The Florida Postconviction Journal

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a quarterly publication of Loren Rhoton, P.A.

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New & Updated Sources for the *Pro Se* Litigant

It feels like we just started publishing the Florida Postconviction Journal. But, this is the eighth issue and we have built up a sizable readership. And we keep adding new subscribers with every issue. With new readers come the numerous requests for back issues of FPJ. It became unfeasible to satisfy every request for back issues. As a result, we compiled the first seven issues of FPJ (Volumes 1& 2, Spring 2010-Spring 2013) into one book that is now available for purchase through Amazon.com, Barnesandnoble.com, and other online booksellers ($15.00 plus shipping), or, through the Office of Loren Rhoton, P.A. ($25.00, includes shipping). While new issues of the FPJ are provided free of charge to Florida prisoners, printing and distribution costs dictate that we, unfortunately, have to charge for the back issues book. Should the back issues be popular to the extent that they cover the costs of production and distribution, we hope to update the compilation with additional back issues in the future. An order form is included in this issue for the new back issue compilation.

Also, the book, Postconviction Relief for the Florida Prisoner, has been updated and is now available in its second edition. The second edition provides up to date postconviction information, as well as a couple of new chapters. It also can be purchased through Amazon.com, Barnesandnoble.com, and other online booksellers ($20.00 plus shipping), or, through the Office of Loren Rhoton, P.A. ($25.00, includes shipping).

At Loren Rhoton, P.A., we will continue to try to educate Florida prisoners about pursuing postconviction relief. To that end, we are currently putting together a postconviction pleadings form book. The forms book is slated for publication in early 2014 and will contain a wealth of helpful information for pro se postconviction litigants. In the meantime, we will continue publishing helpful information through our quarterly newsletter.

Timing Dictates Process for Withdrawing a Plea

The process for withdrawal of a plea is dictated by the timing of a defendant's change of heart. The Florida Supreme Court recently spelled this out in Griffin v. State, 2013 WL 2096350 (Fla. 2013).

If a motion is made before sentencing, the standards in Florida Rule of Criminal Procedure 3.170(f) control. If good cause is shown, the court must allow withdrawal; otherwise it is left to the court's discretion. Fla. R. Crim. P. 3.170(f).

If a motion for withdrawal is made after sentencing, a defendant's options are more limited. If the motion is filed within 30-days of sentencing, a defendant is limited to one of several grounds, such as involuntariness of plea, a sentencing error, lack of subject matter jurisdiction or a violation of a plea agreement. Fla. R. Crim. P. 3.170(l) and Fla. R. App. P. 9.140(b)(2)(A)(ii)(a)-(e). Failure to file such a motion waives the issue for appellate review. Griffin v. State, 2013 WL 2096350.

If the motion to withdraw is not filed within 30-days of sentencing, review is typically limited to relief under Fla. R. Crim. P. 3.850 and 3.851. In those circumstances, claims most commonly amount to claims of ineffective assistance of counsel regarding the voluntariness of the plea (i.e. misadvice).

Thus, it is important for any individual potentially seeking to withdraw a plea to understand exactly what stage of the process his or case is. Often times, litigants find a rule that appears to apply, but fail to recognize the tight window for which that rule applies. Because Rule 3.170(l) only applies to a brief 30-day window of a litigant's case, it is important to understand how the postconviction vehicles change, and what relief may be foreclosed by a failure to timely act. As with many cases featured in *FPJ*, a litigant considering withdrawal of his or her plea may wish to review Griffin and the Court's generous discussion of these timelines and standards.

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 was appointed by the Florida Supreme Court to the Florida Criminal Rules Steering Committee, Subcommittee on Postconviction Relief, which focused on rewriting Florida Rule of Criminal Procedure 3.850. Mr. Rhoton worked 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 was to advocate for changes that were beneficial to postconviction litigants.

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 Prisoners' Legal Aid Organization.

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.

Tolling the Period of Limitations for Out-of-State Inmates

Florida Rule of Criminal procedure 3.850 imposes a two-year period of limitations for the filing of a postconviction motion. Said period of limitations is often used to deny collateral relief and there are only a few exceptions to the period of limitations listed in Rule 3.850(b) (i.e., newly discovered evidence, new retroactive constitutional caselaw, and attorney error in failing to timely file a 3.850). Aside from the exceptions listed in Rule 3.850(b), the two-year period of limitations can be tolled (suspended) under some circumstances.

In Ramsey v. State, 965 So.2d 854, 855 (Fla. 2nd DCA 2007) the 2nd DCA explained that the rationale for permitting the congruence of certain limited, rarely occurring circumstances to toll the time for a prisoner to file a rule 3.850 motion derives from the fundamental right of access to the courts. As the Florida Supreme Court noted when it fashioned the "mailbox rule" in Haag v. State, 591 So.2d 614, 617 (Fla.1992): "Under the Florida Constitution, all persons have a right to equal protection of the laws, particularly in matters affecting life and liberty. Art. I, § 2, Fla. Const. Obviously, this includes a right of equal access to the courts, which serve as the final arbiter of whether life or liberty may be forfeited lawfully."

The Ramsey Court thus provided that "It stands to reason…that an uncounseled prisoner held in an out-of-state jurisdiction who is not represented by counsel and who does not have access to Florida statutes, rules, and forms has been deprived of meaningful access to the Florida courts." 696 So.2d at 1298-99. Thus, under such circumstances it has been held that the two year period of limitations for filing a 3.850 motion is tolled until an out of state inmate is transferred back to the State of Florida where he has access to Florida legal materials. *See also* John v. State, 826 So.2d 496 (Fla. 3d DCA 2002); and, Demps v. State, 696 So.2d 1296, 1298-99 (Fla. 3d DCA 1997

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.

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.

Pacheco v. State, 114 So.3d 1107 (Fla. 2d DCA 2013) – Withdrawal of Plea – Post-trial motion to withdraw plea improperly summarily denied when facts cast doubt on movant's competency to enter plea

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

Important Recent Amendments to Florida Rule of Criminal Procedure 3.850

by Loren D. Rhoton

Effective July 1, 2013, Florida Rules of Criminal Procedure 3.850 have been amended. There are a good number of procedural changes that one should be aware of when pursuing postconviction relief.

3.850(c) (Contents of Motion) has been amended in several ways. First, it is amended to add the requirements that the motion be under oath, stating that "the defendant has read the motion or that it has been read to him or her, that the defendant understands its contents, and that all of the facts stated therein are true and correct," and that the motion explain whether the judgment resulted from a plea or from a trial. Next, it is amended to require that newly discovered evidence claims be supported by affidavits attached to the motion. Lastly, it is amended to remove the language governing the form of the motion currently set out in the last paragraph and to move that language to new subdivision (d) (Form of Motion).

Next, new subdivision (e) (Amendments to Motion) codifies existing case law on amendments to postconviction motions and to comport with the amendments to subdivision (f) (Procedure; Evidentiary Hearing; Disposition), These new provisions together are meant to further the ultimate goal of allowing the trial court to adjudicate the merits of all sufficiently pleaded postconviction claims in a single postconviction proceeding, with a single final appealable order.

New subdivision (f) codifies existing case law and addresses the different options that the trial judge has when considering a motion under the rule, dependent upon such factors as the timeliness of the motion, whether and to what extent the motion is sufficient, whether and to what extent the motion is subject to disposal on the record, whether to obtain a response from the State, and whether counsel should be appointed. The portion of this subdivision addressing disposition by evidentiary hearing is amended to (1) require that the trial court cause notice of the evidentiary hearing to be served not only on the state attorney but also on the defendant or the defendant's counsel; (2) expressly provide that the defendant bears the burden of presenting evidence at the evidentiary hearing and the burden of proof upon the motion unless otherwise provided by law; and (3) require that the order issued by the trial court after the evidentiary hearing resolve all claims raised and be considered the final order for purposes of appeal. Additionally, language directing the court to vacate and set aside the judgment and to discharge, resentence, grant a new trial, or correct a sentence upon finding in favor of the defendant is deleted.

New subdivision (g), (Defendant's Presence Not Required) is amended, to clarify that the defendant's presence is required only at an evidentiary hearing on the merits of any claim.

New subdivision (h)(1), requires that a second or successive motion be titled "Second or Successive Motion for Postconviction Relief."

New subdivision (i) (Service on Parties) is amended to clarify that the clerk of court must serve on the parties a copy of any order issued in the rule 3.850 proceeding.

New subdivision (j) (Rehearing) is amended to state that a motion for rehearing in rule 3.850 proceedings is not necessary to preserve an issue for appeal and to include the requirement that the motion be "based on a good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on a legal precedent or statute not available prior to the court's ruling." Additionally, the subdivision is amended to provide time limitations for the response to and the disposition of a motion for rehearing. A response may be filed within 10 days of service of the motion. The subdivision further provides that "The trial court's order disposing of the motion for rehearing shall be filed within 15 days of the response but not later than 40 days from the date of the order of which rehearing is sought. If no order is filed within 40 days, the motion is deemed denied."

New subdivision (k) (Appeals) is amended to clarify that only the final order disposing of the motion for postconviction relief is appealable. To that end, the amended rule requires final orders denying a rule 3.850 motion to state that the defendant has the right to appeal within thirty days of rendition of the order and further provides that all nonfinal, nonappealable orders should state that the defendant has no right to appeal the order until entry of the final order.

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New subdivision (l) (Belated Appeals and Discretionary Review), is amended to include a provision for belated discretionary review. Said amendment provides: "Pursuant to the procedures outlined in Florida Rule of Appellate Procedure 9.141, a defendant may seek a belated appeal or discretionary review."

New subdivision (n) (Certification of Defendant; Sanctions) replaces the previous subdivision (m) (Frivolous or Malicious Collateral Criminal Pleadings or Motions), which has been deleted. New subdivision (n) is a complete rewrite of the subdivision addressing frivolous or malicious filings by defendants. The provision requires postconviction defendants to take formal steps that communicate the significance of filing a document with a court and to set forth a sanction mechanism to deter frivolous postconviction motions, thus protecting the courts and other litigants from abuse of the postconviction process. The provision has been modified to also apply to the filing of an improper habeas petition seeking relief that should be or was sought by motion under rule 3.850.

Craigslist Sting Results in Entrapment

In Gennette v. State, the First District Court of Appeal was presented with the issue of an overzealous online detective. Gennette, 2013 WL 4873490 (Fla. 1st DCA 2013). Here, a man responded to a Craigslist ad allegedly posted by an adult female. Sometime during the email exchanges, the female, an undercover officer, raised the idea of a minor participating in the sexual three-way encounter. Despite the man's repeated attempts to change the conversation, the officer kept interjecting the idea. Eventually, in the forty-first email, the man inquired whether the minor's participation would be consensual. The emails continued, getting progressively more graphic.

The DCA held that the trial court erred in failing to grant a pre-trial motion to dismiss based upon the defense of entrapment as the man was the victim of the officer's fishing attempt to induce or encourage him to participate in illegal sexual contact.

Support Services for Inmates & Their Families Available

If you have a suggestion for a group or inmate resource that should be listed in our newsletter, please contact us with the information and we will share any helpful information in future issues.

The Florida Postconviction Legal Aid Organization, Inc. – www.myfplp.org
P.O. Box 4104, Milton, FL 32572
Phone: (850) 400-1205; Email: myfplp@aol.com
****FPLAO publishes a newsletter for inmates called the Florida Postconviction Legal Perspectives (FPLP). The FPLP addresses issues of interest to Florida prisoners such as promoting accountability of corrections officials. To become a member and receive monthly FPLP newsletters, contact FPLAO as the address above. Subscriptions cost $18.00 for prisoners and $26.00 for family members/individuals. [The Florida Postconviction Journal is not affiliated with FPLAO or FPLP, and derives no funds from the subscription costs. We merely provide this information as a service to our readers. DO NOT SEND MONEY TO THE FLORIDA POSTCONVICTION JOURNAL FOR FPLAO MEMBERSHIP. ALL INQUIRIES ABOUT FPLAO MEMBERSHIP MUST BE ADDRESSED TO FPLAO'S ADDRESS ABOVE.*

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**Provides referrals in civil matters.*

Prisontalk.com. An Internet community/forum that provides general information and networking for families of inmates. Also, has Florida specific forum that addresses issues ranging from dealing with the D.O.C. to coping with incarceration.

Florida Justice Institute, Inc.
4320 Bank of America Tower
100 S.E. Second Street
Miami, FL, 33131
Phone: (305) 358-2081
Contact: Randall C. Berg, Jr.
Email: rcberg@floridajusticeinstitute.org
**Handles civil-rights cases regarding conditions in prisons and jails; advocates and lobbies on behalf of prisoners.*

Innocence Project of Florida.
1100 East Park Ave.
Tallahassee, FL, 32301
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**Assists inmates with postconviction DNA innocence cases and helps exonerees in obtaining compensation for wrongful convictions.*

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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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Judicial Disqualification

by Loren D. Rhoton

Occasionally a defendant will encounter the necessity of asking a particular judge to recuse him or herself from a case because of some sort of bias on the part of the judge. Judicial disqualification is governed by three bodies of law: Florida Rule of Judicial Administration 2.330 (procedural); Florida Statute §38.10 (statutory); and the Florida Code of Judicial Conduct, Canon 3E(1) (ethical requirements).

Fla. R. Jud. Admin., Rule 2.330(d) permits any party to move to disqualify a circuit judge based upon the following grounds:

> (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or,
>
> (2) that the judge before whom the case is pending, or some person related to said judge by consanguinity (blood relation) or affinity (marriage relation) within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to the cause.

The procedure for disqualification mandated by Rule 2.330 begins with a requirement that the movant "allege specifically the facts and reasons" for the disqualification. Fla. R. Jud. Admin., Rule 2.330(c)(2). The facts alleged must pertain to one of the above-enumerated grounds. It will be fairly easy to allege grounds for recusal if the claim is that that judge is somehow related to one of the parties or attorneys involved, or if the judge is a material witness against one of the parties. One merely needs to allege the relationship that causes a conflict for the judge to assert a facially valid ground for recusal.

When the ground for recusal is that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge, then the "facts alleged in [a motion to disqualify] need only show a well-grounded fear that the movant will not receive a fair trial at the hands of the judge." MacKenzie v. Super Kids Bargain Stores, Inc., 565 So.2d 1332, 1334 (Fla. 1990)).

Once a motion to recuse a judge is filed, the court "shall determine **only** the legal sufficiency of the motion." Rule 2.330(f) (emphasis added). In so doing, the First District Court of Appeal has noted that in determining whether the allegations supporting disqualification are sufficient, the

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Second Edition!

Judicial Disqualification (continued)

facts must be taken as true and must be viewed from the movant's perspective. Smith v. Santa Rosa Island Authority, 729 So.2d 944 (Fla. 1st DCA 1998). If legally sufficient, the court must grant the motion and take no other action. Rule 2.330(f).

The Florida Code of Judicial Conduct provides guidance for determining when a motion to disqualify a judge is "legally sufficient." Pursuant to Canon 3E(1), a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." The Florida Supreme Court has held that questioned impartiality "is not a question of how the judge feels", but simply refers to whether the movant possesses a well-grounded fear of judicial partiality. Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983) ("The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially."). Canon 3E provides a list of situations that would call for disqualification of a judge. The list is not exhaustive, but some of the circumstances are worth noting. Canon 3E provides that a judge should disqualify himself if, among other things:

> 1. the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> 2. the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
>
> 3. the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than *de minimis* interest that could be substantially affected by the proceeding;
>
> 4. the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge;
>
> 5. the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to parties or classes of parties in the proceeding, an issue in the proceeding, or the controversy in the proceeding.

While a judge's perceived prejudice is obviously a delicate question, courts have consistently held that so long as the fear is objectively reasonable, disqualification is required. Jarp v. Jarp, 919 So.2d 614 (Fla. 3d DCA 2006); Scott v. State, 909 So.2d 364 (Fla. 5th DCA 2005); Valdes-Fauli v. Valdes-Fauli, 903 So.2d 214 (Fla. 3d DCA 2005). Recusal should occur even when the grounds are supported by only a mere modicum of reason. Livingston, 441 So.2d at 1085. Consequently, a movant need not satisfy numerous strictly applied technical requirements, but must merely demonstrate that, "[i]f taken as a whole, the suggestion and supporting affidavits are sufficient to warrant fear on the part of a party that he will not receive a fair trial by the assigned judge. Id. at 1086.

Rule 2.330(f) provides that the judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

Once a judge is disqualified on a case, the prior factual or legal rulings by the judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration. Rule 3.330(h). Such a motion for reconsideration must be filed within 20 days of the disqualification order, unless good cause is shown for a delay in so moving or other grounds for reconsideration exist.

If a motion to disqualify a judge is improperly denied, then the denial can be reviewed by an appellate court pursuant to a petition for writ of prohibition. Art.V. Section 4(b)(3) Fla. Const. (1980), and Fla.R.App.P. 9.030(b)(3). Prohibition is the proper remedy to test the validity of the denial of a motion for disqualification of a judge. See, Wal-mart Stores v. Carter, 768 So.2d 21 (Fla. 1st DCA 2000); Rollins v. Baker, 683, So.2d 1138 (Fla. 5th DCA 1996); and State v. Shaw, 643 So.2d

More Manslaughter Instructions Found Erroneous: *Montgomery* Lives On

by Ryan Sydejko

As readers of FPJ are well aware, the Florida Supreme Court held in State v. Montgomery, 39 So.3d 252, 257 (Fla. 2010), that the 2006 manslaughter jury instructions erroneously included an intent to cause death element.

Since that ruling, District Courts have spent considerable time attempting to limit Montgomery. One such attempt was the Second District Court of Appeal's ruling in Daniels v. State, 72 So.3d 227 (Fla. 2d DCA 2011). In Daniels, the following 2008 jury instruction was read:

"ELEMENTS:

1. [The victim] is dead.
2. [The defendant] intentionally caused the death of [the victim].

However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide as I have previously explained those terms.

In order to convict of manslaughter by intentional act, it is not necessary for the state to prove that the defendant had a premeditated intent to cause death, *only an intent to commit an act which caused death*."

Id. at 229. (Emphasis in original).

Although the second element admittedly contained the erroneous requirement of an intent to cause death, the Second DCA held that the italicized language following that element cured any deficiency. Id. at 230-232.

The Florida Supreme Court reviewed and ultimately reversed the Daniels decision. *See* Daniels v. State, 2013 WL 2435562 (Fla. 2013). The Court's opinion provides an excellent analysis of the history of the manslaughter instruction. The 2006 instruction, at issue in Montgomery, was almost identical to the 2008 instruction provided in Daniels. The only difference was the 2008 insertion of the italicized language above. It was that language that the Second DCA opined saved the instruction. Daniels, 72 So.3d at 230. The Supreme Court found that the italicized language was "insufficient to erode the import of the second, incorrect element contained in the 2008 instruction that continued to require the jury to find that the defendant intentionally caused the death of the victim." Daniels, 2013 WL 2435562.

Following issuance of Montgomery and an interim fix, the instruction was officially amended in 2011 to remove the intent to cause death.

Because Daniels' counsel failed to timely object to the jury instruction at the trial court level, the Supreme Court had to review the erroneous instruction under the fundamental error analysis. Appellate courts apply the doctrine of fundamental error "very guardedly" and will only find fundamental error in the context of jury instructions when "the omission is pertinent or material to what the jury must consider in order to convict." State v. Delva, 575 So.2d 643, 644-645 (Fla. 1991) and Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). Further, "where the trial court fails to correctly instruct on an element of the crime over which there is dispute, and that element is both pertinent and material to what the jury must consider in order to decide if the defendant is guilty of the crime charged or any of its lesser included offenses, fundamental error occurs." Daniels, 2013 WL 2435562. In other words, even if the erroneous instruction is given, in the event counsel did not timely object, there are still significant hurdles for the defendant to overcome before fundamental error will be found. Again, the Supreme Court's Daniels decision provides an excellent analysis by explaining fundamental error, explaining when it applies, examining the underlying facts, and correctly applying the law to those facts. The Daniels decision is absolutely a must-read to any *pro se* petitioner hoping to raise a Montgomery-like claim. Many pitfalls and misunderstandings that our office encounters in *pro se* pleadings could be avoided by following the roadmap provided in Daniels.

The Supreme Court's holding is most relevant to those individuals who may have initially thought they had a Montgomery claim, only to have been denied by rulings such as the Second District Court's regarding the 2008 instructions. Additionally, as mentioned above, any *pro se* petitioner raising a Montgomery issue, whether complaining of the 2006 or the 2008 instruction, will benefit from a reading of Daniels and it clearly lays out the process for raising the claim and identifies each point which ought to be raised and addressed.

Loren Rhoton, P.A.

Postconviction Attorneys

412 East Madison Street
Suite 1111
Tampa, Florida 33602
Tel: 813-226-3138
Fax: 813-221-2182
Email:
lorenrhoton@rhotonpostconviction.com
rsydejko@rhotonpostconviction.com

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The Florida Postconviction Journal publishes up to four times per year. This Journal provides resources for information affecting prisoners, their families, friends, loved ones, and the general public of the State of Florida. Promoting skilled access to the court system for indigent prisoners is a primary goal of this publication. Due to the volume of mail that is received, not all correspondence can be returned. If you would like return of materials, please enclose a postage-paid and pre-addressed envelope. This publication is not meant to be a substitute for legal or other professional advice. The material addressed in the Journal should not be relied upon as authoritative and may not contain sufficient information to deal with specific legal issues.

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