies be implemented requiring all uses-of-force to be videotaped in the prisons.

Same Ol Same Ol ?

The eight former guards turned themselves in on the same day the warrants were issued. They were all released on $1,000 bail. All of the former guards except James Brown were charged with first degree misdemeanors for abusing prisoners while Brown was charged with grand theft. State prosecutors gave no explanation for why the former guards were only charged with misdemeanors, which appears odd considering the FDOC investigation findings.

[Sources: FDOC reports; *Gainesville Sun* 5/9/07 and 5/10/07] ■

Disturbance at Marion CI Sparks Lockdown

The Marion Correctional Institution was locked down May 19 when a prisoner and a prison guard got into a fight and over 100 other prisoners initially refused to return to their housing units.

The incident occurred about 1:45 p.m. on a Saturday on the recreation yard of the 1,200-bed prison for men located near Lowell, Florida. According to sketchy information released by the Department of Corrections, several hundred prisoners were on the rec yard when a prisoner "attacked" a DOC sergeant. Other prisoners may have joined the "attack," said DOC spokesman Randy Cunningham.

Other guards broke up the fight, Cunningham said, but then over 100 prisoners refused to return to their housing. Eventually the prisoners were convinced to go to their housing and the institution was placed on lockdown with limited movement and visiting not allowed on Sunday.

The FDOC refused to identify the guard who was allegedly "attacked," saying only that he had refused hospital treatment, and claiming that the incident was under investigation.

After the investigation is completed, Cunningham said, possible disciplinary action and/or criminal charges could be filed against the prisoners involved.

While the FDOC was unwilling to discuss what may have sparked the incident, Marion CI prisoners claim it was part of growing frustration among prisoners over "controlled movement," which places restrictions on prisoners freedom of movement around the institution. Prisoners report that the prison was locked down for 3 days.

[Sources: *Gainesville Sun*, 5/21/07; Marion CI prisoners] ■

Legislature Denies Compensation For Wrongly Convicted Ex-Prisoner

In mid-May, Alan Crotzer, an ex-prisoner who spent more than 24 years in prison for a double rape he didn't commit was denied compensation. Crotzer petitioned the Legislature to pass two bills. One for his wrongful conviction, and another bill that would help other ex-prisoners that have been wrongly convicted receive compensation. However, the Senate rejected both bills.

Another ex-prisoner who was wrongly convicted of rape, Wilton Dedge, was awarded $2 million in 2005. Crotzer asked the Legislature to award him $1.25 million for the time he spent in prison.

Gov. Charlie Crist pledged his support on the Capitol steps to help Crotzer receive compensation. Despite the fact that the Legislature rejected both bills, the House gave Crotzer a standing ovation.

Twenty-one states provide compensation for ex-prisoners who are wrongly convicted. "So it's time for Florida," Crotzer said.

In 2004 the President approved a law that would allow for people wrongly convicted to receive $50,000 for every year spent in prison. However, when the Legislature left town, Crotzer had not received a penny.■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Before a court may accept a guilty or *nolo contendere* plea, there must be an affirmative showing that the plea was intelligent and voluntary. Ashley v. State, 614 So.2d 486 (Fla. 1993); Boykin v. Alabama, 395 U.S. 238 (1969). For a plea to be knowing and intelligent the defendant must understand the reasonable consequences of the plea. Ashley at 488. In the context of defendants who are not U.S. Citizens, the Florida Rules of Criminal Procedure expressly require trial courts to advise the defendant that a guilty plea may subject him to deportation. Fla. R. Crim. P. 3.172(c)(8). Said notification is mandatory, as the rule states: "this admonition **shall** be given to all defendants in all cases." Id. (emphasis added). Therefore, the lack of advice regarding deportation can invalidate a guilty or nolo contendere plea, thus allowing a defendant to withdraw such a plea if he wishes to do so. Florida courts have held that failure to so inform a defendant about the potential deportation aspect of a criminal conviction requires reversal so as to allow the defendant to withdraw his plea. Sanders v. State, 685 So.2d 1385 (Fla. 4th DCA 1997).

The proper procedural vehicle for attacking a plea on the basis of a violation of Rule 3.172(c)(8) is a Florida Rule of Criminal Procedure 3.850 Motion for Postconviction Relief. Wood v. State, 750 So.2d 592 (1999). In order to obtain postconviction relief based on a violation of the rule requiring a trial court to inform a defendant who is not a United States citizen that his plea of guilty or nolo contendere might subject him to deportation, a defendant must establish that: (1) he did not know the plea might result in deportation; (2) the plea could possibly subject him to deportation; and (3) had he known of the possible consequence, he would not have entered the plea. State v.Green, 944 So.2d 208 (Fla. 2006). In the 3.850 motion, the movant must allege how it will be proven that the necessary deportation warning was not given. Id. at 218.

Rule 3.172(c)(8) is not complied with when the only evidence of a defendant's knowledge regarding possible deportation is found within a preprinted plea form. Hen Lin Lu v. State, 683 So.2d 1110 (Fla. 4th DCA 1996). A trial court must verbally confirm that the defendant read and understood the immigration consequences of his guilty plea. Id.

It is also not sufficient for a trial court to assume that defense counsel would have provided the necessary deportation warnings to the defendant. In Labady v. State, 783 So.2d 275 (Fla. 3d DCA 2001), trial counsel testified that he typically

informed clients of potential deportation proceedings, but did not have an independent recollection of doing so in that case. Id. at 276. The trial court subsequently denied post-conviction relief based upon counsel's indication that he generally went over immigration consequences of a plea. Id. The Third District Court of Appeal found that the trial court abused its discretion in deducing that since counsel typically advised clients of immigration consequences, he must have done so in the case in question. Id. That court further held that: "The court's deduction is, at best, an assumption that the trial attorney did in fact advise his client in this instance that he may face deportation proceedings. We find that an assumption is not enough to comply with the mandate of Rule 3.172(c)(8)." Id. In short, there can be no substitution for the mandated court warning regarding deportation.

As with any other issue raised in a Rule 3.850 motion, allegations of a violation of Rule 3.172(c)(8) are subject to a two-year period of limitations. *See* Rule 3.850(b). The motion to withdraw the plea based upon the lack of a court warning regarding deportation must be brought within two years of either: (1) the time at which the judgment and sentence becomes final; or, (2) for cases which were final prior to October 26, 2006, before October 26, 2008. *See* State v.Green, 944 So.2d 208 (Fla. 2006). *See* Green at 219. Any such motion filed outside of the applicable period of limitations will be denied as untimely. Otherwise, as long as the necessary allegations are made for withdrawal of the plea, based upon a violation of 3.172(c)(8), an evidentiary hearing should be granted so that the movant can put on the necessary evidence to demonstrate that withdrawal of the plea is proper.

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. ■

News Brief

As most of you have probably heard by now, On Tuesday, May 22nd, Secretary James McDonough held a press conference announcing a change to the Department of Correction's mission statement. The DOC's mission statement now includes reentry and reads as such:

To protect the public safety, to ensure the safety of Department personnel, and to provide proper care and supervision of all offenders under our jurisdiction while assisting, as appropriate, their reentry into society.

NEWS IN BRIEF

AK- On May, 25, 2007, indictments were filed against one current and two former Alaska legislators. Rep. Victor Kohring, a Republican from Wasilla, was charged with extortion, bribery, conspiracy, and attempted extortion. Pete Kott of Eagle River and Bruce Weyhrauch of Juneau, both Republicans, pleaded not guilty to four counts of extortion, bribery and wire or mail fraud. The charges stem from an allegation that all accepted bribes, which included cash and a job offer in Barbados for one man, in exchange for their support on legislation favorable to an oil services company.

CT- During the month of May, 2007, Stanley Janiak, 55, an ex-prisoner, was indicted by a federal grand jury for possessing an arsenal in his home. The arsenal included: Machine guns, grenades, bomb making materials, and 10,000 rounds of ammunition. Police officials also found two fake identification cards. One for a state officer and the other for an FBI agent.

FL- A trial has been set for Sept. 4, 2007, in the case of Louis S. Robles, 59, a once high-flying asbestos litigation lawyer. The U.S. District judge rejected a 10 years guilty plea because he was unhappy with the amount of time Robles would serve. Robles has been accused of defrauding nearly 4,400 clients out of $13.5 million.

FL- In mid-May, 2007, Carl E. Graves, 45, an ex-deputy for Brevard County Sheriff's office, was arrested and charged with the sexual assault of a teenage girl. Graves was charged by way of information with 24 counts of sexual battery. The sheriff's office released a statement which indicated that Graves was being held on a $840,000 bond in the Brevard County Jail. The statement also said that Graves would be transferred to the Seminole County Jail so he would not be in the custody of his former colleagues.

FL- Herbert Wade Priester, 37, a Gainesville police officer, turned himself in to authorities on May 3, 2007. The patrol officer has been charged by the State Attorney's Office with aggravated child abuse and criminal neglect. The charges related to an assertion that Priester abused his two month old daughter, which suffered injuries on Jan. 29. A report written by an official with the FDLE states that the injuries appeared to have been caused by a dog, as well as some sort of crushing injuries.

FL- On May 23, 2007, Deputy Sheriff Kevin Carter, 46, an Orange County deputy, was arrested for lying in a sworn deposition. The charges stem from a 2005 drug case where Carter gave false testimony. Carter was charged with perjury and suspended without pay.

FL- on May 21, 2007, County Judge Paul Damico rejected a challenge that placing restrictions on where sex offenders must reside was unconstitutional. The judge found that he had no legal basis to rule that the county ordinance is unconstitutional. The ordinance provides that sex offenders must live at least 2,500 feet from places where children gather in unincorporated areas of Palm Beach County.

FL- An ex-lawmaker was sentenced to 18 months probation on May 24, 2007. Former state Rep. Ralph Arza, 47, must also do 150 hours of community service, complete an anger management program, and seek alcohol abuse counseling. The sentence was as a result of charges filed against him for witness tampering. Arza pleaded guilty to two misdemeanors and felony charges were dropped. Under the plea agreement, Arza will be able to hold office again in 2010.

FL- Luis Diaz Martinez, 69, who spent 26 years in Florida prisons after being wrongfully convicted in a series of rapes in South Florida during the 1970s, filed a federal civil rights lawsuit against Miami-Dade County and the police in March '07. The lawsuit accuses them of falsifying records and other illegal activities in order to convict him. Diaz was released from prison in 2005 after DNA evidence exonerated him in two of the rapes and cast doubt on his involvement in all five cases that he had been convicted in.

IL- Jerry Miller, 48, who had spent 25 years in prison for rape, kidnapping, robbery, and aggravated battery, was exonerated when a Chicago judge ruled that DNA evidence showed he didn't commit the crimes. The New York-based Innocence Project group stated it was the 200th such case. After Judge Diane Cannon cleared him of all charges, Miller smiled and the courtroom cheered.

IN- A riot erupted at New Castle Correctional Facility in Indiana this April. The facility is a private for-profit prison owned by the GEO Group of Florida, formerly known as Wackenhut. Arizona paid GEO $6.1 million to house 1,260 of its state prisoners. Two hundred recent arrivals didn't like the long bus ride in chains, in the cold for which no jackets were provided, and knowing that their families in Arizona could no longer easily visit them. The new arrivals became "defiant" leaving the

chow hall, hooked up with part of the 400 Arizona prisoners already there, and the disturbance quickly spread. Some smashed windows while others took mattresses to the rec field where they were burned to generate warmth. Guards used concussion grenades and tear gas to regain control. Seven prisoners and two guards were hospitalized. One mother with two children, Maria Laurelez, explained to reporters that it cost her $600 just to visit her husband without bringing her children from Arizona to Indiana. Arizona prisoners are given no notice of the transfers. They are awakened and shipped out to other states in the middle of the night. Arizona also ships prisoners to private prisons in Oklahoma and Texas. So far no one has filed on the legal implications of altering the jurisdiction of the detention orders, but that is why California's highest court rejected a plan to ship CA prisoners to private prisons in other states. GEO-operated private prisons have a death rate of one murder for every 400 prisoners. The average for other prisons nationwide is one murder for slightly less than every 22,000 prisoners.

LA- In May, 2007, a former Calcasieu Parish Sheriff deputy was sentenced to 30 years in prison for raping boys who came to his house for sleepovers. The former deputy was also a foster parent and a member of Big Brothers—Big Sisters Program.

NJ- A Superior Court, Judge Stuart L. Peim, vacated charges of rape and murder after a DNA test showed a neighbor may have committed the crimes that Byron Halsey, 46, was charged with. Halsey, who had served more than 20 years in prison, was convicted in 1988 of murdering and sexually assaulting the two children of his girlfriend. While the court vacated the verdict, the case has been set for a new trial.

OH- During the second week of May, 2007, a prisoner convicted of killing his cellmate was executed after an hour delay. Christopher Newton, 37, who weighed 265 pounds was stuck at least 10 times with needles in an effort to place the shunts used for the lethal chemicals. Medical staff struggled to find suitable veins because of his weight.

SC- Michael Sheedy, 59, the head of security over the state prison system, resigned during the last week of May, 2007. His resignation came in the middle of a state investigation which is looking into allegations that employees in his agency used work computers to share pornography. The state investigators have not released any of their findings.

TN- A state trooper was suspended on May 22, 2007, pending investigation for taking sex for bribe. The incident took place while the trooper stopped a porn star and found drugs in her car. The trooper let the drug charges slide in exchange for oral sex. The porn star stated that the trooper's own video images of the roadside tryst support her allegations.

VA- In May, 2007, Dwayne Sheffield, a former police chief resigned and former Sgt. Brian Doss was fired. This came after a Smyth County grand jury indicted the two on rape charges involving a 17-year-old girl. The two former officials are accused of assaulting the 17-year-old girl during a Halloween haunted house fundraiser for sexual-assault victims. ■

FPLP: It has been a while since I wrote to you. Because of the misrepresentations made by several of the politically correct spin doctors who provide the yellow journalism to many of our Florida newspapers, I must clarify what took place at Marion in May. It was not a riot. It was caused when the colonel instituted strict controlled movement at this medium/minimum security camp full of errors and without having worked out the details.... and then dumps it on her staff by going on vacation the day it is to start. By not having enough staff in place to allow us to enter the rec field, one staff member attempting to maintain the orders given him put his hands on an inmate and received a few hands and feet put right back on him. The other officer took off out of there. No rioting, no out of control mob. We just went to rec. For that 41 or so got shipped at 1 a.m. by a 24 or so man goon squad team. Unfortunately 39 of those inmates were not involved. Some turned around and went back to their dorms. Some were at the multipurpose building. Some were at the visiting park. But the real kicker is, all have received DR's written by the same female sergeant and she wasn't even present. Also according to the grapevine, credit & thanks need to go to those gals at Lowell who stood up to the control movement there. We are told you stood tall and won. BP AKA GM MCI

FPLP: For conditions of confinement in the in-patient mental health unit at Broward CI I am using 64E-26 FAC rules that were obtained and printed in your August 2006 issue with Osterback article. I would not be surprised if it is the first case filed on 64E-26 rules since they were reinstated in August after 10 years of the illegal repeal of them in 1996. I am grateful to Mark Osterback for his hard persistence in court and for your publication of the article and the rules. I have been threatened with DR's and shipping by upper management at this institution. There seems to be some support from central FDOC though. I do not think they have really been aware of the extent of unsanitary conditions at BCI. It is more than this unit and the law clerks have helped me and the other inmates are hoping it will set some precedence and give the inmates at BCI some chance for relief. CJ BCI

Dear Mrs. Teresa Burns Posey: I have been subscribing since the birth of FPLP. Yet I have not seen much help for prisoners like myself, 85% of the Florida prisoners are guideline sentenced. Pre-1983 lifers eligible for parole, as are capitol life sentence up till 1995 eligible for parole. However prisoners with life sentences from 1983 to 1995 pursuant sentencing guidelines and still in prison (2007). I would like to see FPLP lobby for us too. Majority of us lifers are in prison for non-capitol offenses. Yet we are imprisoned until death. If the Parole Board is abolished and capitol felony offenses under parole eligibility sentences reduced to a number of years, should not the lesser felonies also have their life sentences under the guidelines also be reduced to a number of years. I'd like to see more on this in FPLP. Thank you from a long standing member. KB UCI

Dear FPLP: I want you to know of my experience at ZCI regarding serious illness with Staphylococcus Aureus (MRSA). Medical at ZCI are treating MRSA cases with sarcoptes scabiei treatment which involves packing your property and storing it in the property room; removing you from your cell and job (so you have to go back to ICT) all for a 12 hour treatment in confinement. Dr. Robinson at ZCI treated me as such I went back to Medical and got Dr. Triado when I had sores all over my body. He did a skin graft and put me on antibiotics for 1 week of cipro, 2 weeks of septfla. There was no follow up. At the time I knew little about staph infection. I've now educated myself on it and know that because of the extent of infection when I first was complaining that I should have been put on antibiotic IV. Two other inmates did contract infection, one I had loaned a pair of shorts to, the other was my cell mate. They were both treated by Dr. Robinson for scabies, and still harbor the infection. 14 weeks of antibiotic treatment I received at ZCI and I saw others at ZCI with the MRSA and they were not being treated properly. This is a very important issue as one of those who caught it from me went home infected and the other was to go home within 90 days. ZCI needs to be exposed as a danger to public health. Transferring me out of the region is not any sane resolution. I am still fighting this infection here, medical here seem far more interested in containing this highly contagious disease, and hopefully it will be eradicated now. The public needs to know what an infectious breeding ground for MRSA ZCI is. They must not be allowed to hide their problem there. FSP ECI

Dear FPLP Staff: I received the Mar/Apr 2007 issue which as usual was excellent and critically informative. Thank you. I especially like the new covers. There's an amazing phenomenon that occurs in this fifty four man wing of a butterfly dorm. When I receive my FPLP and PLN at least six to eight inmates (as distinguished from convicts/prisoners) immediately RUSH me saying something to the effect of "Hey Dog can I check it out?". That immediately inspires me to give them, and all others present my standard "Coward ass inmates" speech about how EVERY person IN THE FDOC AND their families SHOULD subscribe to and support FPLP and PLN. I mean it is only $10 to know what is really going on in the FDOC instead of relaying on the unreliable rumor mongers of inmate.com. WGH MCI
I did have the pleasure of meeting your parents at the Tally Rallies in past years. TBP

Dear FPLP: On March 12, 07, I along with 17 other or fellow inmates were placed in AC confinement pending investigation for alleged gang involvement at Glades CI. The confinement was predicated upon a anonymous request form sent to the institution Warden. On March 14, 07, all 18 inmates were interviewed by the gang sergeant at GCI and concluded that no gang activity occurred nor do any of the 18 inmates listed in the request belong to a gang. The investigative report recommended all said inmates be released back into population. However, all 18 inmates were held in AC confinement for 30 days and transferred to Region One as Internal or Institutional threats. Now this form of transfer has become a practice of GCI in which I feel is unjust. The 18 men that were confined & transferred had no compound relations nor any form of affiliation other than living within the same dorm. I was sent to OCI *and during* my initial interview with classification I was advised of the reason for my transfer. The reasons were I was involved in the following, tax fraud, money, drugs, cell phones, staff relations, etc. No mention of gang activities as initially stated. All of these allegations are complete fabrications to insure transfer status, regardless of the negative impact it may have in reference to the inmates good adjustment file. How can we defend ourselves from being victims of anonymous request and no due process? AP OCI

Dear FPLP: I would like to bring to the readers attention, in the past 10 months, Lowell CI has expanded its population growth to 2600 inmates. With this expansion, the mail intake has drastically increased. However, there are still only two employee's working in the mailroom trying to process mail to inmates. Mail processing consists of opening each letter for inspection. As a result of the increase of inmate's, without an increase of mailroom staff, the inmate's at Lowell are having to wait between 2 to 4 weeks to receive their mail after it arrives at the institution. There are literally box's of mail stored in the mailroom that cannot be distributed to the inmate's because there aren't' enough staff to process it. On the weekend of March 3rd and 4th, the Warden sent a team of officers to go in and process mail that had been stored in box's for up to two months. This was due to an expected (annual) inspection from officials in Tallahassee due to arrive on March 5th. The inmates received box's of mail at the dorms over this weekend, mail dated back to December and January. Now, since Tallahassee inspection ended, its back to only two employee's in the mail room, and inmate's, once again, are not receiving their mail until up to 3 to 4 weeks after its past mark. Several inmates have filed grievances. However, the grievances have mysteriously disappeared. Nobody has received an answer on their grievance, no action is taking place, and we are deprived of receiving our mail within the '48 HOURS' prescribed by chapter 33. Another violation swept under the carpet by DOC. CD LCI

Dear FPLP: I wanted to write you, staff and Glenn Smith to give you all prop's on the article written in your July/Aug 2006 issue on Institutional Transfers. I started my grievance procedure on 11-02-06 and I am now in the Mandamus stage of the process. I filed my Mandamus on 1-10-07 with the 2nd circuit and paid the $280.00 fee on 2-05-07 and received an order of Show Cause on 2-13-07 from Judge Terry P. Lewis stating that he finds this to be a prima facie case for relief and directing the defendant (McDonough) to respond within (60) days. So keep up the good work and thanks to that article I will hopefully be moved back down to the central Florida area soon as to be able to visit with my family. Maybe this letter will inspire others to follow suit. "Thanks again" Without your dedication this would not have been possible. DJ GCI

Letters sent to FPLP may be used in this section. All letters are subject to editing for length and content. Only initials will be used to identify senders and their location. Letters are welcome from all FPLP members. Address letters to: Editor, FPLP, P.O. Box 1511, Christmas, FL 32709.

—Federal Habeas Corpus— Title 28 U.S.C. Sec. 2254 An Introduction

by Dana Meranda

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, commonly known as the "AEDPA," was signed into law by President Clinton on April 24, 1996.

A substantial body of case law generated since the AEDPA's enactment illustrates there has been considerable controversy and splits among the federal courts in their decisions with interpretations and application of various provisions of the AEDPA. The Act has similarly spawned a variety of publications from legal scholars alike. See: Hertz and Liebman, *Federal Habeas Corpus Practice and Procedure* (FHCPP), sec. 2.1 n.2 and sec. 5.2 n.1 (5th ed. 2005).

In the decision of *Lindh v. Murphy*, 117 S.Ct. 2059, 2068 (1997) (one of the first cases in which the high court dealt with the AEDPA) concerning a question of whether new sections of the statute governs pending applications in non-capital cases when the Act was passed, Justice Souter described it as: "In a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."

Title I of the Act, entitled "Habeas Corpus Reform," amended previously existing habeas corpus statutes. Those amendments are vital components that affect both capital and non-capital cases brought by state and federal prisoners.

Significantly, the AEDPA created a new time limitation for filing federal habeas corpus petitions; it converted the issuance of a Certificate of Probable Cause to Certificate of Appealability to appeal the denial of relief; and it placed onerous restrictions on successive petitions, almost to a point of non-existence.

For state prisoners, amendments to Chapter 153 also established a new standard of review and included changes regarding exhaustion of state remedies, the presumption of correctness for state court findings (deference), and the availability of federal evidentiary hearings.

Challenges to various provisions of the AEDPA as violating the Suspension Clause, Due Process Clause, and the Ex Post Facto Clause of the U.S. Constitution have mostly been unsuccessful.

The remainder of this article will mainly discuss the purview of the one-year statute of limitations on seeking federal habeas corpus relief as created by the AEDPA. Future articles will touch on in succession the remaining topics noted above that are affected by the AEDPA.

I. Statute of Limitations

The one-year time period in which state and federal prisoners must file in order to seek extended collateral review as created by the AEDPA introduced a major change in federal habeas corpus practice and procedure as practitioners once knew it. At the surface, it's a procedural matter that must be taken into account and treated seriously. In enacting the AEDPA, Congress imposed for the first time in U.S. history a fixed time limit for collateral criminal challenges in federal court on a judgment of conviction. *Mayle v. Felix*, 125 S.Ct. 2562, 2569 (2005). The only constraint upon the timing of filing the petition was a flexible "prejudicial delay" rule, akin to the equitable doctrine of laches. While exercising a course of unrelenting efforts to obtain federal review, the AEDPA one-year time limitation has caused many cases to progressively gravitate into a stage of fatal disruption.

Where a timeliness problem does in fact exist, there are few exceptions available that qualify to the extent of excusing any untimeliness.

Title 28 U.S.C. sec. 2244 (as amended) provides "Finality of Determination," and subsection (d)(1) states, in pertinent part:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

In reviewing the issue of statutory interpretation involving a federal prisoner, the Eleventh Circuit Court of Appeals (U.S.C.A.), in *Kaufmann v. U.S.*, 282 F.3d 1336, 1339 (11th Cir. 2002), analyzed sec. 2255(1) and sec. 2244(d)(1)(A). The Court reasoned that Congress intended the word "final" to have the same meaning in both provisions and held that: (1) if the prisoner files a timely petition for certiorari, the judgment becomes "final" on the date the (U.S.) Supreme Court issues a decision on the merits or denies certiorari; or (2) the judgment becomes "final" on the date on which defendant's time for filing such a petition expires. See also: *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002).

By contrast, in *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), the 11th Circuit agreed with the Tenth and Fifth Circuits that the 90-day rationale does not extend to the tolling provision of sec. 2244(d)(2) following the denial of state post-conviction proceedings.

In other words, the 90-day time period to file certiorari to the U.S. Supreme Court (S.Ct. Rule 13—Time for Petitioning), translated from sec. 2244(d)(1)(A), applies only after the conclusion of a direct appeal not after conclusion of post-conviction proceedings.

Filing notice with the Florida Supreme Court seeking review of a state appellate court's denial of a motion for post conviction relief does not toll the 1-year limitations period for seeking federal habeas corpus review where the appellate court's order was a Per Curium Affirmed (PCA). *Bismark v. Secy. Dep't. of Corr.*, 171 Fed. Appx. 278 (11th Cir. 2006) (unpublished).

If no direct appeal is sought, the triggering date is the expiration of the time for filing such appeal (Rule 9.110(b), Fla.R.App.P.). See generally: FHCPP, sec. 5.2(b) n. 37 (5th ed. 2005); and *Kapral v. U.S.*, 166 F.3d 565, 577 (3d Cir. 1999), which has been joined by a majority of the circuits. Also, recently the 11th Circuit held that the time during which a habeas petitioner could have sought appeal of denial by a Florida court of his motion to correct sentence (Rule 3.800(a), Fla.R.Crim.P., motion) tolled the one-year limitations period for seeking federal habeas relief under the AEDPA, even though the petitioner did not seek appellate review of the denial. *Cramer v. Secy. Dep't. of Corr.*, 461 F.3d 1380, 1383 (11th Cir. Aug. 28, 2006).

In addition, even though the statute of limitations is an affirmative defense for Respondent, the District Court has discretion to raise, *sua sponte*, the timeliness of a habeas petition. *Jackson v. Dep't. of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002). *Day v. McDonough*, 126 S.Ct. 1675 (Apr. 25, 2006).

It is also noted that courts commonly apply the "prison mailbox rule" in determining whether a habeas petition was timely filed per the AEDPA. *Cramer, supra*, at 1382; and *Washington v. U.S.*, 243 F.3d 1299, 1301 (11th Cir. 2001) (per curium).

Calculations of filing date(s) concerning AEDPA Statute of Limitations are resolved under the principles expressed in Rule 6(a), Fed.R.Civ.P.

(B) the date on which the impediment to file an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

For example, where a prosecutor failed to disclose potentially exculpatory information (evidence) under *Brady v. Maryland*, qualified for sec. 2244(d)(1)(B) category of impediment since petitioner could not have discovered evidence earlier because of government alleged misconduct. *Lewis v. U.S.*, 985 F.Supp. 654, 657 (S. D.W.Va. 1997).

The plain language of the statute makes clear that whatever constitutes an impediment must have prevented a petitioner from timely filing. *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005), (Cert. granted Mar. 27, 2006) 126 S.Ct. 1625 (whether time limitations is tolled during pendency of petition for writ of certiorari from judgment denying post conviction relief), decided 20 Fla.L.Weekly Fed. S85 (Feb. 20, 2007); *Lloyd v. Van Natta*, 296 F.3d 630, 633 (7th Cir. 2002). See also: FHCPP, sec. 5.26 n. 43 (5th ed. 2005).

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;

The date from which the limitation period begins to run under this provision is the date on which the Supreme Court initially recognized the right asserted, *not* from the date on which the right asserted was made retroactively applicable to cases on collateral review. *Dodd v. U.S.*, 125 S.Ct. 2478 (2005), see *Id.* at 2482. And, *Howard v. U.S.*, 374 F.3d 1068, 1076, 1080-81 (11th Cir. 2004).

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The one-year limitation period imposed by the AEDPA would not run until prisoner received exculpatory material begin sought under the Freedom of Information Act (F.O.I.A.). *Edmond v. U.S. Attorney*, 959 F.Supp. 1, 3 (D.D.C. 1997).

Likewise, it has been held that a pro se prisoner, whose claim relied on facts contained in a court decision, was subject to the one-year limitations period running from the "date the opinion became accessible in the prison law library, not the date the opinion was issued." *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000). And see: *Roberts v. State*, 874 So.2d 1255 (Fla. 4th DCA 2004) (finding *Miranda* warning defective); and *FPLP*, Vol. 11, Iss. 2, "Post Conviction Corner," by Loren Rhoten, Esq.

For analyzing "due diligence" requirements of the "new facts" provision, see *Aron v. U.S.*, 291 F.3d 708, 711-15 n. 6 (11th Cir. 2002).

II. Statutory Tolling of Limitations Period

Title 28 U.S.C. sec. 2244(d)(2) tolls the limitations period during the time in which a properly filed state post conviction or other collateral review with respect to the pertinent judgment or claim is pending. The key points of this provision have been defined as:

- *Properly Filed*—An application is properly filed when it is permissible under state law and is in compliance with state (procedural) laws and rules governing the delivery and acceptance of filings, such as the form of document, time limits, court and office in which it must be filed, and requisite filing fee (if applicable). *Artuz v. Bennett*, 121 S.Ct. 361, 363 (2000).

A state post conviction motion that is rejected as untimely was not properly filed. *Pace v. DiGuglielmo*, 125 S.Ct. 1807, 1811 (2005) (glossing over a complicating factor where there is no clear state law on timeliness).

However, the fact that a motion is successive does not render it improperly filed. *Drew v. Dep't. of Corr.*, 297 F.3d 1278, 1284 (11th Cir. 2002).

- *Post Conviction or Other Collateral Review*—See: *Duncan v. Walker*, 121 S.Ct. 2120, 2124 (2001) (analyzing state post conviction or other collateral review).

- *Pending*—Under Rule 3.850, Fla.R.Crim.P., a 2-year time limit is provided to file for post conviction relief following the conclusion of a direct appeal. However, under the AEDPA the Rule 3.850 must be filed within one year from the conclusion of the direct appeal in order to toll the AEDPA limitations period. Otherwise the AEDPA one-year period will have run out (leaving no time to toll) before the post conviction motion is even filed to toll the time. *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000); *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001)

Once the state application for collateral review is properly filed, it remains pending through the resolution of the appeal process. *Carey v. Saffold*, 122 S.Ct. 2131, 2134, 2138 (2002); *Nix v. Dep't. of Corr.*, 393 F.3d 1235, 1237 (11th Cir. 2004); and *Nyland v. Moore*, 216 F.3d 1264, 1366-67 (11th Cir. 2000) (from the time of filing until appellate court's issuance of mandate following denial of rehearing).

- *With Respect to the Pertinent Judgment or Claim*—In *Ford v. Moore*, 296 F.3d 1035, 1040 (11th Cir. 2002) (per curium) the 11th Circuit joined the Seventh and Ninth Circuits in holding that the AEDPA limitations period is tolled regardless of whether a properly filed state post conviction application or other collateral review raises a federally cognizable claim (i.e., pertaining to a Rule 3.800(a), Fla.R.Crim.P., motion).

The 11th Circuit has yet to rule on whether a Rule 3.800(c), Fla.R.Crim.P., Motion for Reduction and Modification of Sentence tolls the one-year AEDPA limitations period. There appears to be split decisions among the Circuit on this particular type of motion tolling the one-year limitation period. *Howard v. Ulibarri*, 457 F.3d 1146 (10th Cir. 2006); Cf. *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001).

On the resurrection of what seems to be time-barred claims tagging along on the coattails of a timely claim, see *Walker v. Crosby*, 341 F.3d 1240, 1245 (11th Cir. 2003). See also: *Rainey v. Sec. F.D.O.C.*, 19 Fla.L.Weekly Fed. C399 (11th Cir. 3/29/06).

III. Equitable Tolling of Limitations Period

It has been determined that the one-year time limit in sec. 2244(d) is not jurisdictional, but is a statue of limitations subject to equitable tolling.

However, equitable tolling is an extraordinary remedy which is typically applied sparingly. *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000).

It is available when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. *Sandvik v. U.S.*, 177 F.3d 1269, 1271 (11th Cir. 1999). *Irwin v. Dep't. of Vet. Affairs*, 111 S.Ct. 453, 458 (1990).

Attorney negligence is not a basis for equitable tolling. *Howell v. Crosby*, 415 F.3d 1250 (11th Cir. 2005); *Helton v. Sec. Dep't. of Corr.*, 259 F.3d 1310, 1313 (11th Cir. 2001). Cf. *Seitzinger v. Reading Hosp. and Med. Ctr.*, 165 F.3d 236 (3d Cir. 1999) (attorney misconduct supports relief from default on statute of limitations).

Equitable tolling may be available if some or all of the delay can be attributed to: judicial actions or omissions, government interference, actions or omissions of defendant's counsel, mental incompetence, lack of notice of the filing deadline. See generally: FHCPP, sec. 5.2b n.66 et. seq. (5th ed. 2005). *Arce v. Garcia*, 400 F.3d 1340, 1349 (11th Cir. 2005) (noting that in order to invoke equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment). And equitable tolling allowed in situations where complainant has been induced or tricked by adversary's misconduct. Irwin, 111 S.Ct. at 458. *Knight v. Schofield*, 292 F.3d 709, 711 (11th Cir. 2002) (not receiving notice of court's final disposition).

Some courts have treated a prisoner's "actual innocence" as a factor to justify equitable tolling. Other courts have reached an equivalent result by the alternative means of reading into AEDPA's statute of limitations a "miscarriage of justice" exception for petitioners who present a "colorable showing of actual innocence." *Wyzykowski v. Dep't. of Corr.*, 226 F.3d 1213, 1218-19 (11th Cir. 2000). *Brown v. Singletary*, 229 F.Supp. 2d 1345 (S. D. Fla. 2002). See also: *FPLP*, Vol. 12, Iss. 1, pgs. 12-13, "Post Conviction Corner," by Loren Rhoten, Esq.

Regarding amendments to add claims under Rule 15, Fed.R.Civ.P., after the expiration of the limitations period, see FHCPP, sec. 5.26, iv. no. 79 et. seq. (5th ed. 2005). *Mayle v. Felix*, 125 S.Ct. 2562 (2005).

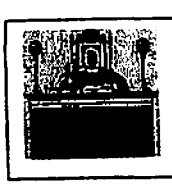
IV. Conclusion

The provisions of sec. 2244(d) are somewhat intertwined, exceedingly narrow, and perhaps only situationally applicable. Therefore, it is imperative to have patience and develop systematic research routines.

The topics discussed herein are not, by any means, exhaustive on conditional mechanisms that the courts may use to resolve AEDPA time limitations issues. This article

is merely intended to point out potential areas of interests, where concentrated case research may prove to be beneficial and to provide a general overview of the critical issue of meeting the time limitations of the AEDPA in seeking federal habeas corpus relief.

[Note: In reference to the discussion of sec. 2244(d)(1)(D) above, for a step-by-step guide to the Freedom of Information Act go to www.aclu.org, ACLU Freedom Network, F.O.I.A. Requests, or write to request a copy from: ACLU, 125 Broad Street, 18th Floor, N.Y., N.Y. 10004. For the Florida equivalent to the federal F.O.I.A. see Chapter 119, Florida Statutes, Public Records Act.] ■



NOTABLE CASES

ANTHONY STUART

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

UNITED STATES COURT OF APPEALS

Mathews v. Crosby, 20 Fla.L.Weekly Fed. C412 (11th Cir. 3/16/07)

Willie Mathews appealed the grant of a summary judgment in favor of James V. Crosby, former warden at FSP, and Tim Giebeig, former inspector at FSP, on grounds that they were immune from suit on the basis of qualified immunity. At the same time, Mathews also appealed the district court's order granting costs and the amount of those costs to Crosby, Giebeig, and other FSP employees who were voluntarily dismissed before trial.

The background of this case is Mathews sued Crosby and Giebeig for violations of his Eighth and Fourteenth Amendment rights, alleging prison guards had repeatedly beat him and that Crosby knew about the general propensity for violence against inmates, but was deliberately indifferent to risk of abuse and serious medical needs of Mathews. Crosby and Giebeig moved for summary judgment, and the district court granted it, finding they could not be held liable for their acts as supervisory officials.

The Eleventh Circuit opined that the district court erred in granting summary judgment in favor of Crosby on grounds of qualified immunity where Mathews had established that Crosby could be held liable as a supervisor for constitutional violations of guards at the prison on basis of supervisory liability under 42 U.S.C. section 1983. It was clearly established at the time of the beatings that the warden, a person charged with directing the governance, discipline, and policy of the prison and enforcing its orders, rules, and regulations, would bear liability under section 1983 predicated on a failure to take reasonable steps in the face of a history of widespread abuse or adoption of custom or policies which resulted in deliberate indifference. Sufficient facts were presented for a jury to find that the guards at the prison committed a constitutional violation and to support supervisory liability under section 1983 against the former warden through a causal connection between his actions and the alleged constitutional deprivations committed by Crosby's subordinates.

It was further opined that the evidence shown, when taken together, was more than adequate to entitle Mathews to proceed to trial and show that inmate abuse at the hands of guards was not an isolated occurrence, but rather occurred with sufficient regularity as to demonstrate a history of widespread abuse at the state prison and that Crosby knew of it. Crosby was on notice of such, in that there was a need to correct or stop the abuse by officers. That same evidence, taken together and viewed in light most favorable to Mathews, was sufficient to allow a jury to consider whether Crosby had established customs and policies that resulted in deliberate indifference to constitutional violations and whether Crosby failed to take reasonable measures to correct the alleged deprivations.

In relation to the costs, it was deemed that the award of prevailing party costs to all parties except Crosby and Giebeig was appropriate where the magistrate judge's report and recommendation went through an extensive analysis of each individual cost and a sound basis for overcoming a strong presumption that a prevailing party is entitled to costs was not presented.

Accordingly, the district court's order granting summary judgment in favor of Crosby was reversed, and in favor of Giebeig was affirmed. The district court's order awarding costs was reversed to Crosby and Giebeig and was affirmed to all other parties.

UNITED STATES DISTRICT COURTS

Nichols v. McDonough, 20 Fla.L.Weekly Fed. D525 (N. D. Fla. 2/16/07)

Jerry Lee Nichols presented an issue pursuant to a petition for writ of habeas corpus regarding a newly discovered "documents" claim that the respondents claimed was untimely.

In pertinent part, the Northern District Court found that Nichols was untimely under 28 U.S.C. section 2244(d)(1)(A), after it noted Nichol's tolling times from conviction (March 7, 2003), direct appeal opinion (February 5, 2004), filing postconviction motion (October 12, 2004), appellate affirmation (February 11, 2005), filing a second postconviction motion (June 9, 2005), appellate affirmation (December 12, 2005), then the Federal Habeas Corpus Petition (March 6, 2006). However, section 2244(d)(1)(D) provides that

the one-year statute of limitations may run, not from the date of finality as the District Court analyzed above, but from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." According to Nichols, he "was not aware" that his attorney's work file contained documents relevant to assisting new grounds for postconviction relief and he "had no way of knowing about the facts and/or the documents" until May 8, 2005.

In *Aron v. United States*, 291 F.3d 708, 711 (11th Cir. 2002), the Eleventh Circuit addressed the analogous one-year limitation in the context of a motion to vacate, and the District Court in Nichols' case opined that it would be appropriate for it to look to Aron for guidance. The one-year limitation period under section 2255(4), is virtually identical to Nichols' habeas period that was at issue, which "begins to run when the facts *could have been* discovered through the exercise of due diligence, not when they were *actually* discovered." *See*: Aron, 291 F.3d at 711. Thus, the "beginning of the one-year period is triggered by a date not necessarily related to a petitioner's actual efforts or actual discovery of the relevant facts." *Id.* The pertinent timeliness inquiry begins with "determining whether the petitioner exercised due diligence because...if he did so, the limitation period would not begin to run before the date he actually discovered the facts supporting the claim." *Id.* "It is only if the petitioner did not exercise due diligence that [the court is] required to speculate about the date on which the facts *could have been* discovered with the exercise of due diligence." *Id.* at 711 n. 1.

After an analysis of Nichols' due diligence, the District Court determined that he failed to exercise due diligence to discover the found documents. As such, it was determined that the Court had to speculate about the date of when the documents could have been discovered with the exercise of due diligence. Subsequently, after its analysis of finding the date speculated to be the time Nichols could have discovered the documents, it found that Nichols petition for writ of habeas corpus to be timely under section 2244(d)(1)(D), and respondent's motion to dismiss should be denied.

Accordingly, in light of the District Court's findings, it was recommended that respondent's motion to dismiss be denied, and Nichols' cause be remanded to the Magistrate Judge for further proceedings.

[Note: Nichols' had been found to have used up 310 days of his one-year time limit.]

SUPREME COURT OF FLORIDA

Galindez v. State, 32 Fla.L.Weekly S89 (Fla. 2/5/07)

Alexander Galindez presented the Florida Supreme Court with a conflict from the decision of the Third District Court of Appeal in *Galindez v. State*, 910 So.2d 284, 285 (Fla. 3d DCA 2005), with the First District in *Isaac v. State*, 911 So.2d 813 (Fla. 1st DCA 2005).

In *Isaac*, the First District opined that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), decided after the defendant's conviction was final, apply to a subsequent resentencing.

The Florida Supreme Court in Galindez's review determined that the harmless error affect applied and as a result, did not give any opinion in regard to the First District's decision in *Isaac*. However, it should be noted that the concurring judge, Cantero, J., gave a lengthy written opinion in Galindez's case regarding the *Isaac* decision.

[Note: The concurring judge's opinion is a must read because it gives a peek at what the Florida Supreme Court "may" decide once a case has reached it to decide on the merits involved regarding the *Isaac* case issue.]

In Re: Standard Jury Instructions In Criminal Cases, 32 Fla.L.Weekly S113 (Fla. 3/29/07)

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases (Committee) filed a report on May 6, 2005, that proposed *amendments* to Standard Jury Instructions in Criminal Cases: 8.6 – Stalking; 8.7(a) – Aggravated Stalking: 8.7(b) – Aggravated Stalking – Injunction Entered; 8.8 – Aggravated Stalking – Victim under 16 Years of Age; 10.15 – Felons Possessing Weapons; 13.2 – Possession of Burglary Tools; and 14.1 – Theft. The Committee also proposed *new* instructions: 11.14 – Dangerous Sexual Felony Offender, and 13.21 – Impairing or Impending Telephone or Power to a Dwelling to Facilitate or Further a Burglary.

After the Supreme Court published the proposals for comments, amendments were made to a few of the proposals and instruction 14.1 was withdrawn. Further, proposal instruction 11.14 was declined by the Supreme Court in authorizing its publication and use, and referred it back to the Committee to address the concerns it had regarding the contents of that proposal.

Otherwise, after the Supreme Court considered all the other proposals and their amendments, authorization for publication and use was granted.

[Note: The amendments and the new instruction can be viewed in Volume 20, Number 13, March 20, 2007, Florida Law Weekly under the Appendix section at S113 through S115.]

In Re: Amendments To Florida Rules Of Criminal Procedure 3.170 And 3.172, 32 Fla.L.Weekly S116 (Fla. 3/29/07)

The Florida Supreme Court, *sua sponte*, amended Florida Rules of Criminal Procedure 3.170 and 3.172 on an emergency basis to ensure consistency between the rules and section 925.12, Florida Statutes (2006). See: *Amendments to Fla. Rules of Crim. Pro. 3.170 and 3.172*, 938 So.2d 978 (Fla. 2006).

The deadline date under the rules governing DNA testing, Florida Rule of Criminal Procedure 3.853, has been extended a few times, and then prior to the last published deadline date, October 1, 2005, the Criminal Procedure Rules Committee (Committee) filed an emergency report that recommended eliminating the deadline altogether. In order to give the Supreme Court time to consider the report and to seek and consider comments, on September 29, 2005, an order was issued amending rule 3.853(d) on an interim basis, which extended the deadline date to July 1, 2006. While the Legislature considered the matter, the Supreme Court had held the committee's report in abeyance pending legislative action.

Subsequently, the Legislature enacted chapter 925, Florida Statutes (2006). The Supreme Court then responded by amending the corresponding rules. First, the Amendment removed the deadline for filing postconviction DNA motions, and the Supreme Court responded by adopting the Committee's proposed amendment to rule 3.853(d). *See*: *Amendments to Fla.R.Crim.P. 3.853(d)*, 938 So.2d 977 (Fla. 2006) (hereinafter Amendments I). Second, the amendment provided that courts should inquire into the existence of DNA evidence before accepting a plea of guilty or nolo contendere to a felony, and the Supreme Court responded by *sua sponte* adopting emergency amendments to rules 3.170 and 3.172. *See*: *Amendments to Fla.R.Crim.P. 3.170 and 3.172*, 938 So.2d 978 (Fla. 2006) (hereinafter Amendments II). The emergency amendments to those rules were published for comment on October 15, 2006.

Subsequent to the publishing for comment, the Committee pointed out that the emergency amendments to those rules were not necessary in light of the Committee's proposed amendments.

After a brief analysis of some concerns in the amendments and a few corrections completed in both Amendments I and Amendments II, the Florida Supreme Court adopted the Committee's amendments. The amendments became effective immediately.

[Note: The above mentioned amendments can be viewed in Volume 20, Number 13, of the March 30, 2007 Florida Law Weekly under the Appendix section at S117 through S118.]

DISTRICT COURTS OF APPEAL

Turner v. McDonough, 32 Fla.L.Weekly D450 (Fla. 1st DCA 2/14/07)

Dennis Turner sought review of a circuit court's order that denied, in pertinent part, his motion to vacate the lien placed on his inmate trust account from a mandamus petition classified as a collateral criminal proceeding.

The circuit court had refused to vacate the lien against Turner's prison account on two grounds: It found the issue was moot because the lien had been paid in full; and that Turner's reliance on *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003), was misplaced because the mandamus petition involved gain-time lost, not as a result of a disciplinary proceeding, but as a result of a revocation of Turner's probation.

On review, the appellate court pointed out that *Schmidt* does not distinguish between gain-time lost as a result of a disciplinary proceeding and gain-time forfeited for other reasons. The *Schmidt* court made it clear what makes a proceeding a collateral challenge: "It is clear that the Supreme Court has refused to be bound by the variations in terminology used in the various challenges to the computation of an inmate's sentence. Instead, it has looked to the effect the challenged action had on the amount of time an inmate has to actually spend in prison...[T]hus, we conclude that a gain-time challenge is analogous to a collateral challenge to a sentence in a criminal proceeding *because the end result is the same—the inmate's time in prison is directly affected.*" *Id.* at 367 (emphasis supplied).

Consequently, the appellate court in Turner's case opined that if a lien has been erroneously placed on an inmate's account, the inmate is entitled to removal of the lien and reimbursement of the funds that were withdrawn from the account to satisfy the lien. *See: Marquez v. McDonough*, 32 Fla.L.Weekly D192 (Fla. 1st DCA 1/5/07). It was further opined in *Turner* that until and unless the funds are reimbursed, the matter is not moot.

Accordingly, Turner's certiorari petition was granted "insofar as it [sought] relief from the authorized lien." Thus, the lien order was vacated and Turner's case was remanded for entry of an order directing the reimbursement of the funds withdrawn from Turner's prison account pursuant to the lien.

Rollins v. State, 32 Fla.L.Weekly D564 (Fla. 2d DCA 2/23/07)

Tarome Rollins appealed a lower court's order that denied his motion to suppress stemming from offenses that had violated his probation.

In the appeal, Rollins challenged two separate circuit court cases. In one case, he had pled guilty

to possession of cocaine within 1000 feet of a church with intent to sell and the other case where Rollins was found in violation of his probation by committing the above offense and by knowingly being in a place where drugs are unlawfully sold, dispensed, or used. Rollins had filed a motion to suppress in both cases, where he argued that the police did not have probably cause to arrest him for violating his probation, and therefore, the cocaine found during the search incident to that arrest should be suppressed.

The background of this case began when police officers had confronted Rollins in an area known as a high drug area. Rollins volunteered his identification card to one of the officers. While his identification was being checked on a computer, another officer asked Rollins if he could search him, and Rollins declined. Subsequently, the computer check revealed that Rollins was on probation, thereafter Rollins was arrested for violating his probation by being in an area where drugs were unlawfully sold, dispensed, or used. A search of Rollins' person incident to the arrest revealed cocaine found in his front pants' pocket.

The appellate court first pointed to the requirements of Rollins' probation, where it read that he "shall not knowingly visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed, or used." It was noted that at Rollins' suppression hearing, there was no evidence that Rollins knew the area was a place where drugs are unlawfully sold, dispensed, or used. Therefore, it was opined that the officers did not have probable cause to arrest Rollins for violating such condition of his probation, and further, the evidence found during the search incident to that arrest should have been suppressed.

The appellate court also mentioned the United States Supreme Court case in *Samson v. California*, 126 S.Ct. 2193, 2202 (2006), where it opined *Samson* did not apply because that case dealt with a California law that allows officers to search a probationer or parolee at any time without cause, and Florida has no such law.

Accordingly, Rollins' judgment and sentence, as well as the order revoking his probation was reversed and the cause was remanded for further proceedings.

Cole v. State, 32 Fla.L.Weekly D577 (Fla. 1st DCA 2/28/07)

William Chester Cole, a Florida prisoner, sought review of an order that dismissed his mandamus petition that challenged the Department of Corrections' calculation of gain-time credits applied to his sentences.

The lower court that dismissed Cole's petition relied on *Kalway v. Singletary*, 708 So.2d 267 (Fla. 1998), which had held that a petition for extraordinary relief must be filed within 30 days from the time that administrative remedies are exhausted, opining Cole's petition was time barred. It was noted that Cole had previously filed a petition for the same relief in the Leon County Circuit Court, which resulted in a dismissal for lack of jurisdiction on the ground that the relief sought constituted a collateral challenge to his sentence, and as a consequence, the Leon Court concluded that the sentencing court, which wasn't the Leon Court, should entertain the petition.

In the appellate court, it was noted that the dismissal was incorrect. However, because Cole did not appeal the prior dismissal, the lower court dismissed the challenge as untimely.

It was opined though that notwithstanding the dismissal of Cole's action, Cole retained the option to seek relief from judgment via Florida Rule of Civil Procedure 1.540(b) in the Leon County Circuit Court at any time on the ground that the judgment entered was void.

Bean v. State, 32 Fla.L.Weekly D662 (Fla. 4th DCA 3/7/07)

Lee Bean appealed the denial of his rule 3.800(a) motion, where he had claimed that his fifty-year sentence as habitual offender for burglary of dwelling with assault or battery while armed was illegal because the offense was a life felony and not subject to habitualization under the applicable law at the time of offense.

Bean's offense occurred in 1991 and, as the appellate court noted, the offense Bean was convicted of under section 810.02(2), Florida Statues (1991), is a first degree felony. As such, pursuant to section 775.087(1)(a) (use of a weapon), the trial court was obliged to enhance the offense to a life felony and at the time of the offense, life felonies were not subject to habitualization. *See: Thomas v. State*, 831 So.2d 762 (Fla. 4th DCA 2002).

On appeal, the state had agreed that Bean's claim was cognizable, but contended that Bean was not entitled to relief because he failed to attach the required sentencing records to his motion. This argument was rejected and the appellate court explained that in denying a legally sufficient 3.800(a) motion, *the trial court's* failure to attach records refuting the claim is reversible error, and the state cannot cure the error by providing the records to the appellate court.

Then the state suggested to the appellate court that the doctrine of laches should apply, where they pointed out that Bean filed his 3.800(a) motion approximately fourteen years after he was sentenced. Further arguing that laches is sustainable in a criminal case where there has been both a lack of due diligence on the defendant's part in bringing forth the claim and prejudice to the state, citing *Wright v. State*, 711 So.2d 66 (Fla. 3d DCA 1998). The appellate court opined that there was no apparent prejudice

to the state in Bean's case and furthermore, a claim of an illegal sentence is one that can be raised at any time.

Bean's case was reversed and remanded in regard to subject matter mentioned.

Roberts v. Florida Parole Commission, 32 Fla.L.Weekly D681 (Fla. 1st DCA 3/12/07)

Marilyn Roberts sought certiorari review of an order from a circuit court that denied her mandamus petition as being untimely pursuant to the 30-day time limit, imposed by Florida Rule of Appellate Procedure 9.100(c)(4), to file a petition challenging agency action.

In *Johnson v. Florida Parole Commission*, 841 So.2d 615, 617 (Fla. 1st DCA 2003), it was held "that unlike the 30-day limit imposed by Florida Rule of Appellate Procedure 9.100(c)(4), to file a petition challenging an order of the Department of Corrections entered in prisoner disciplinary proceedings, the Florida Supreme Court has not by rule adopted a similar time limit to challenge orders of Florida Parole Commission in parole revocation or presumptive parole release date proceedings." *See also: Spaziano v. Fla. Parole Comm'n*, 31 Fla.L.Weekly D1597 (Fla. 1st DCA 6/9/06) (citing *Johnson, Id.* at 617, for such proposition). The question of timeliness must be raised by the affirmative defense of laches. As such, the circuit court in Roberts' case, without issuing a order to show cause, was found to have departed from the essential requirements of law in denying Roberts' petition as untimely under rule 9.100(c)(4).

Accordingly, Roberts' certiorari petition was granted, and the circuit court's order was quashed, and the case was remanded for further proceedings.

Martin v. Florida Parole Commission, 32 Fla.L.Weekly D686 (Fla. 1st DCA 3/13/07)

Henry L. Martin appealed an order from a circuit court that treated his habeas corpus petition as seeking non-habeas relief and denied the petition as untimely pursuant to Florida Rule of Appellate Procedure 9.100(c)(2).

Martin's claim in his habeas petition was a challenge to the revocation of his conditional release supervision and the consequent incarceration that issued, where custody of the Department of Corrections was still current. The circuit court denied relief, finding that Martin's claim was more properly viewed as seeking certiorari review of the parole commission's revocation order, but was time-barred pursuant to the 30-day limitation established by rule 9.100(c)(2).

In rule 9.100(c)(2), by its plain terms, the rule relates to the review of actions "of agencies, boards, and commissions *of local government*," and was found by the appellate court to be inapplicable to a claim challenging an action of the *state agency*. Thus, Martin's challenge was properly presented and the trial court was found to be in error in converting the petition.

The parole commission, however, suggested that the lower court nonetheless had reached the correct result in light of section 95.11(5)(f), Florida Statues (2006), where a petition must be brought within one year, and contended that regardless of whether Martin's petition was properly filed as a habeas corpus action or a certiorari action, it was time-barred. The Commission cited to *Cooper v. Fla. Parole Comm'n*, 924 So.2d 966 (Fla. 4th DCA 2006), review pending in the Florida Supreme Court, No. SC06-1236 (Fla. 6/21/06).

The appellate court found such reasoning flawed for two reasons. First, the legitimacy of applying section 95.11(5)(f) in the type of situation as Martin's case is questionable in light of *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), where it was held that the legislature was without authority to establish deadlines for asserting claims traditionally remediable through habeas corpus. More to the point, the fundamental characteristic of a habeas claim is an assertion of continued unlawful detention, and the "purpose of a habeas corpus proceeding is to inquire into the legality of the petitioner's present detention." *See: Sneed v. Mayo*, 69 So.2d 653 (Fla. 1954). Because Martin alleged that he continued to be unlawfully detained, his claim was necessarily filed within the one-year time limitation established by the statue.

Accordingly, the trial court's order was reversed and the matter was remanded for further proceedings. Further, the appellate court opined that to the extent *Cooper* held that rule 9.100(c)(2) and section 95.11(5)(f) may operate to bar habeas corpus proceedings that challenges a prisoner's continued confinement due to revocation of post-release supervision by the parole commission, it certified conflict with that decision.

Gibson v. McDonough, 32 Fla.L.Weekly D690 (Fla. 1st DCA 3/13/07)

Richard H. Gibson presented the appellate court with a certiorari petition that challenged a circuit court's order of denial of his mandamus petition and claim that a lien was improperly imposed on his prison account.

The appellate court in Gibson's case denied, without discussion, review of the mandamus denial, but granted review as to the lien placed on his prison account. In doing so, it noted section 57.085, Florida Statutes, enables a trial court to place a lien on an inmate's trust account for *civil filing fees*. However, the Statute does not apply to "collateral criminal proceedings." In *Schmidt v. Crusoe*, 878 So.2d 361, 366 (Fla. 2003), the Florida Supreme Court defined a "collateral criminal

proceeding" as including any action that results in an inmate's prison time being "directly affected."

In Gibson's case the appellate court pointed out that despite the overwhelming lack of merit that was in the mandamus petition argument, if Gibson had been successful in his challenge of the Department of Correction's decision of a disciplinary action, he would have been eligible to receive the gain-time lost due to the infraction. Thus, the appellate court was compelled to conclude that Gibson's mandamus petition was a "collateral criminal proceeding" pursuant to *Schmidt*. *See: Yasir v. McDonough*, 31 Fla.L.Weekly D1459 (Fla. 1st DCA 5/25/06) (citing *Cox v. Crosby*, 31 Fla.L.Weekly D310 (Fla. 1st DCA 1/26/06)).

Accordingly, Gibson's petition was granted in part as to the subject of the lien, where the order imposing it was quashed, and it was ordered that all funds collected from the prison account to be refunded. *However*, the appellate court went further and opined that because of what it perceived to be logical implications of *Schmidt* as illustrated by cases such as Gibson's, it certified the following question to the Florida Supreme Court, as it had in *Cox* and *Yasir*, which was opined to be believed one of great public importance: "Does the holding in *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003), extend to all actions, regardless of their nature, in which, if successful, the complaining party's claim would directly affect his or her time in prison, so to preclude imposition of a lien on the inmate's trust account to recover applicable filing fees?"

Jackson v. State, 32 Fla.L.Weekly D792 (Fla. 2d DCA 3/23/07)

Jessie Jackson Jr. appealed an order that revoked his probation where he claimed, in pertinent part, that he was entitled to relief based on ineffective assistance of trial counsel apparent on the face of the record.

Jackson's probation officer had filed an affidavit of violation alleging that Jackson violated the requirement that he have no contact with the victim in his case directly or indirectly, including through a third person, unless approved by the sentencing court. The victim's testimony contradicted the affidavit allegations. The record that was before the lower court showed the only "contact" between Jackson and the victim occurred when the victim called Jackson to request that Jackson provide financial assistance for the victim's child, which was fathered by Jackson. The revocation of Jackson's probation was predicated on Jackson's admission of the telephone contact.

It was opined that although the telephone contact that was initiated by the victim may have constituted a technical violation, it was not a *willful and substantial violation*. Furthermore, the telephone contact was not alleged as the violation in the affidavit. Thus, it could not be a basis for revocation. *See*: *Soto v. State*, 727 So.2d 1044, 1046 (Fla. 2d DCA 1999); *Butler v. State*, 450 So.2d 1283, 1285 (Fla. 2d DCA 1984).

Therefore, it was found on appeal that Jackson's counsel permitted Jackson to enter an admission to a violation that was uncharged and which, even if charged, would be an insufficient basis for revocation. Further, when Jackson's probation was revoked, his counsel neither offered a contemporaneous objection nor otherwise sought to preserve an objection. As such, it was agreed that counsel's ineffectiveness was apparent on the face of the record. Also, it was decided that it would be a waste of judicial resources to require the lower court to address the issue. *See*: *Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla. 1987).

It was further opined that there was no plausible strategic reason for the course of action that was chosen by Jackson's counsel. The deficiency of counsel's performance and the resulting prejudice to Jackson were manifest. *See*: *Lambert v. State*, 811 So.2d 805, 07 (Fla. 2d DCA 2002); *Holsclaw v. Smith*, 822 F.2d 1041 (11th Cir. 1987).

The order revoking probation was reversed and the case was remanded for further proceedings.

Murphy v. State, 32 Fla.L.Weekly D868 (Fla. 5th DCA 3/30/07)

Eddie Murphy appealed his habitual sentence asserting that the State failed to give him sufficient written notice of its intent to seek habitualization, and that in any event the lower court failed to inquire during the plea colloquy whether he was aware of the consequences of habitualization.

At Murphy's plea and sentencing hearing, Murphy was asked if he had read and understood the plea agreement that he signed, to which Murphy replied in the affirmative. The agreement basically said that there was no dispositional understanding and that Murphy was pleading to a habitual traffic offender charge. It further indicated that if Murphy had two or more prior felonies, he might receive a sentence double the normal five-year sentence for a third-degree felony. No further explanation was given.

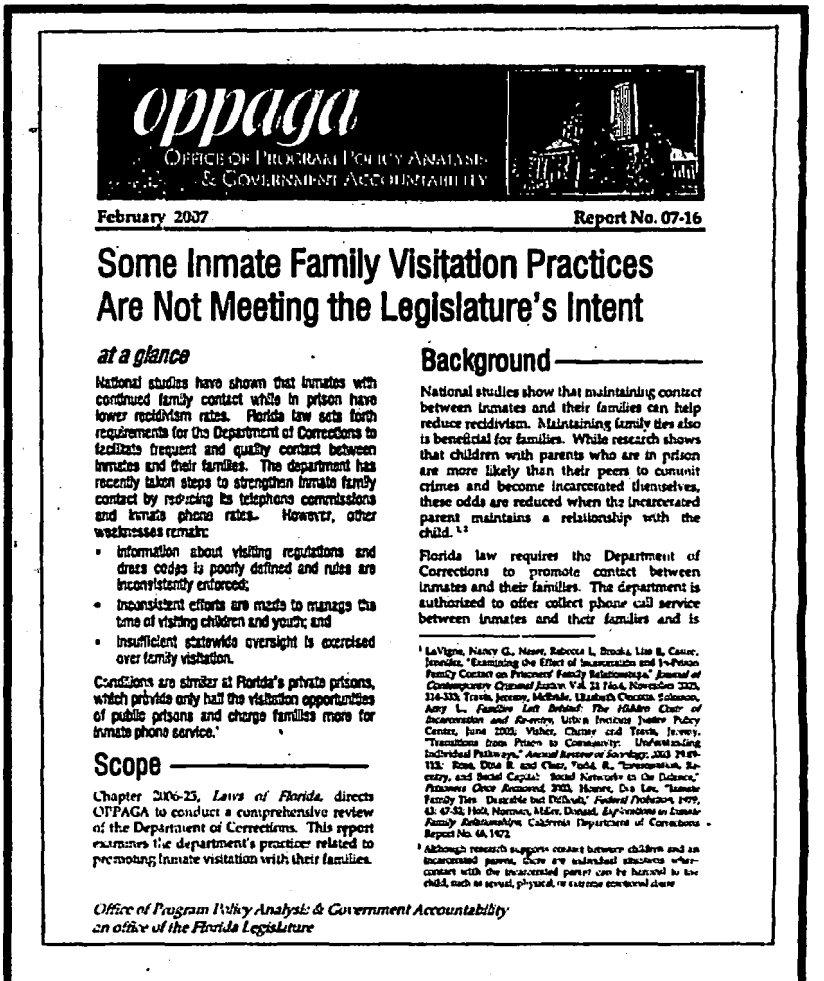
During Murphy's sentencing from his "open" plea agreement, the State pointed out that they had filed a "habitual felony offender notice" in open court that showed numerous prior felony convictions. The lower court sentenced Murphy to 5 years prison, and the court stated: "Furthermore, Mr. Murphy, I'm going to find that you are a habitual felony offender and this 5-year sentence is as a habitual felony offender. Because it is as a habitual felony offender sentence, I could have sentenced you to 10 years, but I don't choose to do that."

On appeal, it was opined that while the lower court is required to

inform a defendant only of the direct consequences of the plea and is under no duty to apprise him or her of any collateral consequence, knowledge that habitualization may affect the possibility of early release through certain programs is considered a direct consequence or one that has a definite, immediate, and largely automatic effect on the range of a defendant's punishment.

In *Ashley v. State*, 614 So.2d 486 (Fla. 1993), the Florida Supreme Court set the requirements of what the lower court is to be informed of in such habitual sought sentences. Further, the lower court should, during the plea colloquy, discuss his or her eligibility for habitualization, as well as the maximum habitual offender term for the charged offense, the fact that habitualization may affect the possibility of early release through programs, and where habitual violent felony offender provisions are implicated, the mandatory minimum term. *See*: *Major v. State*, 814 So.2d 424, 429 (Fla. 2002); *Black v. State*, 698 So.2d 1370 (Fla. 2d DCA 1997).

Consequently, the appellate court determined that the lower court in Murphy's case failed to satisfy the requirements for habitualization. Accordingly, the judgment and sentence was reversed and Murphy's case was remanded for the lower court to allow Murphy the opportunity to withdraw his plea and proceed to trial. However, it was further instructed that if Murphy should plead no contest or guilty, the lower court could, in its discretion, impose a guideline sentence or a habitual offender term provided that the requirements of section 775.084, Florida Statutes and Ashley are met. ■



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Office of Program Policy Analysis & Government Accountability

February 2007 Report No. 07-16

Some Inmate Family Visitation Practices Are Not Meeting the Legislature's Intent

at a glance

National studies have shown that inmates with continued family contact while in prison have lower recidivism rates. Florida law sets forth requirements for the Department of Corrections to facilitate frequent and quality contact between inmates and their families. The department has recently taken steps to strengthen inmate family contact by reducing its telephone commissions and inmate phone rates. However, other weaknesses remain:

- Information about visiting regulations and dress codes is poorly defined and rules are inconsistently enforced;
- Inconsistent efforts are made to manage the time of visiting children and youth; and
- Insufficient statewide oversight is exercised over family visitation.

Conditions are similar at Florida's private prisons, which provide only half the visitation opportunities of public prisons and charge families more for inmate phone service.

Scope

Chapter 2006-25, *Laws of Florida*, directs OPPAGA to conduct a comprehensive review of the Department of Corrections. This report examines the department's practices related to promoting inmate visitation with their families.

Background

National studies show that maintaining contact between inmates and their families can help reduce recidivism. Maintaining family ties also is beneficial for families. While research shows that children with parents who are in prison are more likely than their peers to commit crimes and become incarcerated themselves, these odds are reduced when the incarcerated parent maintains a relationship with the child.[1,2]

Florida law requires the Department of Corrections to promote contact between inmates and their families. The department is authorized to offer collect phone call service between inmates and their families and is

[1] LaVigne, Nancy G., Naser, Rebecca L, Brooks, Lisa E, Castro, Jennifer, "Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships," *Journal of Contemporary Criminal Justice* Vol. 21 No4, November 2005, 314-335; Travis, Jeremy, McBride, Elizabeth Cincinia Solomon, Amy L. *Families Left Behind: The Hidden Costs of Incarceration and Re-entry*, Urban Institute Justice Policy Center, June 2003; Visher, Christy and Travis, Jeremy, "Transitions from Prison to Community: Understanding Individual Pathways," *Annual Review of Sociology*, 2003 29:89-113; Rose, Dina R. and Clear, Todd R., "Incarceration, Re-entry, and Social Capital: Social Networks in the Balance," *Prisoners Once Removed*, 2003, Hooper, Dru Lee, "Inmate Family Ties: Desirable but Difficult," *Federal Probation*, 1979, 43: 47-52; Holt, Norman, Miller, Donald, *Explorations in Inmate-Family Relationships*, California Department of Corrections Report No. 46, 1972.

[2] Although research supports contact between children and an incarcerated parent, there are individual situations where contact with the incarcerated parent can be harmful to the child, such as sexual, physical, or extreme emotional abuse.

Office of Program Policy Analysis & Government Accountability
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Last year Florida Prisoners' Legal Aid Organization was contacted by the Legislature's Office of Program Policy Analysis and Government Accountability (OPPAGA) for assistance on compiling a report concerning the problems faced by families of Florida state prisoners. FPLAO arranged a meeting in Orlando between OPPAGA staff and a group of family members and assisted OPPAGA in setting up other meetings in other parts of the state. The above report is the result of those meetings. While OPPAGA's report did not address all the issues that FPLAO and family members brought to the researchers' attention, the report does address several problem areas experienced by prisoners' visitors.

OPPAGA makes several interesting recommendations to the Department of Corrections to improve maintenance of family of family contact with prisoners in the report and responses from the DOC and Department of Management Services are included in the 12 page report.

A copy of the report (which should be read by all family members) is freely available in print or on the Internet. To obtain a copy contact OPPAGA by telephone (850/488-0021 or 800/531-2477), by FAX (850/487-3804), in person, by mail (OPPAGA Report Production, Claude Pepper Bldg., Room 312, 111 W. Madison St., Tallahassee, FL 32399-1475), or on the Internet (www.oppaga.state.fl.us). ■

Challenging Continued Retention in Close Management

by Melvin Pérez

This article is intended to help prisoners in Close Management (hereinafter CM), challenge their continued CM retention. We know how hard it can be for prisoners trying to challenge their continued CM retention and not have the proper information to do so, or not be able to get the help they need. Whether this is caused by DOC staff or incompetent law clerks that are unable to provide the assistance necessary to pursue such administrative or judicial remedies, it hinders prisoners' ability to seek proper relief. Therefore, in this article, will be discussed both administrative and judicial remedies that can be used in challenging continued CM retention.

Florida Administrative Code (hereinafter F.A.C.), Rule 33-601.800(16)(c)-(d), provides in relevant part that: "When an inmate has not been released to general population and is in any CM status for six (6) months, the classification officer shall interview the inmate and shall prepare a formal assessment and evaluation on the report of CM. If it is determined that no justifiable safety and security issues exists for the inmate to remain in CM, the ICT shall forward their recommendation for release to the SCO for review. For an inmate to remain in CM the ICT shall justify the safety and security issues or circumstances that can only be met by maintaining the inmate at the current level or modifying the inmate to another level of management." We all know that classification officers in CM units are not conducting these *interviews* as required by this rule. The practice is to serve a prisoner his or her CM papers before going in front of the CM board. Further, classification officers have been justifying continued CM retention with general statements on a prisoner's CM papers like: "Based on seriousness of original placement reason and/or inmate's prior adjustment, safety and security concerns exists and continuation of CM is warranted." This general statement does not meet the requirements to justify continued CM retention. It does not justify *what* safety and security issues or circumstances that legitimately exist to keep the prisoner on CM. Prison administrator's bald assertions of security interest will not justify loss of prisoner's fundamental rights. See: *Bradbury v. Wainwright*, 718 F.2d 1538 (11th Cir. 1983). Thus, after this six month period, if there are no legitimate penological reasons to keep a person on CM, he or she must be released to the general population as provided by the aforementioned rule. Since this is in line with *Osterback v. Moore*, Case No. 97-2806-Civ-Huck, Defendant's Revised Offer of Judgment, page 2, which states, "The goals of the department's close management program shall be (1) progressive assignments of each inmate to the least restrictive level necessary and appropriate to manage each inmate and for the least amount of close management time deemed necessary by competent corrections and medical staff to assure the security and order of the institution and public safety, and (2) close management is not punishment." If no legitimate basis is given to justify such continued CM retention, after going before the CM board, and the state classification office (hereinafter SCO) agrees with the recommendation from the institution, the next step would be to pursue administrative remedies.

Administrative Remedies

Prisoners may challenge their continued CM retention by filing a formal grievance to the warden within 15 calendar days from the date that the SCO approved the ICT's recommendation. See: F.A.C., 33-103.001(3)(a). A prisoner that is challenging CM retention does not have to file an informal grievance before filing his or her formal grievance. See: F.A.C., 33-103.005(1). The requirement that the prisoner shall attach a copy of the informal grievance and the response to the informal grievance to his DCI-303 does not apply in such situation. See: F.A.C., 33-103.006(2)(h). Many times a grievance is denied because of the failure to file an informal grievance or failure to attach a copy of the informal grievance and response to the formal grievance filed with the warden. However, this practice is contrary to the rules quoted above, and prisoners should point this out, if the formal grievance is denied for any of these reasons.

A prisoner must allege, among any other reasons, that the Dept. has failed to follow their own rules and that such failure amounted to a denial of due process under Art. I., Sec. 9 of the Fla. Constitution and 14th Amendment of the U.S. Constitution. He or she must point out, that the ICT failed to justify what issues exist for the prisoner to remain in CM, and that the SCO failed to comply with F.A.C., 33-601.800(16)(e), in approving the ICT's recommendation. Sub-section (16)(e) states in relevant part: "For an inmate to remain in close management, the SCO shall determine based on the reports and documentation that there are safety and security issues or circumstances for maintaining the inmate at the current level or at a modified level of management."

The FDOC, instead of releasing prisoners after the first six months at any level of CM, if no legitimate basis exist, has been modifying prisoners to a lower level and keeping them on CM. Most times prisoners stay on the same CM level based on the same reasons as in prior hearings. Not to mention the many bogus disciplinary reports written by DOC staff with the very intention of keeping the prisoner on the same level for another three to six months. And at times upgrading prisoners to a higher CM level.

Rule 33-103.011(3)(b) provides that the formal grievance filed to the warden shall be responded to within twenty (20) calendar days. If no response is received within that time, a prisoner may go to the next step of the grievance process. If this occurs, the prisoner must clearly

indicate this fact when filing at the next step and also state that no extension was agreed to by the prisoner. See: Rule 33-103.011(4).

If the formal grievance is denied, the prisoner has 15 calendar days to file an appeal to the office of the secretary from the date of the denial. He or she *must* attach a copy and response of the denial of his institutional grievance. If the 15th day falls on a weekend or holiday, the due date shall be the next regular work day. See: Rule 33-103.011(5). The first DCA has ruled that the mailbox rule applies to grievances filed by prisoners. See: *Gonzalez v. State*, 604 So.2d 874 (Fla. 1st DCA 1992).

The appeal should argue the response received from the warden, any factors not addressed by Respondent, that mandatory language and substantive predicates in DOC rules and regulations concerning CM create for prisoners a liberty interest in remaining in the general prison population, rather than in CM, that the failure to follow their own rules amounted to a denial of due process, and any other issues that may be present. Remember that you must put in your grievances anything you want the court to consider, if your administrative remedies are denied.

If you don't argue any issue on your grievances, you may not try to raise them in any judicial proceedings. The relief sought, among others, should be the release of the prisoner to the general population. If this fails, there is only one option left, judicial remedies.

Judicial Remedies

A prisoner may pursue judicial relief after he has exhausted all administrative remedies. Even if no response was received from his appeal to the secretary. Rule 33-103.11(4) provides in pertinent part: "If the inmate does not agree to an extension of time at the central office level of review, he shall be entitled to proceed with judicial remedies as he would have exhausted his administrative remedies." Similarly, boilerplate denials of an allegation that DOC declined to address in either the disciplinary proceedings or the administrative grievance process has been held to be insufficient to raise a material issue of fact, and a prisoner's factual allegation in this regard should therefore be deemed to be admitted as true. See: *Pehringer v. McDonough*, 32 Fla.L.Weekly D131 (Fla. 1st DCA Dec. 28, 2006).

The proper vehicle to pursue a claim of this nature is by way of a writ of habeas corpus. See: *Taylor v. Perrin*, 654 So.2d 1019 (Fla. 1st DCA 1995). Habeas corpus affords a prompt judicial determination of the validity of a restraint or detention. See: *Seccia v. Wainwright*, 487 So.2d 1156 (Fla. 1st DCA 1986). This petition must be filed in the circuit court for the county in which the prisoner is detained. See: *Wilder v. State*, 909 So.2d 536 (Fla. 1st DCA 2005), and *Richardon v. State*, 918 So.2d 999 (Fla. 5th DCA 2006).

The subsequent transfer of a prisoner to a different CM institution does not defeat circuit court jurisdiction, if the prisoner was detained within the circuit at the time the petition was filed. See: *Perkins v. State*, 766 So.2d 1173 (Fla. 5th DCA 2000). The jurisdiction of the circuit court to entertain the petition is granted in Florida Statute 79.09 and the power of the court to grant the petition is found in the Florida Constitution, Art. I., Sec. 13.

In order for the court to treat the petition as the proper remedy, the prisoner must allege that he is entitled to immediate release. See: *Campbell v. Florida Parole Comm'n*, 630 So.2d 1210 (Fla. 1st DCA 1994). Since the prisoner is in CM, he must allege that the writ, if granted, would entitle him to immediate release from CM to the general prison population. The failure to allege a right to immediate release will result in the petition being treated as a writ of mandamus. See: *Rowe v. State*, 765 So.2d 94 (Fla. 1st DCA 2000), and *Ashley v. Moore*, 746 So.2d 584 (Fla. 1st DCA 1999). Moreover, the prisoner must allege that he has exhausted all available administrative remedies or it will be considered facially insufficient. See: *Roy v. Dugger*, 592 So.2d 1235 (Fla. 1st DCA 1992).

When filing the petition for writ of habeas corpus, the prisoner must raise grounds of harassment, lack of due process, failure of the Dept. to comply with its own rules regarding CM or any other grounds which would provide a basis to grant his release from CM, provided that these grounds were raised via the administrative process. Failure to raise these grounds will result in the writ being properly denied. See: *Holland v. State*, 791 So.2d 1256 (Fla. 5th DCA 2001). A prisoner must attach as exhibits to his petition a copy of the grievances filed at both the institution, and central office, the responses thereto, and a copy of his CM papers that he receives after the hearing.

Prisoners should note that many courts deny these petitions because the prisoner also fails to allege that his CM placement imposes "a typical and significant hardship on the prisoner in relation to the ordinary incidents of prison life." See: *Sandin v. Conner*, 515 U.S. 472 (1995).

A prisoner has a liberty interest to remain in the general population. On this same issue, the 11th Cir. Court stated, "Mandatory language and substantive predicates in department of corrections rules and regulations concerning administrative segregation and close management create for inmates a liberty interest in remaining in the general prison population, rather than in close management." *Mcqueen v. Tabah*, 839 F.2d 1525 (11th Cir. 1988).

Prisoners, in their petition, should name as Respondent the secretary of the FDOC since the secretary of the FDOC has responsibility for all matters pertaining to the governance and control of prisoners in DOC custody. See: *Plymel v. Moore*, 770 So.2d 242 (Fla. 1st DCA 2000).

Furthermore, such petition should be filed under Rules of Civil Procedure, Rule 1.630(a). Under the aforementioned rule the petition must contain:

(1) the facts on which the plaintiff relies for relief;
(2) a request for the relief sought; and
(3) if desired, argument in support of the petition with citations of authority.

This rule does not set a time period to file such petition. Likewise, no other rule found in either appellate or civil rules of court provides for a time limitation to file such petition. The 30-day time limitation for filing petitions for writ of mandamus challenging disciplinary actions after the denial of the final appeal to the secretary does not apply in filing this petition. See: *Martin v. Florida Parole Commission*, 32 Fla.L.Weekly D686 (Fla. 1st DCA, March 13, 2007). Nevertheless, prisoners should file their petition in a reasonable time after the denial of their last administrative appeal. 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). In *Anderson v. Singletary*, 688 So.2d 462 (Fla. 4th DCA 1997), the court held that a petition for writ of habeas corpus was barred by the doctrine of laches. The original petition must be sent to the clerk of court and a copy served to the general counsel for DOC.

There is no cost for filing this petition, and no requirement to file an affidavit of insolvency along with this petition. See: *Bocharski v. Circuit Court of Second Judicial Circuit*, 552 So.2d 946 (Fla. 1st DCA 1989). So the court can't place a lien on a prisoner's account for filing this petition. In fact, the Florida Constitution, Article I, Section 13, provides that, "The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." Moreover, the trial court clerk must docket a habeas corpus petition without payment of a filing fee. See: *Bradley v. Sturgis*, 541 So.2d 766 (Fla. 5th DCA 1989).

Within a reasonable time after the filing of the petition, the court should issue an order to show cause before entertaining the merits of the prisoner's claims. If the court denies the petition without ordering a show cause order, under certain circumstances this may constitute a departure from the essential requirements of law and the DCA should reverse the lower court's denial. See: *Duncan v. Fla. Parole Commission*, 939 So.2d 176 (Fla. 1st DCA 2006). If a show cause order is issued, the court will usually give the general counsel 20 days to file a response, and the prisoner has 20 days from the date of the response to file a reply to their response. A prisoner does not have to file a reply, if he does not wish to file one. The original must be sent to the court and a copy to the general counsel, if filed.

If the lower court denies the petition, the proper remedy to seek further review would be to file a petition for writ of certiorari in the DCA. Pursuant to Florida Rule of Appellate Procedure 9.030(b)(2)(b), a circuit court order ruling on an administrative action is reviewable in the district court by certiorari. See: *Sheley v. Florida Parole Commission*, 720 So.2d 216, 217 (Fla. 1998) and *McDuffy v. Moore*, 747 So.2d 1003, 1004 (Fla. 2d DCA 1999).

The writ of certiorari should be filed within 30 days from the lower court's denial. See: Rules of Appellate Procedure, Rule 9.100(c). Moreover, the petition must attach an appendix, which shall contain references to the appropriate pages of the supporting appendix. In this case the appendix would be made of the initial petition filed with the lower court, any responses, or replies filed, along with any show cause order, and the final order denying the petition. They should be numbered by letters with an index that refers to each pleading by the proper letter. The original must be filed with the DCA. The appendix does not need to be served on the general counsel since he already has a copy of the lower court pleadings. However, the prisoner should send him a copy of the index to the 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. In *King v. Byrd*, 590 So.2d 2 (Fla. 1st DCA 1991), the district court denied a petition for writ of habeas corpus, in part, because the petitioner had not attached a transcript of the proceedings in the trial court. The appendix must contain the pleadings and other portions of the record that are necessary for a determination of the petition. In *Keene v. Nudera*, 661 So.2d 40 (Fla. 2d DCA 1995), the court dismissed a petition for writ of certiorari in part because the appendix was not sufficient. For more information on preparing the appendix, see Fla.R.App.P. Rule 9.220(b).

When filing the petition in the proper DCA, some courts require that an affidavit of insolvency be filed along with the prisoner's six month bank statement. Some courts like the first DCA will dismiss the petition if this is not filed. Thereafter, the DCA will usually issue an order to show cause giving the general counsel 20 to 30 days to file a response and the same order will advise the prisoner how much time he will have to file a reply, if he wishes to file one. The prisoner is not required to file a reply in this case either.

In addition, when filing pleadings with the courts, some courts impose a page limit. For example, a petition filed under rule 9.100 may not exceed fifty pages. See: Fla.R.App.P. 9.100(g). The response filed by the DOC is subject to the same limits. In the same manner, if a reply is filed by the prisoner under the aforestated rule, it may not exceed fifteen pages. These page limits don't apply to the appendix.

The standard of review for certiorari in the district court is limited to whether the circuit court afforded procedural due process and whether the circuit court

applied the correct law. See: *Combs v. State*, 436 So.2d 93 (Fla. 1983), and *City of Jacksonville Beach v. Marisol*, 706 So.2d 354, 355 (Fla. 1st DCA 1998). Keep this in mind when arguing your certiorari petition, since this is the only thing the DCA will consider.

Hopefully, this article will help those improperly retained on CM successfully challenge their continued retention and provide useful information needed in pursuing both administrative and judicial remedies. ■

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