FLORIDA PRISON LEGAL

Perspectives

VOLUME 13 ISSUE 5/6 ISSN# 1091-8094 SEPT/DEC 2007

Study Says Habeas Review Slower After 1996 "Fast Track" Law

According to a new study published September 3, 2007, in the *National Law Journal*, federal court review of state prisoners' challenges to their convictions and sentences in both non-capital and capital, but especially in capital cases are taking longer to complete, despite a 1996 federal law designed to speed up federal court review of state prisoners' habeas corpus actions. The study was conducted by Vanderbilt University School of Law and the National Center for State Courts.

The two-year study examined almost 2,400 non-capital cases, randomly selected from the more than 36,000 federal habeas corpus cases filed by state prisoners in 2003 and 2004. The study also considered more than 360 death penalty cases from 13 federal districts filed between 2000 and 2002.

The study's findings do not bode well for federal courts that may find themselves squeezed by tough new processing deadlines in states that are certified by the U.S. Department of Justice as qualified for fast-track federal habeas review of capital cases under a 2006 federal law. It further illuminates that nothing in Congress's perverse laws to limit and twist constitutional habeas corpus rights bodes well for justice or the principles upon which our country was founded.

Taking Longer

The study found that the first professed goal of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), to speed up the processing of federal court review of state prisoners' habeas corpus actions, has not been realized.

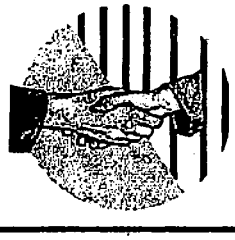
The study found that capital cases that had been completed in federal habeas corpus proceedings are taking twice as long as they did before the AEDPA was passed, being completed on average in 29 rather than 15 months. Not one of the 13 districts completed its capital cases in less than 500 days. Yet, the new processing deadline for federal courts under the 2006 law is 450 days in states certified by the Justice Department.

The average time from start to finish in non-capital cases was found not to be as disparate, with the cases studied taking only 7.1 months to complete compared to the average 6-month pre-AEDPA time. This, however, is in line with the true, second, goal of the AEDPA—making habeas corpus a largely meaningless exercise in futility.

Second Goal Succeeding

The professed second goal of those who pushed for passage of the AEDPA in 1996 was to promote the finality of state court convictions and sentences by the imposition of predicts and severe procedural and time limitations (that are often insurmountable by the average defendant without substantial resources). (See, e.g. article in the last issue of *FPLP*, "The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996," by Thomas C. O'Bryant.)

FAMILIES ADVOCATES PRISONERS



ON THE INSIDE

FLORIDA PRISON LEGAL PERSPECTIVES

P.O. BOX 1511
CHRISTMAS, FLORIDA 32709

Publishing Division of:
FLORIDA PRISONERS' LEGAL AID ORGANIZATION, INC.

A 501 (c) (3) Non-profit Organization

E-mail:
Website:

FPLAO DIRECTORS

Teresa Burns-Posey
Bob Posey, CLA
David W. Bauer, Esq.
Loren D. Rhoton, Esq.

FPLP STAFF

Publisher	Teresa Burns-Posey
Editor	Bob Posey
Research	Sherri Johnson
	Anthony Stuart

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The study found that, particularly in non-capital cases the second goal of the AEDPA appears to be succeeding.

Of 2,384 non-capital cases examined, only seven (7) petitioners won relief in federal courts, a rate of one in every 341 cases filed, more than 3 times lower than the rate of one in every 100 habeas corpus cases filed by state prisoners before AEDPA.

"Prisoners' filings in district courts are staggering and to see only seven get relief out of 2,384, well, you think 'Whoa, what is going on there?'" said Nancy J. King, of Vanderbilt Law School, who lead the study along with Fred Cheesum and Brian Ostrum of the National Center.

"Is it just so many frivolous filings or are more meritorious claims being made and federal courts can't get to them because of AEDPA," King asked. "The story behind the grant rate is still unclear, but it is remarkably low for any set of cases. The odds are very, very low of getting any relief in non-capital cases."

Especially notable, King added, was the study's finding that one in every five of these cases was dismissed because the prisoner missed the Act's filing deadline.

The odds of winning federal habeas relief are better in capital than in non-capital cases, even there, however, the grant rate appears to be lower after AEDPA than before according to the study.

Of 267 capital federal habeas cases filed in 2000, 2001 and 2002, and completed before December 2006, about one in eight were granted relief, or 12.4 percent (13 percent of first-petition terminations), a grant rate 35 times higher than the rate in non-capital cases.

[Editor's Note: It is not the purpose or intent of *FPLP* in reporting such negative information as above to discourage any prisoner from seeking legal relief on any wrongfully imposed conviction or sentence, indeed, such relief should be sought to the fullest. It is our purpose and intent to expose within our means how justice and fairness are being eroded in our country, bit-by-bit, in the name of expediency as more-and-more are incarcerated. At some point there will be an awakening by those who are denied relief and there will be a reckoning.] ■

—Federal Habeas Corpus— Exhaustion of State Remedies Under Title 28 U.S.C. Sec. 2244(b)-(c)

by Dana Meranda

Regarding the exhaustion of State remedies by State prisoners, the AEDPA amended section 104(1), the exhaustion provisions of the Habeas Corpus Statutes.

Title 28 U.S.C. sections 2254(b)-(c) now provides that:

(b)(1) application for a writ of Habeas Corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State;

or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant. (2) An application for writ of Habeas Corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The general rules of exhaustion consist of a number of requirements and exceptions (statutory and non statutory) to exhaust a claim for purposes of federal habeas corpus.

Rule 5(b) of the Rules governing sec. 2254 cases provides the State with the burden of asserting non-exhaustion as a defense.

Following the rule of *Granberry v. Greer*, 107 S.Ct. 1671 (1987) the AEDPA requires any waiver by the State of the exhaustion defense must be express. *Kelly v. Sec'y. Dep't. of Corrections*, 377 F.3d 1317, 1351 (11th Cir. 2004).

Federal Courts should assess the question of waiver on a case by case basis, exercising discretion in deciding whether the administration of justice would be better served by reaching the merits of unexhausted claims or requiring further State Court proceedings before addressing the merits of the claim.

For policies in favor of reaching the merits or otherwise requiring exhaustion, see Hertz and Leibman, *Federal Habeas Corpus Practice and Procedure*, sec. 23.2a, notes 12-21 (5th Ed. 2005).

Once the State pleads the non-exhaustion defense in a proper and timely fashion, or the Court raises the issue of exhaustion (sua sponte), the burden shifts to the petitioner to show exhaustion has been satisfied, or an exception thereof.

If all of the claims in a petition are incapable of justifying relief, the entire "application for a Writ of Habeas Corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State,with respect to one or more of the claims," *Peoples v. Campbell*, 377 F.3d 1208, 1243 (11th Cir. 2004).

Circumstances may counsel that a District Court raise (sua sponte) a procedural bar to relief that the State has waived, such as the exhaustion requirement. *Winck v. England*, 327 F.3d 1296, 1300 (11th Cir. 2003), and *Trent v. Cain*, 118 S.Ct. 478, 480 (1997) (describing Granberry as establishing that appellate court may raise sua sponte petitioner's failure to exhaust State remedies).

Generally, a petitioner satisfies the exhaustion requirement if the claim is properly raised on direct appeal or throughout on complete course of post conviction proceedings.

In order to be exhausted, a federal claim must be "fairly presented" in the State courts, *McNair v. Campbell*, 416 F.3d 1291, 1301-02 (11th Cir. 2005), giving the state courts the "opportunity" to pass upon and correct alleged violations of federal (Constitutional) rights. *Duncan v. Henry*, 115 S.Ct. 887, 888 (1995).

To provide the state with the necessary opportunity, the prisoner must "fairly present" his claim in each appropriate State court (including any discretionary appeals that are an established part of the State's appellate review process). *O'Sullivan v. Boerckel*, 119 S.Ct. 1728, 1732 (1999). See Hertz and Leibman, *Federal Habeas Corpus Practice and Procedure*, sec. 23-3b notes 20-25, discussing the effects *O'Sullivan* may have in requiring additional pleadings such as discretionary appeals and rehearing motions filed out of abundance of caution for exhaustion and default purposes.

While addressing the "fair presentation" requirement in *Baldwin v. Reese*, 124 S.Ct. 1347, 1348 (2004), the Court provided some guidance and explained that a litigant who wishes to raise a federal issue can easily indicate the federal law basis for his claim in state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim federal.

The petitioner must present his claim to the State courts such that they are permitted the opportunity to apply controlling legal principles to the facts bearing upon the constitutional claims. *Picard v. Conner*, 92 S.Ct. 509, 513 (1971).

For example, petitioners may not present particular factual instances of ineffective assistance of counsel in their Federal petitions that were not first presented to the State courts. *Footman v. Singletary*, 978 F.2d 1207, 1212 (11th Cir. 1992).

The federal courts do not demand exact replicas. Habeas petitioners are permitted to clarify the arguments presented to the State courts now on federal review provided that these arguments remained unchanged in substance. *Kelley v. Sec'y. Dep't. of Corr.*, 377 F.3d 1317, 1343-44 (11th Cir. 2004).

The legal basis for the claim urged upon the State courts must be the "substantial equivalent" of those relied upon in the federal petition. See: *Henry v. Dep't. of Corr.*, 197 F.3d 1361, 1367 (11th Cir. 1999) applying the *Picard v. Conner* standard and holding (claim was exhausted notwithstanding differences in framing of claim in federal and State court, because variations were not significant).

Re-exhaustion of a claim may be required if a newly established "federal" ruling changes existing precedent.

A common issue that arises at the post-filing stage is the correlation between the doctrine of exhaustion and the doctrine of independent and adequate State procedural grounds. Both doctrines involve situations in which a failure to present a claim in the State courts bars the federal court from granting habeas corpus relief. The two doctrines are distinct and have different repercussions.

A claim is procedurally defaulted if the State courts clearly denied relief because petitioner failed to comply with a reasonable and even-handedly applied State procedural rule governing "how and when" the claim should have been presented in the State courts.

Such rejection of a claim on procedural grounds would meet the technical requirement for exhaustion but would likely subject the petition to dismissal with prejudice on the basis that the procedural ruling constitutes an independent and adequate State procedural ground barring federal habeas corpus relief. *Coleman v. Thompson*, 111 S.Ct. 2546, 2565 (1991).

When the State court has declined to rely upon a procedural default, the procedural default no longer bars consideration of the issue in federal court. *Peoples*, 377 F.3d at 1235.

In analyzing procedural default, the 11th Circuit has concluded that the procedural requirements of Florida's Rule 3.850 constitute independent and adequate State grounds under the applicable law. *Lecroy v. Sec'y. Dep't. of Corr.*, 421 F.3d 1237, 1260 n.25 (11th Cir. 2005).

The habeas petitioner can avoid the exhaustion requirement only by showing cause for the default and actual prejudice resulting there from, or by establishing a fundamental miscarriage of justice. *Kelley*, 337 F.3d at 1345, citing *Murray v. Carrier*, 106 S.Ct. 2639 (1986); and *Shlup v. Delo*, 115 S.Ct. 851 (1995).

It is difficult to prevail on an exception to the exhaustion requirement because the basis for avoiding the requirement may not necessarily avoid a procedural default.

Every claim in the federal habeas corpus petition must be exhausted. A "mixed petition," i.e., one including both exhausted and unexhausted claims, will generally not be adjudicated by the federal courts and is subject to dismissal without prejudice. *Rhines v. Weber*, 125 S.Ct. 1528, 1532-33 (2005), (endorsing the use of a "stay-and-abeyance procedure").

The above is only a summary of requisites for the exhaustion of State remedies. Therefore, it may be necessary to extend research into specific area on a case-by-case basis. ■

Lawyers Challenge New Law In Florida Supreme Court On Behalf of Indigent Defendants

On September 20, 2007, the Florida Association of Criminal Defense Lawyers filed a challenge with the Florida Supreme Court to block a new law that would set up a second-tier of public attorneys to represent insolvent defendants in criminal cases. The new law also will provide legal representation in child dependency cases.

In criminal cases, the second-tier attorney would only be appointed if there is a conflict of interest and the public defender's office cannot represent the client.

This new law has caused much debate which has lead private attorneys to withdraw their names from pro bono list because the new law places a cap on the compensation attorneys may receive.

The Florida Legislature passed this law in an effort to cut spending due to a current year revenue short fall of $1.1 billion. However, attorneys argue that such law denies the constitutional right defendants have under the Sixth and Fourteenth Amendment of the U.S. Constitution to effective assistance of counsel.

Further, such caps places attorneys in a position of not wanting to represent such defendants because they would not be able to effectively represent a client due to the compensation cap as some cases would require much more money than what the state can compensate an attorney working on a case.■

Former Disabled Attorney Granted Pardon

On September 20, 2007, the state clemency board granted pardon to a former disabled attorney, Richard Paey, 48.

Paey had been convicted for drug trafficking and was serving a 25-year sentence. He had completed almost four years into the 25-year sentence at the time of his release.

A jury convicted Paey because they believed he had forged so many prescriptions and purchased large amounts of pain pills, leading them to believe he was selling them. This was the sole evidence used to convict him at trial.

The Parole Commission had recommended that Paey be denied pardon. However, the clemency board voted unanimously to grant him pardon.

Paey's case made headlines nationwide, which drew several advocacy groups to call for his release. (*FPLP* previously reported on Paey's case.)

Advocacy groups argued that Paey purchased the drugs for constatnt pain he suffered as a result of his disability and that he never purchased such drugs to sell them. The former attorney had multiple sclerosis and used a wheelchair. ■

U.S. Supreme Court Grants Certiorari Review Over Lethal Injection Challenge

The U.S. Supreme Court agreed to hear a challenge into the method of lethal injection during the month of September, 2007. This challenge was filed by two prisoners from Kentucky, Ralph Baze and Thomas Clyde Bowling, Jr.

The prisoners argue that the procedure used in Kentucky to execute prisoners amounts to cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.

This move by the U.S. Supreme Court was a surprise to many. The last acceptance of this issue came in 1879, when the Court found that Utah's use of a firing squad was constitutional. Then in 1972 the Court halted executions. Since executions resumed in 1976, 927 prisoners have been executed by lethal injection.

Similar challenges are pending before the Florida Supreme Court and justices are debating whether to delay executions in Florida until the U.S. Supreme Court addresses the Kentucky cases.

No prisoner has been executed in Florida since the execution of Angel Diaz last year which took 34 minutes.

One Florida prisoner has been scheduled to be executed, Mark Schwab. However, a lawyer representing Schwab said he believes the state should halt executions until the U.S. Supreme Court makes a decision on the Kentucky cases.

[Note: During November the Fla. Supreme Court held that Florida's lethal injection methods are not unconstitutional.] ■

FDOC Disciplines Eight Correctional Officers Over Gay Wedding Ceremony

On October 24, 2007, FDOC announced that disciplinary action had been taken against eight correctional officers for allowing female prisoners to perform, decorate, and participate in a wedding ceremony.

The incident took place at Lowell CI in a close management unit. Officials knew about the incident after receiving information from a prisoner which resulted in an internal investigation.

Investigators reviewed a digital video and seized some evidence from at least one prisoner's cell. The investigation concluded that around 5:15 p.m. prisoners were allowed to go to the day room. While there, they used a bed sheet to clothe a table and a second sheet as a veil for one of the prisoners. Officials also claim that pink paper used in Inmate Request Forms was torn to make bows and paper curls on the table, while paper towels were used for other decorations. Moreover, prisoners also used human hair and dental floss to make rings that the two women exchanged, according to the investigation.

As a result of the investigation six officers were suspended: Kimberly Brown, Shayla Davis, Tina Davis, Jannene Henry, Darian Rhem, and Laurie Vaughn. Also, Sgt. Yelonda Vereen was fired and Sgt. Jennifer Thomas resigned. ■

Blountstown Police Officer Charged With Child Molestation

A Blountstown police officer appeared in court October 3, 2007, officially charged with two counts of unlawful sexual activity with a minor and one count of battery.

According to court documents, Charles Bender, 52, who lived in Marianna but worked in Blountstown as a police officer, forced a teenage girl to perform oral sex on him and put his hand in another girl's bra.

Bender's assaults allegedly took place with teen girls participating in a Police Explorer Program. He was suppose to be mentoring the girls. All the alleged incidents happened in a Blountstown police car. The first report of the incidents emerged September 20 when Blountstown Police Chief Glenn Kimbrel reported it to the Florida Department of Law Enforcement for investigation.

Police officials say Bender has a squeaky clean file. Bender had previously worked with the Florida Department of Corrections as a prison guard. ■

FDOC Guard Charged With Child Molestation

Agents with the Brevard County Sheriff's Office Special Victims Unit arrested William Carlile, 47, on September 29, 2007, in Port St. John. He was charged with 24 counts of sexual battery and 60 counts of lewd and lascivious molestation of a child.

Carlile, at the time of his arrest was a state prison guard employed by the Florida Department of Corrections at Brevard Correctional Institution in Sharpes, FL. He had been employed by the FDOC since 1988, despite the fact that he had a history of domestic violence and a prior arrest for child molestation.

Seven years ago Carlile was arrested on similar charges filed by another child, but the case was eventually dropped by the state. About the same time the Sheriff's Office SWAT team also had a confrontation with Carlile at his home on a domestic abuse call.

Sheriff officials say that Carlile molested his latest victim over a five-year period. ■

FDOC Guard Arrested on Drug Charges

A Florida Department of Corrections guard, who worked at a facility supervised by Polk Correctional Institution, was arrested September 25, 2007, and charged with selling drugs to prisoners.

Kevin Rix, 24, a prison guard since 2005 was employed at the Largo Road prison, which is under the supervision of nearby Polk CI.

According to the Florida Department of Law Enforcement, a three-month investigation by that agency found that Rix provided drugs to prisoners in exchange for cash. The FDOC and the Pinellas County Sheriff's Narcotics Investigation Division also participated in the investigation.

Rix faces charges of unlawful compensation, introducing contraband into a prison and trafficking in cocaine. ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Florida Rule of Criminal Procedure 3.850 prescribes a two-year period of limitation for the filing of most postconviction issues which collaterally attack a judgment and sentence. The period of limitations begins to run when the judgment and sentence is final. There are a few exceptions to the period of limitations spelled out in rule 3.850 (newly discovered evidence, new constitutional case law which is retroactive, and failure of counsel to timely file a motion when retained to do so). There are sometimes (but not often) other issues which may be filed outside of the two year period of limitations. One such claim arises when jurisdiction of the trial court is challenged.

A void judgment may be challenged at any time. Brown v. State, 917 So.2d 272 (Fla. 5th DCA 2005). Assertions challenging subject matter jurisdiction of a court involve claims of fundamental error and can be raised at any time, including for the first time on direct appeal. Booker v. State, 497 So.2d 957, 958 (Fla. 1st DCA 1986). Such issues can also be raised outside of the two-year period imposed by Rule 3.850. A trial court should review the merits of a postconviction motion, even if untimely, which raises a jurisdictional issue that was not previously considered on the merits. Gunn v. State, 947 So.2d 551 (Fla. 4th DCA 2007). There are any number of ways which a court can lack jurisdiction over a case.

In Harrell v. State, 721 So.2d 1185 (Fla. 1998), the defendant entered a guilty plea in the trial court while a petition for writ of prohibition was pending in the district court. Later, well after Harrell's two-year period of limitations had passed, Harrell challenged his judgment and sentence on the basis that the trial court was without jurisdiction to accept his plea and adjudicate him. The challenge was filed as a petition for writ of error coram nobis but was considered as a rule 3.850 motion.

The Harrell court first noted that the petition raised a fundamental defect in Harrell's conviction which, if true, required the conviction to be set aside. Id. at 1186. Next, it was held that the lack of jurisdiction could be raised at any time. *See*, C.W. v. State, 637 So.2d 28, 29 (Fla. 2d DCA 1994); Booker v. State, 497 So.2d 957 (Fla. 1st DCA 1986); Page v. State, 376 So.2d 901, 904 (Fla. 2d DCA 1979); Wesley v. State, 375 So.2d 1093, 1094 (Fla. 3d DCA 1979); Waters v. State, 354 So.2d 1277, 1278 (Fla. 2d DCA 1978). It was further noted that a lack of jurisdiction cannot be cured by consent or waived by entry of a guilty plea.

Akins v. State, 691 So.2d 587 (Fla. 1st DCA 1997); Radford v. State, 360 So.2d 1303 (Fla. 2d DCA 1978). The doctrine of waiver cannot be effective when the court lacks jurisdiction over the case itself. Novaton v. State, 610 So.2d 726, 728 n. 3 (Fla. 3d DCA 1992); *approved on other grounds,* 634 So.2d 607 (Fla.1994).

Another situation where there can be a lack of jurisdiction is where the Office of the Statewide Prosecutor becomes involved. The Statewide prosecutor has the power to prosecute crimes only if they involve two or more judicial circuits and are either part of a related transaction or part of an organized crime conspiracy. Winter v. State, 781 So.2d 1111 (Fla. 1st DCA 2001). Jurisdiction must be apparent from the face of the indictment or information. Id. As a result, the Office of the Statewide Prosecutor must allege its jurisdiction on the face of the information, and any conviction based upon an information which does not properly allege jurisdiction is void. Id. If the Office of the State Prosecutor does not have jurisdiction over a case in which it has filed charges, the trial court does not have jurisdiction to hear the case. Id.

Another situation in which a court could lack jurisdiction is if a county court judge sits as a circuit court judge without being appointed. Thus when a county court judge acts as a circuit court judge, in contravention of an administrative order, or when no administrative order is in place, it does so without proper jurisdiction. Klosenberg v. Rainwater, 410 So.2d 1009 (Fla. 3d DCA 1982). Invalid or non-existent administrative orders render all actions and orders of that judge who is temporarily assigned void. Rowls v. Rowls, 465 So.2d 632 (Fla. 1st DCA 1985).

The above are possible situations where a lack of jurisdiction could arise. These are merely examples of a lack of jurisdiction. If you are outside of the two year period of limitations and cannot satisfy one of the exceptions delineated in Rule 3.850, it is advisable to check into the court's jurisdiction to hear your case in the first place. If the jurisdiction is at issue, the two year period of limitations under Rule 3.850 may not apply to a challenge to the trial court's jurisdiction.

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.

IN THE NEWS

AL- Six state prisoners and the mother of a prisoner found unconscious in his cell have filed a law suit seeking DOC records. DOC officials claim that the records are not open to the public. The records sought concern alleged assaults by correctional officers. The suit was filed on September 20, 2007, after the mysterious death of a prisoner who had been convicted of killing two police officers and who three days after arriving at the prison was found unconscious.

AL- During the fist week of October, 2007, a circuit judge resigned in the middle of an investigation by a state judicial panel. Herman Thomas had been suspended with pay since March when charges were filed against him for unduly helping relatives and friends with legal problems. The panel later added charges of sexual improprieties after Thomas was accused of spanking male prisoners in a private courthouse room.

CA- A report released by a receiver who was to oversee the California prison health care system on September 20, 2007, found that out of 381 prisoner deaths 18 could have been prevented and 48 may have been with proper care. The report also said that 66 prisoners died last year in the state system as a result of poor medical care.

CT- A former prisoner who was beat by prison guards will receive a settlement of $500,000. Robert Joslyn, 32, filed a lawsuit claiming he was beat by guards at the Northern Correctional Institution while serving a 1 ½ year sentence for burglary. The state said it would settle on October 11, 2007.

FL- During the first week of September, 2007, the State Attorney's Office announced that a former captain with the Gainesville Police Dept., Ray Weaver, will not face criminal charges stemming from a sexual-harassment complaint. Weaver retired in the midst of the investigation and surrendered his law enforcement certification. A female officer had accused Weaver of taking pictures of her breast by sticking a camera phone into her shirt. The officer also said that Weaver kissed her on the neck, had her sit on his lap, and masturbated in front of her.

FL- On September 5, 2007, a former Broward County sheriff, Ken Jenne, pleaded guilty to federal tax evasion and mail fraud conspiracy. Jenne resigned one day before entering his plea. A U.S. district judge set a sentencing hearing for Nov. 16, 2007.

FL- Chris Wietzer was hired as a correctional officer in the Alachua County Jail during the first week of September, 2007. Last month, Wietzer resigned as a deputy for the Alachua County Sheriff's Office when he was accused of driving a Sheriff's Office vehicle under the influence of alcohol while off-duty.

FL- A U.S. assistant attorney based in Pensacola tried to hang himself with a sheet in his cell at the Sanilac County Jail in Michigan. Another inmate told jail officials who prevented his suicide. John Atchison, 53, was arrested on September 16, 2007, at the Detroit Metropolitan Airport. The federal prosecutor had flew to Michigan for a sexual encounter with a 5-year-old girl, said authorities. However, when he met with a woman that he thought was the mother of the girl, the woman was a detective working with the sheriff's office. The detective allegedly arranged the whole sexual encounter as part of an internet sex sting operation.

FL- An Ocala police officer was sentenced to two years of sex offender community control and three years of sex offender probation after pleading guilty to soliciting a child via computer. Matthew Wayne Edmonds, 32, was sentenced on September 13, 2007. The child he was soliciting turned out to be an undercover FDLE agent posing as a 14 year old girl. Edmonds, who worked with the Ocala police for 10 years, was also ordered to give up his law enforcement license and register as a sex offender.

FL- On September 18, 2007, Col. Christopher A. Knight, 50, resigned in the midst of an investigation. The investigation concluded that Knight, the head of the Florida Highway Patrol, had been negligent in his duties and falsified records.

FL- On September 21, 2007, Larry Bostic, 51, was released from prison after DNA evidence didn't match evidence found in a rape crime scene. Bostic was convicted of rape and spent more than 19 years in prison for a crime he didn't commit.

FL-Two corrections officers were fired and one resigned on October 8, 2007 after an internal investigation showed they used improper force on a prisoner. The incident took place at the Marion County Jail. The investigation showed that Officer David Tencza kicked the inmate between two-five times without legitimate justification. The other two officers were Beatriz Ayala and Timothy Lemmeyer. Officials say that it's not clear what role that

Officers Ayala and Lemmeyer played.

FL- A police officer who was part of the department's youth outreach program known as the Explorer Club, was fired on October 4, 2007 after being arrested on charges of sexual activity with two underage girls. An FDLE investigation alleged that, Charles Bender, touched one girl underneath her bra and received oral sex from another girl on four different occasions.

FL- Gov. Crist on October 31, 2007, issued an order that calls for the reports prepared by the Parole Commission be provided to prisoners seeking clemency. The ACLU praised the governor's decision to release the confidential reports prepared by the commission.

FL- On November 2, 2007, James Troiano, a captain at the Alachua County Jail, was demoted to lieutenant and reassigned from his post. Authorities say Troiano lacked personal and professional skills to be a productive supervisor. Traiano was another example of Sheriff Darnell's plan to clean the agency since taking office. Other officers have also been reassigned or demoted by Darnell, including the former jail director, the ass. director and the jail director major.

FL- Michael Mazza, 40, escaped while being transported to court on November 7, 2007. Authorities released a statement that a 76-year-old deputy, Paul Rein, was fatally shot with his own gun in Pompano Beach. Mazza was later captured and found with the deputy's gun.

FL- The Florida Supreme Court unanimously held on November 1, 2007, that the state's lethal injection procedure was not unconstitutionally cruel. The Court added that FDOC had taken additional safeguards into the protocol since the execution of Angel Diaz in December, 2006. The next execution was set for Nov. 15, 2007.

FL- Officials at the Alachua County Sheriff's office announced on October 16, 2007, that a settlement was reached in a lawsuit filed on behalf of three female inmates that were raped while at the jail by another inmate. The three females claimed they were raped by Randolph Jackson who received 30 years for charges filed on behalf of two of the three females. The lawsuit against the sheriff's office was settled for 1.25 million.

FL- The Florida Supreme Court dismissed a formal complaint against a judge on October 26, 2007, for unwanted sexual advances filed by one of his law students. The Court dismissed the complaint because Judge James Hauser had retired on the first of October.

FL- A former prisoner who was released from the Gainesville Work Release Center in December, 2006, was arrested on October 25, 2007, for flashing and stalking. An employee at the Court Services Building in Gainesville said that Barry Bernard Adams, 41, exposed himself at least four times. The employee called an officer who also witnessed the incident.

FL- On October 27, 2007, a Miami-Dade undercover police officer was arrested. Authorities arrested Ricardo Toledo on allegations that he took $100,000 from a motorist and let him go.

GA- On September 19, 2007, David Yates, was arrested on rape charges and other charges stemming from the rape; Yates was the police chief. A second police officer was also charged with influencing a witness in Yates case and violation of oath of office.

IL- On October 2, 2007, federal judge sentenced, Erik Johnson, a former Chicago police officer, to six years in federal prison. Johnson was sentenced for taking part in a ring that was ripping off drug dealers. Tears ran down Johnson's face when the judge stated that his corrupt activities had undermined trust in the police department before handing down the sentence. Other officers are still pending charges.

IN- A police officer resigned after being charged with reckless driving and interference with reporting a crime on September 20, 2007. Jason Lyons, 38, crashed a squad car while showing off for three college student females that were riding in his squad car with him.

MT- An internal investigation by the state Corrections Department into employees' email at Montana State Prison found "disgusting" behavior. Some emails contained sexually explicit and racial humor, nudity and other sexual remarks, said the agency. One employee resigned and dozens of others may be disciplined, said officials.

NC- After spending 18 years in prison for child rape, Allen Dail, 39, was cleared of his conviction after new DNA showed he did not commit the crime. Dail was released from prison on August 28, 2007.

NC- Former Roberson County Sheriff Glenn Maynor was charged in mid-September with lying to a grand jury, misapplying federal funds, and allowing deputies to do personal and political work for him on county time. As many as seventeen other former deputies have been charged with charges including money laundering and kidnapping. All seventeen former deputies have pleaded guilty.

OR- Nearly 100 correctional officers across the state began training on the use of tasers equipped with digital

cameras on October 1, 2007. Prison guards say that the devices are to help control a prison population of over 13,500 prisoners.

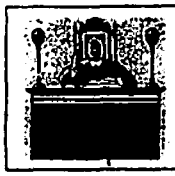
TN- A report released after an investigation conducted by *The Tennessean*, showed that over 150 prisoners who had escaped in the last three decades remain uncaptured. The report was released on September 16, 2007, and showed that out of 48 states that keep track of prisoners who escape, California and New York has the highest number of uncaptured escapes.

TN- Jennifer Hyatte, 33, a former prison nurse was sentenced to life in prison without parole on September 18, 2007. The sentence was handed down for her role in helping her husband escape who was serving a 41-year sentence. The escape took place at the Roane County Courthouse, which ended in a shooting where a correctional officer was killed. Both escaped, but were arrested in Ohio 36 hours later.

TX- Bryan Baldwit, a police detective, was arrested on September 13, 2007, after hitting a man who was dating his ex-wife. Baldwit was off-duty when the incident took place. Baldwit's case is the second in recent months where a city detective was charged with assault.

TX- A death row prisoner scheduled to die was spared in his final hours on September 13, 2007. Joseph Lave had been convicted of two murders. The state attorney found evidence that it's believed was withheld from Lave's trial lawyers. The state said that attorneys from their office misled the court regarding the evidence of a second polygraph test given to Lave's co-defendant. The attorneys no longer work with the State Attorney's Office.

VI- Virgin Islands authorities announced on October 2, 2007, that a 12-year prison guard had been shot and killed. Police say that Davidson James, 37, was killed as he entered the gate outside his home. Investigators say the motive was unclear. ■



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.

Supreme Court Of Florida

In Re: Amendments to Florida Rules of Criminal Procedure 3.790, 32 Fla. L. Weekly S423 (Fla. 7/5/07)

In conjunction with the Florida Supreme Court's request that concerned rules 3.131, Pretrial Release and 3.132, Pretrial Detention, the Criminal Procedure Rules Committee (Committee) filed an out-of-cycle report and proposed amendments to rule 3.790, Probation and Community Control. The proposed amendments implemented provisions of the Jessica Lunsford Act, which became effective September 1, 2005, and which concerns the release of high-risk sexual offenders and predators who are arrested for committing a material violation of probation or community control. See: ch. 2005-28, section 13, at 223-24, Laws of Fla.

While this matter was pending, the Legislature enacted the Anti-Murder Act, which became effective March 12, 2007, and which concerns the release of violent felony offenders of special concern and certain other offenders who are arrested for committing a material violation of probation or community control. See: ch. 2007-2, Laws of Fla. After slight changes were made in the amendments, the Committee proposed that new subdivision (b)(2) of rule 3.790 be reserved for Lunsford Act proceedings and that new subdivision (b)(3) be added for Anti-Murder Act proceedings.

After a review of the amendments the Florida Supreme Court adopted them on an emergency basis. The amendments became effective immediately upon the release of the opinion.

In Re: Standard Jury Instructions In Criminal Cases, 32 Fla. L. Weekly S513 (Fla. 7/12/07)

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases. Those amendments included the following instructions: 8.4- Aggravated Battery; 8.10- Assault on Law Enforcement Officer or Firefighter; 8.11- Battery on Law Enforcement Officer or Firefighter; 8.12- Aggravated Assault on Law Enforcement Officer or Firefighter; 8.13- Aggravated Battery on Law Enforcement Officer or Firefighter; 8.14- Aggravated Battery on Person 65 Years of Age or Older; 11.1- Sexual Battery- Victim Less than 12 Years of Age; 13.1 Burglary; 14.2- Dealing in Stolen Property (Fencing); 14.3- Dealing in Stolen Property (Organizing); and 27.1- Escape.

The Committee also proposed new instructions. Those are listed as follows: 6.3- Attempted Felony Murder; 6.3(a)- Attempted Felony Murder-Injury Caused by Another; 8.4(a)- Aggravated Battery (Pregnant Victim); 10.16- Use of a Firearm While Under the Influence; 13.5(a)- Trespass on School Grounds or Facilities; 13.5(b)- Trespass on School Grounds or Facilities after Warning by Principal or Designee; 20.13- Fraudulent Use or Possession of Personal Identification Information; 20.14- Harassment by Use of Personal Identification Information of a Minor; 20.16- Fraudulent Use of Personal Identification Information of a Minor by a Parent or Guardian; 20.17- Fraudulent Use of Possession of Personal Identification Information Concerning a Deceased Individual; and 20.18- Fraudulent Creation, Use or Possession of Counterfeit Personal Identification Information.

After its review, the Florida Supreme Court declined to authorize proposed new instructions 20.13 and 20.17. Those proposals were referred back to the Committee. Otherwise, all other amendments and new instructions were authorized for publication and use, and became effective when the opinion was final.

[Note: A complete view of these amendments and new instructions can be found in Volume 32, Number 29 of the July 20, 2007, Florida Law Weekly at S514-S523.]

District Courts Of Appeal

Jones v. Fla. Parole Commission, 32 Fla. Law Weekly D1578 (Fla. 1st DCA 6/27/07)

In a prior ruling of Tony Jones' case, *Jones v. Fla. Parole Commission*, 944 So.2d 1244 (Fla. 1st DCA 2006), the appellate court ordered a refund of monies taken from his prison account because his original filings were of a collateral criminal proceeding. Because no monies had been refunded to him, he filed a mandamus petition that asked the appellate court to enforce its mandate from its prior ruling.

In answer to Jones' complaint, the Commission concede that Mr.

Jones' claims were well-taken. Accordingly, Jones' petition was granted, and the lower court was directed to issue an order complying with the original mandate order within 15 days of the issuance of the mandate in the cause before the court.

Rowlie v. Fla. Parole Commission, 32 Fla. L. Weekly D1578 (Fla. 1st DCA 6/27/07)

Thomas Rowlie filed for certiorari review of the lower court's opinion that vacation of the illegal lien placed on his prison account was moot since the filing fee on the collateral criminal proceeding had already been paid in full.

In *Turner v. McDonough*, 949 So.2d 1106, 1107 (Fla. 1st DCA 2007), it was opined that "[i]f a lien is 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. Until and unless the funds are reimbursed, the matter is not moot."

Rowlie's petition was granted as far as the unauthorized lien issue. The lien order was vacated and the lower court was directed to issue an order directing the reimbursement of those funds withdrawn from the account pursuant to the lien.

Hurd v. State, 32 Fla. L. Weekly D1594 (Fla. 4th DCA 6/27/07)

Todd D. Hurd appealed the denial of his motion to suppress evidence found subsequent to a non-valid traffic stop.

The background of this case is where Hurd was observed by a police officer making a lane change and a turn without giving any signal. The officer further testified that during Hurd's maneuver, there were no other cars or traffic around.

Under search and seizure law, the stopping of a motorist is reasonable where a police officer has probable cause to believe a traffic violation has occurred. See: *Whren v. U.S.*, 517 U.S. 806,810 (1996). However, the test is whether a police officer could have stopped the vehicle for a traffic violation.

The appellate court's findings were that a stop for Hurd failing to use a turn signal was not valid where it was testified that no other traffic was affected by failure to signal. Further, failure to maintain single lane alone cannot establish probable cause when the action is done safely, and nothing in the record established that Hurd's actions were not done safely, lead an officer to suspect impairment, or that Hurd's driving could be considered erratic.

Therefore, it was found that the lower court's order denying Hurd's motion was in error. As such, Hurd's conviction and sentence were reversed and the case was remanded with instructions for the lower court to enter an order granting the motion to suppress and to hold further proceedings that will be consistent with the appellate court's opinion.

Ragan v. McDonough, 32 Fla. L. Weekly D1606 (Fla. 4th DCA 6/7/07)

Amos Ragan challenged the lower court's order that denied a habeas corpus petition where he had attacked the Parole Commission's 2002 revocation of his parole.

In October, 2006, Ragan filed his habeas petition, and the lower court issued an order to show cause directed to the Parole Commission. The Commission filed its response, and five days later, the lower court entered its order denying Ragan's petition. It was reasoned that the challenge to the 2002 revocation order was time barred pursuant to section 95.11(5) (f), Florida Statutes (2006). Ragan then filed for a rehearing, noting that the lower court's order of denial was prematurely entered, because it was issued before he had a chance to file his reply. The lower court denied the motion for rehearing.

Florida Rules of Appellate Procedure 9.100(k) indicates that a petitioner in a habeas corpus proceeding "may serve a reply." The purpose of a reply is to avoid an affirmative defense. See: Florida Rules of Civil Procedure 1.100(a)

Ragan's case was reversed and remanded to consider his reply to the Commission's response.

Earls v. State, 32 Fla. L. Weekly D1610 (Fla. 1st DCA 6/29/07)

Jason Earls challenged a lower court's summary denial of his rule 3.850 motion as being untimely filed.

On August 25, 2004, Earls was sentenced and he did not file a direct appeal. The certificate of service on his 3.850 motion reflected that the motion was placed in prison officials hands on September 22, 2006, for mailing.

The two-year time limit for filing a rule 3.850 motion does not begin to run until appellate proceedings have concluded and the court issues a mandate *or thirty days after the trial court enters its order if no direct appeal is filed.* (emphasis added). See: *Gust v. State*, 535 So.2d 642 (Fla. 1st DCA 1988).

The appellate court opined that Earls' time limit began to run on September 24, 2004. Thus, under the mailbox rule, the date that a motion is placed in prison official hands for filing is the date the motion is considered filed. See: *Thompson v. State*, 761 So.2d 324 (Fla. 2000).

Accordingly, the case was reversed and remanded for the lower court to consider the motion on the merits.

Clowers v. State, 32 Fla. L. Weekly D1650 (Fla. 3d DCA 7/5/07)

Sterling A. Clowers appealed a trial court's denial of his public records request.

Clowers, pursuant to section 119.01, Florida Statutes (2006), filed a motion for production of the State Attorney's prosecutorial files in order to prepare a rule 3.850 motion. He also declared that he was indigent and that he should receive the documents without cost. The lower

court denied the motion as legally insufficient on its face.

The State conceded that Clowers was entitled to copies of its files, however, a defendant must pay the State for such copies. The appellate court agreed.

It was opined that while an indigent prisoner may obtain free copies for a plenary appeal, there is no such provision to obtain them afterward. See: *Ridge v. Adams*, 643 So.2d 116, 117 (Fla. 5th DCA 1994).

Accordingly, the lower court's denial of Clowers' motion was affirmed.

Thomas v. Florida Parole Commission, 32 Fla. L. Weekly D1696 (Fla. 1st DCA 7/12/07)

Dorrie Thomas appealed the dismissal of his mandamus petition for not filing copies of his prison account records as required by section 57.085, Florida Statutes.

Thomas had filed an affidavit of indigence where he alleged he was indigent within the meaning of section 57.081(a), Fla. Statutes (2004), and was entitled to a filing fee waiver because his claim was a collateral criminal proceeding pursuant to *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003). The lower court clerk issued a response stating that Thomas had failed to file all the required information to determine his eligibility to proceed as an indigent and ordered Thomas to comply within 60 days or pay the filing fee, the clerk provided an affidavit of indigence form that cited section 57.085, Florida Statutes. Thomas filed this form as a supplement to his initial affidavit, and supplied all the information requested by the clerk with the exception of a photocopy of his prison account records for the preceding six months. Subsequently, the lower court dismissed Thomas' case for failing to fully comply with the clerk's documentation request.

On appeal, Thomas argued that the lower court's denial was in error because he had completed the affidavit requirements initially, pursuant to section 57.081 which did not require the production of copies of six months' prison account records. The appellate court agreed.

Section 57.085 requires a lien to be placed on a prisoner's account. However, section 57.085 specifically exempts criminal proceedings and "collateral criminal proceeding[s]." See: section 57.085 (10), Fla. Stat. (2006).

The appellate court opined, if a prisoner is not required to proceed under section 57.085, Florida Statutes, he may be permitted to proceed as an indigent pursuant to section 57.081. Section 57.082 details the information that a petitioner is required to supply to the clerk of the court.... An affidavit under section 57.081 must supply most of the information required in one filed under 57.085. "Specifically, copies of the records of the inmate's trust account for the preceding six months are not required to be provided by a petitioner proceeding under section 57.081."

Thomas' case was reversed and remanded, and if he was found to be indigent under section 57.081, determination on the merits of his petition should be made.

Brown v. State, 32 Fla. L. Weekly D1711 (Fla. 4th DCA 7/18/07)

Robert Brown appealed the summary denial of his rule 3.850 motion where he alleged, in part, prosecutorial misconduct.

In Brown's motion, it was claimed that the prosecution in his case deliberately deceived the court and jury by presenting critical testimony which the state knew to be false.

The testimony Brown's subject was about came from a witness, Jerome Fiddeman, who later recanted his trial testimony. This recantation was learned by Brown and which he attached an affidavit to his motion from Fiddeman that plainly stated he had testified falsely.

As a result, Brown's case was reviewed, as a newly discovered evidence claim, which the state did not dispute. Based on that finding, the appellate court opined *it needed* not resolve whether Brown was entitled to relief for prosecutorial misconduct pursuant to *Giglo v. U.S.*, 405 U.S. 150 (1972).

McLin v. State, 827 So.2d 948 (Fla. 2002), held that an evidentiary hearing is required on a claim of newly discovered evidence, based on the recantation of trial testimony, unless the sworn allegations are conclusively refuted by the record, or are inherently incredible.

Brown's case was reversed and remanded for further proceedings on the subject.

Perrette v. State, 32 Fla. L. Weekly D1712 (Fla. 4th DCA 7/18/07)

In Stephen Perrette's case the appellate court opined that a timely motion to withdraw plea, that claimed the plea was based on counsels misadvise, falls within an exception to the general rule preventing a defendant from filing pro se motions while represented by counsel. See: *Bermudez v. State*, 901 So.2d 981, 984 (Fla. 4th DCA 2005). Thus, an evidentiary hearing would be necessary to resolve the motion to withdraw.

Perrette's case was remanded for the lower court to appoint conflict-free counsel and an evidentiary hearing on his motion.

Office of the Public Defender, Fourth Judicial Circuit v. Madison, 32 Fla. L. Weekly D1749 (Fla. 1st DCA 7/20/07)

In this case the appellate court stressed that once the Public Defender's Office's representation of an indigent defendant ends, "the office must," upon request, surrender any trial transcripts *in its possession* to the defendant. See: *Pearce v. Sheffey*, 647 So.2d 333 (Fla. 2d DCA 1994) (finding public defender must relinquish transcript to petitioner upon conclusion of underlying appeal). See also: *Thompson v. Unterberger*, 577 So.2d 684 (Fla. 2d DCA 1991), and *Davis v.* Smith, 861

So.2d 1214, 1216 (Fla. 2d DCA 2003) ("[M]andamus is a proper means to compel a public defender to furnish... such transcripts.")

Evans v. State, 32 Fla. L. Weekly D1734 (Fla. 3d DCA 7/18/07)

Kanisky Evans sought to reverse the lower court's dismissal of his rule 3.850 motion because it was simultaneously filed with a habeas petition in the appellate court for ineffective assistance of appellate counsel.

The lower court had erroneously determined that it lacked jurisdiction on Evans' rule 3.850 motion while his habeas petition was pending in the appellate court.

The appellate court opined that the lower court was in error because the two filings' subjects were separate and distinct and thus could proceed simultaneously. See: *White v. State*, 855 So.2d 723 (Fla. 3d DCA 2003).

The lower court's order striking Evans' motion was reversed and the cause was remanded for the motion to be reinstated and the merits of the motion to be considered.

Banco Lation v. Avtek Electronica, 32 Fla. L. Weekly D1735 (Fla. 3d DCA 7/18/07)

In this civil case, the appellate court pointed out that where record demonstrates good cause for further extending time to effect service of process, it would be error for the lower court to deny a motion for extension.

Here, it was found that the petitioner showed good cause and his petition was granted and the order that denied his extension was quashed.

[**Note:** Judge Green, J. concurred with an opinion. He stated thought: "However, I write separately because our decision *should not* be construed as carte blanche authority for the petitioner to continue to receive unlimited extensions. The petitioner must continue to demonstrate that it is making substantial progress to locate and serve the respondents.]

Clark v. State, 32 Fla. L. Weekly D1735 (Fla. 3d DCA 7/18/07)

Vincent Clark appealed the denial of his motion to correct an illegal sentence where he claimed that the imposition of a violent career criminal designation was error.

Clark was convicted of battery on a law enforcement officer. Based on the authority of *Hearns v. State*, 32 Fla. L. Weekly S177 (Fla. 4/26/07), the appellate court opined that the lower court in Clark's case erred in finding that his conviction was a qualifying offense for purposes of a violent career criminal sentence. Battery on a law enforcement officer is not a qualifying offense for such designation.

Therefore, Clark's case was reversed and remanded with instructions to re-sentence Clark without the violent career criminal designation.

Torgerson v. State, 32 Fla. L. Weekly D1834 (Fla. 4th DCA 8/1/07)

James Torgerson's case presented the appellate court with an expired statute of limitation to prosecute issue.

Initially, Torgerson brought the issue to the lower court pursuant to a rule 3.850 motion, and it was denied. It was explained in his motion that the statute of limitations had run out for the prosecution on his charged crimes (lewd or lascivious battery on a person between 12 and 16, and sexual battery-great force not used). The State had charged Torgerson of these crimes on May 18, 2005. The charging document alleged the offenses were committed between January 1, 2001 and August 14, 2001.

A capias was issued May 19, 2005 and Torgerson was arrested June 9, 2005. His argument was that on August 15, 2004, statute of limitations had ran out, because that was three years after the victim turned 16 years old. According to the statutes that were in effect at the time, sec. 775.15(7), Fla. Stat. (2000), the statute of limitations began to run after the victim's 16th birthday--not 18 years old as it is in the 2001 Fla. Statutes.

Therefore, the appellate court opined that it appeared Torgerson had grounds to dismiss prior to entering his plea for a 30 month prison sentence followed by 15 years probation agreement. Because of the findings, the appellate court reversed the lower court's denial of Torgerson's rule 3.850 motion, and remanded the case - for further proceedings. It was further instructed that because Torgerson appeared to be entitled to discharge the lower court was directed to expeditiously hold any hearing it deems necessary to properly decide the case on the merits.

Martinez v. State, 32 Fla. L. Weekly D1839 (Fla. 4th DCA 8/1/07)

Pascual Martinez had petitioned the appellate court with a certiorari writ that sought review of an order that struck is rule 3.800 (c) motion as being untimely.

Martinez's petition was previously denied, however, the appellate court vacated that order and granted a rehearing.

It was found that Martinez's counsel had filed the rule 3.800 (c) motion within the 60 day time-limit. At the same time, the lower court was asked to grant an extension of time for a hearing on the motion. However, the rule 3.800 (c) motion was not delivered to the judge until after the 60 day period. As a result, the judge struck it and did not rule on the requested extension of time.

The appellate court vacated the lower court's order and remanded the case for it to rule on the extension request. See: *Abreu v. State*, 660 So.2d 703 (Fla. 1995) (where it was held that pursuant to Florida Rule of Criminal Procedure 3.050, the court may extend the sixty-day limit on a rule 3.800 (c) motion as long as the

motion is resolved within a reasonable time.)

Silver v. State, 32 Fla. L. Weekly D1843 (Fla. 1st DCA 8/3/07)

Michael Silver presented the appellate court with a lower court's denial of his rule 3.850 motion as being untimely.

Subsequent to Silver pleaing guilty and being sentenced to his charged crime, he filed a direct appeal. He later filed a motion to voluntarily dismiss the case on direct appeal, and on August 29, 2002, his direct appeal was rendered dismissed.

On August 5, 2004, Silver filed his rule 3.850 motion in the lower court. It was denied as untimely based upon the fact that Silver voluntarily dismissed his direct appeal. The lower court reasoned, apparently, that because of the voluntary dismissal the direct appeal did not exist, causing Silver's sentence to become final 30 days after sentencing was imposed.

On appeal it was opined that Silver's conviction did not become final until after the appellate court relinquished jurisdiction on August 29, 2002, when it granted the voluntary dismissal. See: *Small v. State*, 941 So.2d 555 (Fla. 1st DCA 2006).

Therefore, the lower court's denial was reversed and Silver's case was remanded for the merits of his motion to be considered.

Mackall v. State, 32 Fla. L. Weekly D1850 (Fla. 5th DCA 8/3/07)

The appellate court in Harlan R. Mackall's case has stressed that a defendant is not legally entitled to jail credit against a Florida sentence for time spent incarcerated in another state. See: *Kronz v. State*, 462 So.2d 450, 451 (Fla. 1985).

It is at the trial court's discretion whether out-of-state jail credit is awarded. See: *Gallinat v. State*, 941 So.2d 1237, 1240 (Fla. 5th DCA 2007). The lower court in Mackall's case chose not to award such credit, thus, his rule 3.800 (a) that sought it was properly denied, and the appellate court affirmed the ruling.

Watson v. State, 32 Fla. L. Weekly D1856 (Fla. 2d DCA 8/8/07)

Alexander Watson appealed his judgment and conviction by jury trial of possession of a firearm or ammunition by a convicted felon.

At trial, Watson moved for a judgment of acquittal on the ground that the State failed to prove that he had constructively possessed the items as listed in the charging information.

The appellate court opined that, indeed, evidence was insufficient to establish Watson was in constructive possession of firearms and ammunition discovered beneath the front passenger seat, in glove box, and in trunk of the rental car jointly occupied by him and another man who had borrowed it from his girlfriend. Furthermore, it was opined that even if the evidence was sufficient to prove that Watson knew about the items, the state had failed to prove he had control over any of it, other than his mere proximity to the items.

Watson's case was reversed and remanded with directions to discharge the ex-prisoner.

Scott v. State, 32 Fla. L. Weekly D1899 (Fla. 4th DCA 8/8/07)

In Melvin Scott's appeal of the denial of his rule 3.800 (a) motion, the appellate court pointed out that a claim attacking a lower court's order that places additional conditions on a plea agreement which were not accepted by the defendant, because defendant was sentenced in absentia, does not go to the legality of the sentence, but to the validity of the plea or conviction. Further, being sentenced in absentia does not make the resulting sentence illegal for rule 3.800 (a) purposes. See, e.g., *Patterson v. State*, 904 So.2d 593 (Fla. 4th DCA 2005) (affirming denial of rule 3.800 (a) motion claiming defendant was sentenced in absentia, without prejudice to raise the issue in a timely rule 3.850 motion). See also: *Harris v. State*, 789 So.2d 1114 (Fla. 1st DCA 2001).

Bush v. State, 32 Fla. L. Weekly D1899 (Fla. 4th DCA 8/8/07)

On appeal from a summary denial of Larry Bush's rule 3.850 motion, the appellate court opined that a claim where a defendant states he would not have entered a plea of no contest had defense counsel told him he could file a successful motion for suppression of his statements to police rather than telling him no defense would be successful at trial and with no good reason for such action would constitute deficient performance. An evidentiary hearing would have to issue to show a satisfaction of the prejudice prong of *Strickland*.

D.B.A. v. State, 32 Fla. L. Weekly D1920 (Fla. 2d DCA 8/10/07)

D.B.A. appealed the denial of his dispositive motion to suppress evidence found subsequent to an illegal search of his person.

Stop and frisk law authorizes a limited *patdown* of a detainee's outer clothing when the officer has probable cause to believe the detainee is armed with a dangerous weapon, and only if the officer reasonably believes that an object he feels during patdown is a weapon may he be allowed to seize the object.

The officer in D.B.A. case did not conduct a patdown first before he reached into D.B.A.'s pants pocket and pulled out a baggie of marijuana. Thus, the officer exceeded the scope of the stop and frisk law. See: section 901.151 (5), Fla. Stat. (2006) and *Winters v. State*, 578 So.2d 5,6 (Fla. 2d DCA 1991). See also *Frazier v. State*, 789 So.2d 486, 488 (Fla. 2d DCA 2001) and *Thompson v. State*, 550 So.2d 970, 071 (Fla. 2d DCA 1990).

As a result, D.B.A.'s adjudication of delinquency was reversed and the

case was remanded with directions for D.B.A. to be discharged.

Armour v. Fla. Parole Comm'n, 32 Fla. L. Weekly D1933 (Fla. 1st DCA 8/14/07)

Donald Hugh Armour filed a certiorari petition in the appellate court that challenged a circuit court's order construing his habeas petition as one seeking non-habeas relief and which affirmed the suspension of his presumptive parole release date (PPRD) by the Florida Parole Commission (the Commission).

The appellate court opined that the lower court had departed from the essential requirements of law. In Armour's habeas petition he was not challenging the suspension of his PPRD, he was challenging the rescission of his effective parole release date (EPRD). Initially, the Commission had granted parole to Armour and had set an EPRD. However, it later declined to parole him and rescinded its decision due to not wanting to wait for a foreign state's investigation to be completed from the state Armour sought to be parole released to.

The First District Court of Appeal has stated in prior cases that "a Commission order suspending an inmate's PPRD and thereby refusing to set an [EPRD] is appropriately reviewed by mandamus," but "the proper remedy to obtain review of a Commission's decision *after* it has set an EPRD is by habeas corpus release." See: *Williams v. Fla. Parole Comm'n*, 625 So.2d 926, 934 (Fla. 1st DCA 1993). Also see: *Griffith v. Fla. Parole & Probation Comm'n*, 485 So.2d 818, 820 (Fla. 1986).

It was further opined that by concluding Armour was challenging the suspension of his PPRD, which was reviewed for abuse of discretion, rather than whether the Commission had statutory authority to rescind his EPRD, the circuit court violated a clearly established principle of law resulting in a miscarriage of justice.

Armour's certiorari petition was granted and the lower court was directed to reinstate his habeas petition, to vacate the order that had directed him to pay a filing fee, and to transfer his petition to the Union County Circuit Court, the county where Armour was incarcerated. See, e.g., *Carter v. Fla. Parole Comm'n*, 955 So.2d 665 (Fla. 1st DCA 2007), and *Knowles v. Fla. Parole Comm'n*, 846 So.2d 1246 (Fla. 1st DCA 2003).

Gaines v. Fla. Parole Comm'n & Fla. Dept. of Corrections, 32 Fla. L. Weekly D1934 (Fla. 1st DCA 8/14/07)

Jerome Gaines sought certiorari review of an order issued by the lower court denying his mandamus petition that sought credit for time spent at liberty.

On review, the appellate court opined that Gaines was not entitled to the credit for time spent at liberty after being mistakenly released by county jail officials. It was the appellate court's reasoning that Gaines knew or should have known that his release was in error. Further, Gaines made no attempt to call that apparent error to the attention of any authority following the release.

Accordingly, as to the above issue, Gaines' petition was denied.

[Note: In Gaines' case, Judge Benton dissented with the above decision with a very well written opinion that would make a good argument against such decision. Hopefully, Gaines has sought further review with his claim. It should also be noted that in 32 Fla. L. Weekly at D1982, Gaines' case appears again. It appeared that there were no changes in the appellate court's decision. However, it was noted that Judge Benton's opinion had slightly changed, but still meaning quite the same, with some paragraphs changed from the original opinion's order.] ■

Florida Supreme Court Adopts Rules for Drug Arrests

On June 21, 2007, the Florida Supreme Court adopted rules that would allow defendants to withdraw their guilty or no contest pleas after successful completion of drug court treatment programs.

The Court made separate rules that would cover plea withdrawals by juveniles and adults who entered their pleas in exchange for their cases to be transferred to drug court.

The rules the high court adopted are in uniformity with new laws the Florida Legislature had passed in 2005 and 2006.

Under the new rules, judges may now take into consideration the "need for substance abuse evaluation and/or treatment," before deciding to release a person on bail. ■

Compelling A Trial Court To Rule On A Motion Or Petition

by Melvin Pérez

Through this article the writer intends to provide information that hopefully will be useful for prisoners who seek to compel a lower court to rule on a petition or motion. We all know how frustrating it can be to have a motion or petition sitting for months in the trial court without a ruling.

Since the standard of legal sufficiency is different in criminal and civil cases, this article will expound on both areas of law.

Mandamus is the proper remedy to compel a court to exercise its discretion and decide a cause, where there is no valid reason to reserve ruling on the matter. See: *Villas at Cutler Ridge Homeowners' Ass'n, Inc. v. Newman*, 498 So.2d 579 (Fla. 3d DCA 1986). Moreover, mandamus lies to compel a trial court to rule on a motion or petition after a reasonable time. See: *Mattews v. Circuit Court*, 515 So.2d 1065 (Fla. 5th DCA 1987).

While courts have never defined how much time is specifically reasonable, the courts have applied this principle on a case-by-case basis.

A petition for writ of mandamus, seeking to compel a lower court to rule on a motion or petition, must be filed in the DCA having jurisdiction over the circuit court where the action is pending. The authority of the DCA to grant a writ of mandamus is vested in Article V, Section 4(b)(3) of the Florida Constitution and restated in Fla.R.App.P., Rule 9.100(a).

In a civil case, there are certain legal requirements that must be met before filing this type of petition. These will be discussed hereunder.

Civil Cases

Before a petition for writ of mandamus is filed with the DCA on cases such as declaratory judgments, injunctive petitions, or any type of civil cases, the prisoner must allege that he has made the trial court aware of the pending action and seeks a hearing. See: *Al-Hakim v. State*, 783 So.2d 293, 294 (Fla. 5th DCA 2001). Further, the First DCA has expanded this requirement by holding that "in civil proceedings prisoner must allege that a hearing was scheduled with trial judge's office." See: *Gosby v. Third Judicial Circuit Court*, 562 So.2d 775 (Fla. 1st DCA 1990).

This requirement is met by filing a notice making the court aware of the pending action, and notice of hearing. The notice must request a definite time to present arguments to the court. It must also set the relief sought, and the scope or matters to be addressed at the hearing. Failure to meet these requirements will result in dismissal without prejudice. See: *Hogan v. Dickenson*, 910 So.2d 866 (Fla. 5th DCA 2005).

A notice of hearing is governed by Fla.R.Civ.P., Rule 1.080(a) and must be served on opposing counsel. The notice of hearing must also contain a certificate of service as outlined in Fla.R.Civ.P., Rule 1.080(f).

Criminal Cases

The aforementioned requirements do not apply to criminal cases. Thus, heretofore, no court has interpreted these cases to apply to criminal cases. While the state has always argued that petitioners should meet these requirements, such invitations have been rejected.

Another argument that the state has raised in an attempt to persuade the court to deny the writ, is that the writ should be denied because the lower court is aware of the pending action. However, one court has already rejected this argument in two different cases. See: *Johnson v. State*, 938 So.2d 639 (Fla. 5th DCA 2006), and *Lewis v. State*, 934 So.2d 605 (Fla. 5th DCA 2006).

This court has also expressed their concern "that the failure to rule on a motion impairs his [Petitioner's] rights of access to the courts and due process." *Id.*

As previously discussed in the beginning of this article, courts have never defined how much time is specifically reasonable for a court to make a ruling on a petition or motion. However, decisional law shows in the following cases what the courts found to be reasonable. Six months was reasonable to file petition for writ of mandamus in *Smith v. State*, 603 So.2d 95 (Fla. 2nd DCA 1992). Nine months was reasonable in *Hellum v. State*, 869 So.2d 759 (Fla. 1st DCA 2004). While in two other cases one year and 13 months was found to be reasonable. See: *Johnson*, *supra* and *Lewis*, *supra*.

Many self-professed jailhouse lawyers think that the court's failure to rule on a motion is due to the strong grounds raised in the pleading itself, this is merely wishful thinking.

Filing the Petition

Pursuant to Fla.R.App.P., Rule 9.030(b)(3), a district court of appeal may issue a writ of mandamus. The original jurisdiction of the court shall be invoked by filing a petition, accompanied by a filing fee, if prescribed by law, with the clerk of the court deemed to have jurisdiction. See: Fla.R.App.P., Rule 9.100(b). Thus, if the prisoner is proceeding in forma pauperis, he may write the appropriate DCA and ask them for an affidavit and/or motion of insolvency.

The procedure seeking indigent status in different courts is not always the same. For example, the First DCA will dismiss a petition after 20 day's notice, if a six month bank statement is not provided with the motion and/or affidavit of insolvency. While on the other hand, the Fifth DCA has no such requirement. However, all five district courts of appeal require that an affidavit and/or motion of insolvency be provided.

Further, the caption on the petition shall contain the name of the court and the name and designation of all parties on each side. All parties to the proceeding in the lower tribunal who are not petitioners shall be named in the caption of respondents. See: Fla.R.App.P., Rule 9.100(e)(1). The judge or the lower tribunal is a formal party to the petition for mandamus and must be named as such in the body of the petition (but not in the caption). See: Rule 9.100(e)(2).

Moreover, the caption shall contain a statement that the petition is filed pursuant to that subdivision. Likewise, the petition must be served on all parties, including any judge or lower tribunal who is a formal party in the petition. The original is filed with the DCA. In addition, the petition shall not exceed 50 page limit.

Rule 9.100(g) also provides that the petition shall contain the following:

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

Similarly, in a petition of this nature, the petition shall be accompanied by an appendix as prescribed by Rule 9.220, and the petition shall contain references to the appropriate pages of the supporting appendix.

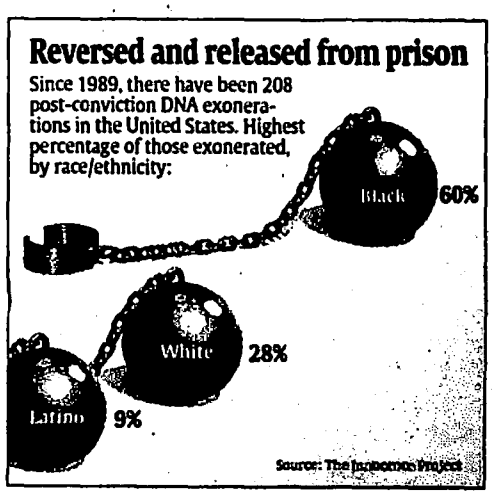
If the petition is filed in a civil case, the appendix will consist of the notice making the lower court aware of the pending action, notice of hearing (which can be made in one motion), and a copy of the initial motion or petition filed in the lower court and any response thereto.

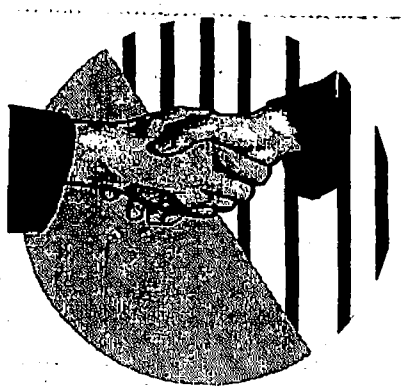
In a criminal case, the appendix would be made of the initial motion or petition filed. See: Fla.R.App.P. 9.220 for more information on the appendix. The appendix does not count towards the 50 page limit as discussed above.

Thereafter, the DCA will review the petition and, if found to have merit, it will issue a show cause order for the opposing party to respond within a time set by the court.

After the opposing party has filed a response, the petitioner has 20 days, from the date in which opposing party filed his response, to file a reply if he wishes to file one. A reply in this proceeding is optional. However, should one be filed, it shall not exceed 15 pages in length and a supplemental appendix can be filed along with the reply. The DCA will issue a ruling within a reasonable time after.

I hope this information may be useful for prisoners that may, at one point or another, be faced with this same predicament. ■





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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

MICHAEL TWEEDY, #910577,

Plaintiff,

vs. Case No. 2005 CA 001508

JAMES MCDONOUGH, Secretary for the Florida Department of Corrections,

Defendant.
_____/

AFFIDAVIT OF JAMES UPCHURCH

STATE OF FLORIDA)
COUNTY OF LEON)

I, James Upchurch, am the Bureau Chief of Security Operations for the Florida Department of Corrections. As Bureau Chief, my duties and responsibilities include oversight on all security matters within the department. I have been employed in the field of corrections since 1968 and have worked in all areas involving the custody and control of inmates. I give this affidavit in connection with the above-styled case.

1. Private institutions may sell in their canteens items that are not sold in the Department's institutions or sell brands of items different than the brands sold in the Department's canteens. It has been the Department of Corrections's practice to consider as contraband an item of property a prisoner possesses while incarcerated at one of the Department's institutions that the prisoner purchased at a private correctional facility that is of a different brand than the same item sold in the Department's canteens. Prisoners possessing "specialty" items that other prisoners may not possess creates security concerns.

2. However, the Department has reconsidered this practice and no longer will consider an item of property purchased at a private institution contraband solely because it is a different brand than the same item sold in the Department's canteens.

3. Because of this modification in the Department's practice, Inmate Tweedy's tennis shoes, headphones, and cigars will be returned to him. In his complaint Inmate Tweedy states that he purchased another pair of tennis shoes, and he wants special permission to possess two pairs of tennis shoes. The Department's rules authorize an inmate to possess only one pair of athletic shoes. Therefore, Inmate Tweedy may not possess two pairs of athletic shoes at one time. However, the institution will store one pair of his athletic shoes for him, and he may possess that pair of shoes when the pair he currently possesses is no longer *serviceable* or

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otherwise discarded or sent out of the institution.

4. Inmate Tweedy's plastic bowls will not be returned to him as they are contraband in the Department's institutions. Plastic bowls are not sold in the Department's canteens and are not authorized on the Department's property list. Plastic bowls were previously approved items prior to January 1, 1996. Under the Department's rules, inmates who purchased and possessed plastic bowls prior to January 1, 1996, are allowed to keep those bowls until they are no longer serviceable. However, Inmate Tweedy was not in the Department's custody until 1998, and he states in his complaint that he purchased the bowls while incarcerated at South Bay Correctional Institution, a private facility, and he was first incarcerated at South Bay in 2003. Therefore, Inmate Tweedy did not purchase and possess his bowls prior to January 1, 1996, and, accordingly, his bowls are contraband, and he may not possess the bowls.

5. The information contained in the foregoing affidavit is personally known to me and is true and correct to the best of my knowledge. I am over the age of 18 and otherwise competent to testify to such were I called upon to do so in a court of law.

FURTHER AFFIANT SAYETH NAUGHT

James R. Upchurch, Affiant

The foregoing instrument was sworn to and subscribed
before me this 27th day of July, 2006
by James R. Upchurch, who is personally known to me.

Mary W. Le

Notary Public
My Commission Expires:

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Editor's Note: This document was filed in a Replevin action. Mr. Tweedy prevailed in the case and recovered his costs in filing the action.

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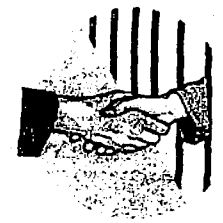

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