

JUSTICE WATCH John Pacenti

AGING INMATES PUTTING STRAIN ON PRISON SYSTEMS

Two recent federal cases highlight the problem elderly defendants present in the criminal justice system.

Former obstetrician David Rothman faces sentencing for health care fraud if U.S. Bureau of Prisons doctors don't concur that he suffers from disabling dementia at 69.

In the meantime, his attorney, **Joel Hirschhorn**, a partner at Hirschhorn & Bieber in Coral Gables, said Rothman is not receiving his medications, and prison doctors have pretty much ignored him.

"The Bureau of Prisons, in this instance, is achieving a new low in incompetence, arrogance and insensitivity," Hirschhorn contended.

The other case that highlights the problem of an aging prison population is the tax evasion conviction of developer Mauricio Cohen Assor. The deterioration of the 77-year-old within months was remarkable. He was diagnosed while incarcerated with Parkinson's disease and dementia. The French citizen testified eloquently at trial, but during sentencing he could barely stand or remain coherent and was at times mildly aggressive — a symptom of dementia — at the defense table.

Defense attorneys say it's time to address health questions of aging inmates at sentencing.

Recidivism for elderly convicts is not a consideration. Defense



“The Bureau of Prisons, in this instance, is achieving a new low in incompetence, arrogance and insensitivity.”

JOEL HIRSCHHORN
PARTNER
HIRSCHHORN & BIEBER



“There is potential bias in the court system.”

DR. MARC AGRONIN
MEDICAL DIRECTOR
MENTAL HEALTH AND
CLINICAL RESEARCH
MIAMI JEWISH HEALTH
SYSTEMS

attorneys and aging experts say the BOP, the Justice Department and the U.S. Sentencing Commission should implement new policies for the elderly or start building nursing homes instead of jailhouses.

SEE JUSTICE WATCH, PAGE A4

 **on the web**

Read related court documents on
DailyBusinessReview.com

JUSTICE WATCH: Some say nursing homes should be built instead of prisons

The U.S. Bureau of Justice Statistics reported the number of federal and state prison inmates age 55 and older grew 76 percent from 1999 to 2008, the latest year available, from 43,300 to 76,400. In Florida state prisons, 17,379 inmates are 50 or older.

AGING BEHIND BARS

The oldest inmate in the state's prison system is 91-year-old Maria Otero, who was arrested at 87 and imprisoned for fatally shooting a 13-year-old boy in 1975. Volusia County child molester James F. Washington is the oldest male inmate at 90.

For the elderly in the criminal justice system, any type of sentence is often a life term. Cohen-Assor was sentenced to 10 years in prison for failing to report up to \$150 million in income to the Internal Revenue Service. His lawyers have characterized it as a life sentence.

"When you are in your 70s and sentenced to more than a couple of years, you are talking in terms of a death sentence. The expression is rough, but it's true. You come out in a box," said **Michael Pasano**, a Carlton Fields partner who represented Cohen Assor.

Courts often are at a loss when dealing with elderly defendants. It's hard for a judge to determine if someone is suffering from early stages of Alzheimer's or exhibiting mild or intermittent dementia, said Dr. Marc Agronin, medical director for mental health and clinical research for Miami Jewish Health Systems.

"There is a potential bias in the court system," he said. "With older defendants there may be unique medical and psychiatric factors that need to be considered, but the courts are not giving them the benefit of the doubt."

David O. Markus, a Miami criminal defense attorney, said there are some signs the judicial system is moving in the right direction. The U.S. Sentencing Commission last year changed its policy to allow age to be a mitigating factor in going below sentencing guidelines.

"Thankfully the sentencing commission now recognizes what common sense has told us for a long time — that old age is a reason to go below the guidelines," he said.

The commission's new policy reads, "Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration."

But Pasano said some judges are resistant to discount for age.

FRATERNITY BROTHERS

Hirschhorn and Rothman were fraternity brothers at Phi Epsilon Pi in 1960 (merged with Zeta Beta Tau in 1970) at the University of Connecticut. Hirschhorn went on to become a successful criminal defense attorney, while Rothman opened up a booming obstetrical practice in suburban Kendall.

Several years ago Hirschhorn ran into Rothman by chance, and there was something disturbing about his old friend. "He was not the same person I knew," Hirschhorn said.

It was only when Rothman was charged with health care fraud and became Hirschhorn's client that he learned his 68-year-old friend had frontotemporal lobe dementia, which affects reasoning, personality, movement, speech, social graces, language and some aspects of memory.

It was the reason Rothman left his medical practice and became a HIV and AIDS health care provider. The clinics he worked for were targeted by federal authorities for health care fraud.

"My defense is his executive functioning was impaired at the time he was working for these clinics, and they took advantage of him," Hirschhorn said.

But that defense, despite the diagnosis and expert testimony, was an uphill battle. U.S. Magistrate Judge Andrea M. Simonton found Rothman competent Feb. 19, 2009. An appeal to U.S. District Judge Ursula Ungaro didn't change the outcome, and Rothman was convicted.

Hirschhorn renewed his motion, asserting Rothman was incapable of participating in his defense. Simonton ordered a 10-day evaluation at the Federal Medical Center in Rochester,

Minnesota, and reversed her decision in August, finding Rothman incompetent due to frontotemporal lobe dementia.

Rothman was facing a 50-year sentence, but Ungaro ordered a 120-day evaluation by psychiatrists at the Butner Federal Complex in Butner, North Carolina. If at the end of the period, Rothman is again found incompetent and not in danger to himself or others, he will be released, Hirschhorn said.

The reversal was far from a slam dunk.

"The BOP has a long and sad rich history of finding that those who are sent to their facility are competent to stand trial," Hirschhorn said. "If BOP decides he no longer has frontotemporal lobe dementia and they send him back for sentencing, I will ask the judge to enter an order to give me a sample of the waters the doctors are drinking."

After Rothman entered the facility Feb. 18, he disappeared into a black hole.

At one point, Hirschhorn said BOP administrators mixed up Rothman and accused Ponzi scheme operator R. Allen Stanford, the one-time billionaire also at Butner to be evaluated for competency.

Hirschhorn said they insisted Rothman had a conference call with his Houston attorney Ali Fazel, who is actually Stanford's court-appointed attorney.

Despite the mix-up, Hirschhorn said a BOP administrator at Butner accused Rothman's attorney of lying.

Keith Pierro, a Hirschhorn associate, said Rothman entered the prison with his medications and copious medical records, but the BOP said they never received any information. The attorneys admit goading the agency, which later located the records.

"We were told they could not do a work-up on him until they had the records, which they already did," Prieto said. "In other words they let him sit for several weeks without addressing his immediate needs."

In the last week, Rothman got in touch with his attorneys but is still not receiving his cocktail of seven medications, which include Namenda and Aricept for dementia. Hirschhorn said without proper medication, people with dementia could deteriorate rapidly, become aggressive, give reason for prison officials to tell the court they are a danger to themselves and/or others, and need to be confined.

"They don't care if he acts out. These are expensive medicines that are not on the BOP formulary," he said.

When Cohen Assor testified at his tax trial, he spoke in French, but even through a translator his eloquence was unquestioned. He spoke passionately about designing yachts, the hotel business and divisions within his family.

Four months later at sentencing Cohen Assor was a shadow of that man. He was shaking, barely able to stand, irascible with his defense counsel and his son, a co-defendant. He did not seem to be following the proceedings.

"It was not the same Mauricio from the trial," Pasano said.

The attorney said the federal system is not geared to deal with its growing population of elderly prisoners. Not only are more entering the system, longer sentences mean more young men grow old behind bars.

"I do think we need additional help from the Sentencing Commission or help from Congress to try to do something, maybe adding additional or alternative sentences for the elderly," Pasano said.

Such thinking challenges the prevailing philosophy of prison as a place of punishment and little else.

To sentence seniors on a sliding scale, a prison term would be a function of freedom lost as opposed to a set amount of time to serve. Attorneys say that would make sentencing even more subjective.

In the end, Agronin said he foresees the BOP running nursing homes behind barbed wire.

"It would make sense to have geriatric facilities," the doctor said. "Not only are their needs different, it would be safer for them not to be in the general prison population."

John Pacenti can be reached at jpacenti@alm.com or at (305) 347-6638.

“When you are in your 70s and sentenced to more than a couple of years, you are talking in terms of a death sentence.”

MICHAEL PASANO
CARLTON FIELDS
DEFENSE ATTORNEY