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# Life Sentence Without Parole Stricken by U.S. Supreme Court as Applied to Juveniles Tried as Adult Offenders

In May of this year, the Supreme Court of the United States ruled that it is unconstitutional for Florida courts to impose a life sentence without the possibility of parole on juvenile offenders who have committed an offense other than homicide. In Graham v. Florida, 130 S.Ct. 2011 (2010), the Supreme Court overturned the decision of First District Court of Appeals of Florida that upheld a life sentence without parole for a defendant who was sixteen years old at the time he committed an armed burglary and attempted armed burglary. The *Graham* Court held that the Florida sentencing scheme that allowed for a life sentence without the possibility of parole for a non-homicide criminal defendant violated the Eighth Amendment of the U.S. Constitution's prohibition against cruel and unusual punishment. The Supreme Court issued a bright-line rule demarcating the age at which a straight life sentence for a juvenile offender is inappropriate, writing: "This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Graham at 2030.

Graham did not specifically state that its holding was retroactive. Nevertheless, given the constitutional nature of the issue and the fact that the court established a bright-line rule, there is persuasive argument in favor of retroactivity. Any inmates who received life sentences without the possibility of parole for a non-homicide case that was committed while the defendant was a juvenile would be wise to file a postconviction motion attacking the constitutionality of the sentence as cruel and unusual, in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution. As always, it is recommended that any such collateral attack be filed as soon as possible to avoid the possibility of new case law that could limit the application of the ruling.

# Postconviction Hearings and the Defendant's Right (sometimes) to be Present

In McDowell v. State, 25 So.3d 1257 (Fla. 2d DCA 2010), the Second District Court of Appeal acknowledged that a defendant's presence is not always required for postconviction evidentiary hearings pursuant to Rule 3.850. In McDowell, the defendant was not present for his evidentiary hearing because his counsel was unsuccessful in having him transported from federal custody. McDowell, 25 So.3d at 1258. Although counsel objected, the trial court proceeded with the evidentiary hearing anyways. Id. One issue raised by the defendant was premised upon misadvice of trial counsel. Id. The trial court heard testimony from the defendant's trial attorney, and subsequently denied relief on that issue. Id. On appeal, the defendant argued that he had a right to be present and testify as to his recollection of the events. Id.

The Second District Court of Appeal noted that a postconviction movant's presence is not required at every postconviction evidentiary hearing. Id. But, the Court continued, when the defendant has personal knowledge of material facts in dispute (such as what the trial attorney's advice was), the defendant "should" be afforded the opportunity to be present and testify. Id. at 1259. Further, a defendant's presence is necessary to adequately cross-examine witnesses against him. Id.

Ultimately, the Second District Court of Appeal held that the trial court abused its discretion in failing to permit the defendant an opportunity to testify and assist his counsel in cross-examination of witnesses against him. Id. The case was reversed and remanded with instructions for the trial court to conduct a second evidentiary hearing, this time with the defendant present. Id.

# About Loren Rhoton, P.A.

Loren Rhoton, P.A. is a law firm that focuses exclusively on postconviction actions and inmate issues. The mission of Loren Rhoton, P.A. is to ensure that justice is accomplished in each and every case the firm undertakes. The firm's area of practice ranges from direct criminal appeals and postconviction actions to assisting inmates in dealing with the Florida Department of Corrections. Loren Rhoton, P.A., is a small firm, consisting of Mr. Loren D. Rhoton and Mr. Ryan J. Sydejko. The firm strives to keep a small caseload in order to give each case the individual attention it deserves. We are not a volume business. We do not accept every case that is presented to the firm for representation. A thorough review of any potential case will be conducted before the firm undertakes full representation. If you wish to have your case reviewed for representation, please contact Loren Rhoton for more information. If inquiring about representation, please do not send any materials to the firm that you wish to have returned to you.

## Loren D. Rhoton, Esq.

Loren D. Rhoton is an attorney in private practice with the law office of Loren Rhoton, P.A., in Tampa, Florida. Mr. Rhoton graduated from the University of Toledo College of Law and has been a member in good standing with The Florida Bar since his admission to practice in 1995. The exclusive focus of Mr. Rhoton's practice is dedicated to assisting Florida inmates with their criminal appeal/postconviction cases.

Mr. Rhoton is a member of The Florida Bar's Appellate Division. He is also a member of the U.S. District Court, in and for the Middle and Northern Districts of Florida. Mr. Rhoton is licensed to practice before the U.S. Court of Appeals for the 11th Circuit and is also certified to practice before the U.S. Supreme Court. Mr. Rhoton regularly practices before Federal District Courts and the U.S. Court of Appeals for the 11th Circuit.

Mr. Rhoton typically deals with clients who have lengthy prison sentences. Mr. Rhoton has investigated and pursued hundreds of postconviction cases. He has practiced in all phases of the Florida Judicial System, all the way from misdemeanor county courts up to the Florida Supreme Court. Additionally, Mr. Rhoton has been directly responsible for amendments to Florida Rule of Criminal Procedure 3.850 (the main vehicle for most postconviction actions). Mr. Rhoton is appointed by the Florida Supreme Court to the Florida Criminal Rules Steering Committee, Subcommittee on Postconviction Relief, which is focused on rewriting Florida Rule of Criminal Procedure 3.850. Mr. Rhoton works on said subcommittee with judges and other governmental officials in an effort to improve the administration and execution of postconviction proceedings. Mr. Rhoton's role on said committee has been to advocate for changes that will be beneficial to postconviction litigants (inmates).

For over a decade, Mr. Rhoton authored a bimonthly article, *Post Conviction Corner*, for Florida Prison Legal Perspectives. Selected articles from *Post Conviction Corner* have been compiled and printed in a legal self-help book, *Postconviction Relief for the Florida Prisoner*. Mr. Rhoton also served on the Board of Directors of the Florida Prisoner's Legal Aid Organization, Inc.

## Ryan J. Sydejko, Esq.

Ryan J. Sydejko is an attorney with the law office of Loren Rhoton, P.A. His practice focuses primarily on postconviction matters for those incarcerated throughout the State of Florida. He has argued cases before many circuit courts and District Courts of Appeal and has several published opinions. Mr. Sydejko has also presented cases to the Supreme Court of Florida and the U.S. District Courts for the Middle and Northern Districts of Florida.

Mr. Sydejko graduated from the University of Minnesota with a degree in political science and attended the University of Tulsa College of Law. As a student, he authored a law review article entitled: "International Influence on Democracy: How Terrorism Exploited a Deteriorating Fourth Amendment." The article, exploring how domestic terrorist threats have reshaped everyday law enforcement procedures, was published in the Spring 2006 edition of the Wayne State University Law School Journal of Law in Society. Mr. Sydejko also wrote articles for the Florida Prison Legal Perspectives. Mr. Sydejko is a member in good standing with the Florida Bar and is qualified to practice in all Florida state courts, as well as the Federal District Courts for the Middle and Northern Districts of Florida.

## Notable Firm Cases

Dames v. State, 773 So.2d 563 (Fla. 2d DCA 2000) – Improper summary denial of Rule 3.850 Motion reversed & remanded for evidentiary hearing.

Dames v. State, 807 So.2d 756 (Fla. 2d DCA 2002) – First Degree Murder conviction vacated & new trial granted due to ineffective counsel

Battle v. State, 710 So.2d 628 (Fla. 2d DCA 1998) – Improper Habitual Felony Offender Sentence on violation of probation reversed & remanded for resentencing

Mitchell v. State, 734 So.2d 1067 (Fla. 1st DCA 1999) - counsel can render ineffective assistance for failure to argue boarded-up structure is not a 'dwelling' under arson statute

Caban v. State, 9 So.3d 50 (Fla. 5th DCA 2009) – counsel can be ineffective for failing to object to improper impeachment of defense expert witnesses in Shaken Baby Syndrome case

Graff v. State, 846 So.2d 582 (Fla. 2d DCA 2003) – attorney's misadvice as to potential sentence can amount to ineffective assistance of counsel sufficient to justify withdrawal of plea.

Easley v. State, 742 So.2d 463 (Fla. 2d DCA 1999) – counsel can render ineffective assistance for failure to investigate insanity defense.

Campbell v. State, 16 So.3d 316 (Fla. 2d DCA 2009) – Manifest Injustice – summary denial of Rule 3.800 motion to correct illegal sentence reversed & remanded on manifest injustice grounds.

Thompson v. State, 987 So.2d 727 (Fla. 4th DCA 2008) – Reversal of Life Sentences – entitled to *de novo* resentencing upon correction of improper consecutive life sentences for murder and burglary.

Williams v. State, 777 So.2d 947 (Fla. 2000) – Right to Belated Postconviction Motion – if post-conviction counsel fails to timely file Rule 3.850 Motion, defendant has right to file belated appeal.

Parker v. State, 977 So.2d 671 (Fla. 4th DCA 2008) – Sentence reversed & remanded for resentencing due to judicial vindictiveness

# Improper Bolstering of Co-Defendant's Testimony by Police Warrants Reversal

The Florida Supreme Court recently ruled in a case where a police officer bolstered testimony of a co-defendant in a first-degree murder case. In Tumblin v. State, 29 So.3d 1093 (Fla. 2010), the defendant was charged in the shooting death of a auto shop owner. Id. at 1095. The only eyewitness to the shooting was another suspect, who eventually became a co-defendant. Id. The co-defendant implicated Tumblin as both the mastermind and the gunman. Id. at 1096. In exchange for this information and his testimony at trial, the co-defendant received a plea deal for second-degree murder with a 20-year cap on his sentence. Id.

At trial, a police lieutenant, who took the initial statement from the co-defendant, testified that he believed the co-defendant was telling the truth. Id. at 1101. The Court noted that allowing a witness (the lieutenant) to comment on the credibility of another witness (the co-defendant) invaded the province of the jury as deciders of credibility. Id. Further aggravating is the fact that testimony from law enforcement is typically afforded greater weight. Id.; *see also* Perez v. State, 595 So.2d 1096, 1097 (Fla. 3d DCA 1992) (stating that improper admission of police officer's testimony to bolster the credibility of a witness cannot be deemed harmless).

Defense counsel did object to the improper statement, and the trial court did strike the comment. Id. at 1101. Even with a curative instruction however, the Court held Tumblin was denied a fair trial as the improperly bolstered testimony of the co-defendant put Tumblin at the scene with a gun in his hand, and pulling the trigger. Because this testimony was instrumental to the jury's finding of first-degree premeditated murder, it's admission denied Tumblin of his right to a fair trial. Id. at 1104.

# Support Services for Inmates & Their Families Available

*The Florida Postconviction Journal* will occasionally recommend groups or services that are beneficial to inmates and their families. If you have an organization that provides advice or assistance to inmates and/or their families, contact us about the possibility of a mention in our newsletter. We have recently discovered R.I.S.E. (Relations of Inmates Supporting Each-Other). R.I.S.E. is an organization that offers support to the friends and families of the Florida incarcerated population. Their programs include a carpool connection, Books for Inmates, a Christmas toy drive for children of inmates, assistance to out-of-state families who are visiting Florida inmates, new visitor seminars, and a newsletter, The Sun-RISE Chronicle. Candy Kendrick is the founder and CEO of R.I.S.E., and she can be reached at RISEFLORIDA@Yahoo.com, or by phone at (941)421-6907. The address for R.I.S.E. is: 23184 Allen Avenue, Port Charlotte, Florida 33980.

# Supreme Court Finds Fundamental Error In Use of Standard Jury Instruction

by Ryan J. Sydejko

In State v. Montgomery, 35 Fla. L. Weekly S204 (Fla. 2010), the Florida Supreme Court addressed a significant issue with Florida Standard Jury Instruction (Criminal) 7.7 (2006). In Montgomery, the defendant was charged with first-degree murder, as well as the necessary lesser included offense of second-degree murder and manslaughter. Id. At the time of Montgomery's trial (2007) the instruction read: "To prove the crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:

1. (Victim) is dead.
2. (Defendant) intentionally caused the death of (victim).

Id. The problem with such an instruction, according to the Florida Supreme Court, is that a reasonable jury would have to find that the defendant intended to kill the victim, despite the fact that intent to kill is not an element of the offense of manslaughter. See Fla. Stat. § 782.07. Instead, manslaughter requires an intent to commit an act which causes death. In re Standard Jury Instructions in Criminal Cases – Report 2007-10, 997 So.2d 403, 403 (Fla. 2008).

On its face, it would appear beneficial to criminal defendants to force the State to prove this extra element (an intent to kill). But, as in the case of Montgomery, it actually cuts against the defense. Therefore, Montgomery argued that not only was the instruction erroneous, but such an erroneous instruction constituted fundamental error as it deprived him of an accurate manslaughter instruction. As the argument went, the incorrect statement of Florida law deprived Montgomery of the possibility of receiving a conviction for the lesser included offense of manslaughter. For example, the jury did not find Montgomery guilty of first-degree murder, as charged. They jury then, presumably, went down the list of lesser included offenses. It next arrived at second-degree murder, which includes the element of committing a criminal act imminently dangerous to another human being which resulted in death. Note the absence of an intent to kill. Because the jury already decided there was no intent to kill (by foregoing a conviction of first-degree murder), it may have simply arrived at a verdict of guilt of second-degree murder because it was the only offense left that did not include intent to kill. Had the jury been properly instructed, it may have continued down the list of lesser included offenses and found Montgomery guilty of manslaughter instead. In other words, the jury was not permitted the opportunity to consider the appropriate, permitted the opportunity to consider the appropriate, and necessary, lesser included offense of manslaughter in which the defendant was entitled. State v. Hankerson, 831 So.2d 235, 236-237 (Fla. 1st DCA 2002).

The Court held that criminal defendants are entitled to accurate jury instructions. Reed v. State, 837 So.2d 366, 369 (Fla. 2002). And because manslaughter is a category one lesser included offense of first-degree murder, the jury must be so instructed. *See* Fla. Std. Jury Instr. (Crim.) 7.2. The erroneous statement of Florida law regarding manslaughter was "pertinent or material to what the jury must consider in order to convict" and therefore constituted fundamental error which can be raised for the first time on appeal.

The question then becomes whether the error was such to warrant vacation of Montgomery's judgment and sentence. The key in Montgomery was that Montgomery was ultimately convicted of the lesser included offense of second-degree murder, an offense only one step removed from manslaughter. The Court has previously held that an erroneous jury instruction of an offense one step removed from the offense for which the defendant was convicted results in per se reversible error. Pena v. State, 901 So.2d 781, 787 (Fla. 2005). When the offense is more than one step removed, the harmless error analysis applies. Id. Because the conviction in Montgomery (second-degree murder) was only one step removed from the erroneously instructed offense (manslaughter), the Court found fundamental error which was per se reversible. Such error can be raised in a timely petition alleging the ineffective assistance of appellate counsel if counsel failed to raise the issue of erroneous manslaughter instructions. Sharpe v. State, 35 Fla. L. Weekly D1154 (Fla. 1st DCA 2010).

Montgomery was rendered on April 8, 2010, and the District Courts of Appeal have moved relatively swiftly in their attempt to limit Montgomery's application. Most notably is the First District Court's decision in Rozzelle v. State, 29 So.3d 1141 (Fla. 1st DCA 2009), which declined to apply Montgomery retroactively to cases that were final prior to Montgomery's issuance. Further, if the defendant is convicted of manslaughter, there is no showing of prejudice. Rivera v. State, 29 So.3d 1139 (Fla. 1st DCA 2009). Therefore, in the event an erroneous manslaughter instruction may have been provided at trial, it is imperative to present a timely claim to the tribunal.

# Public Records and Access to the Files of the Office of the State Attorney

by Loren D. Rhoton

When one investigates his or her case for potential postconviction claims he typically reviews pretrial discovery documents, trial transcripts, the record on appeal, and correspondence from the trial attorney. All of these documents are valuable and, when properly reviewed, can present viable postconviction claims. But, an often of overlooked source of potential claims is the State Attorney's file. Said file is, for the most part, a public record and can be viewed by anyone who makes a request. The purpose of this article is to direct interested persons on how to obtain public records such as a prosecutor's file on a criminal case.

Article I, §24(a) of the Florida Constitution provides that: "every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer or employee of the state...". In addition to the Florida Constitution, Florida Statutes §119, the *Public Records Act*, is the vehicle which affords the public access to most public information. §119.011 defines public records as "...all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." In other words, public documents include all materials made or received by an agency in connection with official business that are used to perpetuate, communicate, or formalize knowledge. *See*, Shevin v. Byron, et.al., 379 So. 640 (Fla. 1980). For the most part, any and all records received by a public agency are public records unless they are subject to an exception provided by Chapter 119. For the purposes of this article, important exceptions to be aware of are:

* *Active* criminal investigative and intelligence information
* Attorney "work product" in an active case
* Identity of crime victims
* Addresses and phone numbers of law enforcement officers and former officers and their families

Other exemptions from Chapter 119 can be found in §119.071. But, for the most part, Chapter 119 is based upon the premise that all records of a public agency are public records unless excluded by a specific exemption. The public records law is to be construed liberally in favor of openness, and all

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The *Florida Postconviction Journal* is currently being provided, free of charge, to Florida inmates who are interested in receiving the helpful advice and information contained in the newsletter. If you wish to have your name added to the newsletter's mailing list, please fill out the form below and mail it to Loren Rhoton, P.A., 412 East Madison Street, Suite 1111, Tampa, FL 33062. For non-inmates interested in subscribing to the newsletter, please forward a money order in the amount of $25 for a one-year subscription.

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exemptions from disclosure are to be construed narrowly and limited to their designated purpose. *See*, City of St. Petersburg v. Romine ex rel. Dillinger, 719 So.2d 19, 23 (Fla. 2nd DCA 1998).

It is important to know that a prosecutor's case file is a public record that can be reviewed by any person who so requests. Of course, State Attorney case files on active cases will be considered to come under the *active criminal investigative* or *criminal intelligence* exemptions of Chapter 119. But, once a criminal case is disposed of and the disposition is final, the entire State Attorney's file on the case becomes a public record under Chapter 119. This means that the entire file (excluding any portions that are covered by a specific exemption) is open to viewing by anybody who makes a public records request.

Of course it is quite possible that the State Attorney's Office may claim that a prosecutor's notes come under the *work product* exception. However, this is frequently not a valid exemption for the State to claim as Florida Statute §119.071(d)(1), provides:

> (d) 1. A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution **until the conclusion of the litigation or adversarial administrative proceedings**. (*Emphasis added*).

In reviewing public records, be sure to be alert for information and or evidence that is noted in the files and was never disclosed to you or your attorney. If any such nuggets should appear, they could potentially provide grounds for a 3.850 motion based upon newly discovered evidence, Brady violations, etc. While it is not possible to list every potential issue that could arise upon the viewing of the prosecutor's files, it is important to note that such a public records request may be very helpful in preparing a postconviction attack on a Judgment and Sentence.

If you are reading this article it is likely that you are incarcerated and will be unable to conduct a review of a prosecutor's files on your own. Therefore, I recommend, if possible, that an attorney experienced in such matters be retained to assist with the request and review of the prosecutor's files. In the alternative, a friend or family member could conduct the search on an incarcerated person's behalf. But, it will be important for the reviewer to be extremely familiar with the facts of the case being reviewed so as to know when something interesting/helpful appears in the prosecutor's file.

Chapter 119 provides that: "Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee. The custodian shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law... and for all other copies, upon payment of the actual cost of duplication of the record." §119.07(1)(a) provides more information on the costs of copies and duplication of records. Be aware that one may incur costs when performing a public records review.

To make a public records request, one must contact the records custodian for the public agency and ask to view specific records. The request does not have to be in writing. *See* §119.07(1)(a). Nevertheless, it is always beneficial to put the request in writing and ask that the custodian specify, in writing, any §119 exemptions it is claiming. It will behoove the public records requestor to make a paper trail in

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case he or she needs to bring a civil action to enforce public records viewing rights. Therefore, it is best to make a specific written request for the records one wishes to see. Once the request is made the records custodian must be given a "reasonable time" to retrieve the records and delete any portions that the custodian claims are exempt. Said "reasonable time" is the only delay that is permitted for producing the public records for inspection. The Tribune Company v. Cannella, 458 So.2d 1075 (Fla. 1984).

Once a public records request is made the custodian must permit the inspection at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee. *See* §119.07(1)(a). The custodian cannot refuse to produce the requested records just because some parts of the record are exempted. Instead, the custodian shall delete or excise the exempted portions and produce the nonexempted record portions. *See* §119.07)(2)(a). Once again, when making public records requests, it is wise to be aware that the custodian can charge for copies and for extensive use of technology and clerical or supervisory costs. §119.07(1)(b).

If, for some reason, the custodian fails to act on a public records request, the proper remedy is a petition for a writ of mandamus in the appropriate circuit court. Staton v. McMillan, 597 So.2d 940 (Fla.1st DCA 1992). Such a petition should seek to compel the custodian of the records to comply with the public records request. But, before filing a mandamus petition the petitioner must first furnish a public records request to the agency involved. It will help to attach your written public records request as an exhibit to the petition. It is also important to note that if a mandamus petitioner succeeds in obtaining the records via a civil action (mandamus petition) §119.12 provides for attorneys fees. §119.12 specifically provides that "[i]f a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected, examined, or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees."

A public records search of the prosecutor's file may not always turn up information helpful to a postconviction case. On the other hand, one never knows, the file could be rife with newly discovered evidence claims. Therefore, it is important to consider conducting such a public records search to discover, support or supplement a postconviction claim.

# Ineffective Assistance of Counsel and Strickland: Proving the Prejudice Prong

by Ryan J. Sydejko

As many postconviction followers are aware, Strickland v. Washington, 466 U.S. 668 (1984), is one of, if not the most, important cases to understand and apply when pursuing Florida Rule of Criminal Procedure 3.850 motions for postconviction relief. In order to demonstrate that trial counsel rendered ineffective assistance of counsel, a movant must demonstrate: (1) that counsel's conduct was so defective as to fall below an objective standard of reasonableness; and (2) that such conduct prejudiced the movant in that but for counsel's conduct, a different outcome would have probably occurred. Id. at 687. Both prongs must be demonstrated to support postconviction relief. Id. This fact is frequently overlooked by postconviction movants. Remember, even if counsel's conduct was deficient, it must be shown that had counsel performed effectively, a different outcome would probably have occurred.

In Ferrell v. State, 29 So.3d 959 (Fla. 2010), the Florida Supreme Court provided a litany of examples of the failure to demonstrate prejudice. Ferrell is helpful, especially for those proceeding *pro se*, as it illustrates the pitfalls of alleging ineffectiveness without backing it up with much substance. The following were some of the claims addressed by the Supreme Court in Ferrell:

* Ferrell argued that trial counsel was ineffective for failing to depose two witnesses whom testified at trial, as both would have revealed a number of reliability and impeachment issues. Id. at 969. The Court found this allegation conclusory as Ferrell failed to show any "specific evidentiary matter to which the failure to depose witnesses would relate"; failed to state what those issues would be; and failed to allege what evidence would have been discovered. Id. at 969-970. Without any specificity, Ferrell failed to demonstrate prejudice. Id. at 970.

* Ferrell argued that trial counsel was ineffective for failing to attend depositions of two witnesses. Id. Even though the Court acknowledged that counsel's failure to attend depositions was presumed deficient, the Court found that Ferrell failed to establish prejudice as he did not identify any specific information that counsel would have learned by attending the depositions. Id.

* Ferrell next argued that counsel was ineffective due to an inexcused absence from a scheduled hearing date. Id. at 971. The Court found this action deficient, but also found Ferrell failed to demonstrate any prejudice due to counsel's absence from the hearing. Id.

* Ferrell also argued that counsel was ineffective for failing to attend numerous other pretrial hearings. Id. The Court found that counsel either called ahead and informed the Court of his expected absence, or nonsubstantive matters were addressed. Id. Therefore, once again, Ferrell failed to show how he was prejudiced.

* Ferrell argued that counsel was ineffective for conducting an 8-page voir dire while the State took 141-pages. Id. at 973-974. The Court found, again, that Ferrell failed to demonstrate prejudice as he failed to identify any questions counsel should have posed, and failed to identify any juror who, with more extensive questioning, would have been found biased. Id. at 974.

* Ferrell alleged counsel was ineffective for telling the jury during opening statement that an alibi defense would be presented; then, during trial, failing to present said defense. Id. at 975. The Court found no prejudice as counsel sufficiently explained this failure during closing argument. Id.

The Court also went on to address Ferrell's Giglio and Brady claims, among many others, which failed to rise to the level of reversible error. The issue that finally garnered Ferrell relief pertained to his purportedly unknowing and involuntary waiver of evidence during the penalty phase of his capital murder trial. Id. at 983. Ferrell was subsequently awarded a new penalty phase proceeding.

The most important aspect of this case, for non-capital felony defendants, is the importance of alleging and clearly demonstrating prejudice. Many litigants focus primarily on counsel's conduct, and its impropriety, and conclude their motions with brief, conclusory statements that they were prejudiced. In order to satisfy Strickland, it is important to not only identify exactly how the conduct was prejudicial, but also how it would have affected the outcome without the ineffectiveness. Reviewing Ferrell's arguments can provide a great tutorial in avoiding blanket arguments and actually getting specific with one's claims.

# Overview of Procedure for Restoring Forfeited Gain Time

Submitted by Guest Columnist Melvin Perez

This article will provide an overview to the procedure required for restoring gain time forfeited due to disciplinary reports (DR's) or violations of any form of supervised release.

Under the rule, gain time that has been forfeited under the current commitment due to disciplinary action or revocation of parole, probation, community control, provisional release, supervised community control, conditional medical release, control release or conditional release shall be subject to restoration when the restoration would produce the same or greater benefits as those derived from the forfeiture in the first place. Fla. Admin. Code 33-601.105(1).

However, only those prisoners whose adjustment and performance since the forfeiture comply with, and exceed, all behavioral objectives are eligible for consideration. Moreover, the restoration shall only be considered when the prisoner has clearly performed positively over a period of tiem and it appears the prisoner will continue this positive adjustment without further violations of Department of Corrections rules or the law of the State of Florida. The rule also provides that the prisoner must be serving that portion of the sentence which, but for the forfeiture of gain time, would have been completed. Further, there must be an elapsed time of at least one-year since the last disciplinary action occurred if the forfeiture resulted from a DR. Fla. Admin. Code 33-601.105(2)(a). Equally important, the prisoner must have completed or be participating in all available programs recommended by the classification team.

In contrast, a prisoner is ineligible if he or she has been convicted of a felony during the current commitment or if found guilty of any of a number of rule violations. See Fla. Admin. Code § 33-601.105(2)(a)(4). Once the prisoner has gain time restored, subsequent loss of gain time due to DR's makes the prisoner ineligible for further restoration. Gain time lost before a prisoner is convicted of an additional felony while incarcerated will not be considered for restoration.

If the forfeiture results from a violation of any type of the aforementioned release supervisions, there must also be a one-year lapse and the prisoner will only be considered if he was not convicted for a new offense that occurred during the release period. Likewise, the prisoner must be DR free since return of the violation, and have completed or be participating in all available recommended programs. Any prisoner who receives the restoration due to a violation will not be eligible for such on any subsequent violations.

A prisoner will only be considered for restoration if he or she meets the requirements in subsections (1) and (2). But, there is no entitlement for consideration. The prisoner must submit a request to his classification officer who must determine if the prisoner meets the criteria. If the prisoner meets such criteria, the request shall be forwarded to the Institutional Classification Team (ICT) with a recommendation either for or against restoration. In turn, if the prisoner does not meet the criteria, the classification officer shall return the request to the prisoner indicating in writing which criteria have not been met.

The ICT shall consider the request based upon the criteria described in subsections (1) and (2). If the ICT recommends restoration, the recommendation shall be forwarded to the Assistant Secretary of Institutions or designee for final action. On the other hand, if the ICT does not make a recommendation for restoration, the request shall be returned to the prisoner along with the basis for the denial. If the ICT's basis for the denial fails to comply with the rules or are unreasonable, the prisoner may file a formal grievance challenging the ICT's basis. The ICT's failure to follow the rule in denying the request can be challenged through a mandamus action after exhausting administrative remedies. While the act of granting the restoration is discretionary, DOC must comply with the rules. Although a writ of mandamus cannot be used to compel a public agency to exercise its discretionary power in a given manner, it may be used to compel the agency to follow its own rules. Rivera v. Moore, 825 So.2d 505 (Fla. 1st DCA 2005).

Upon receipt of the recommendation from the ICT, the final approving authority shall approve or deny the recommendation based upon the applicable criteria. The institution will be notified and the facility staff must notify the prisoner of the decision and the basis for the decision.

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