The Florida Postconviction Journal

Volume 1
Issue 3

a quarterly publication of Loren Rhoton, P.A.

Winter 2010

Lame Ducks, Dead Hippies & New Year's Wishes

by Loren D. Rhoton

Okay, so, the good news is that if you are a long-dead rock star with a misdemeanor conviction, you'll have no problem getting clemency relief in Florida. On the other hand, if you are an actual living human being who has legitimate grounds to request clemency, you will have to wait at least two years before the Florida Clemency Board will even consider whether or not to allow you to petition for executive clemency. That's right, the Florida Clemency Board and Charley Crist recently granted a pardon to Jim Morrison, singer for 60's psychedelic rock band, The Doors. Charley Crist said that he did so because, after reviewing the evidence, he believed that Morrison might not be guilty. I'm sure this is pretty interesting to the hoards of inmates who have been explicitly told by the Clemency Board that the board does not retry cases.

Anyway, aside from my wanting to vent about how ludicrous it is for the Clemency Board to grant a pardon to a dead anti-hero (albeit a very cool one) who would have wiped his @#$ with the pardon if he were alive, I guess the point is this: We are coming into a new year with a new Governor and hopefully some big changes will be made with regard to the clemency process. Whether that is realistic or not, I do not know.

Regardless, my wish for all of my readers this year is that you can get the post conviction and/or clemency relief that each and every one of you deserves. So along with my newsletter, I send out my best wishes for a happy and productive new year. In keeping with my wish, I once again hope that you find the advice in this newsletter to be helpful and informative about how to attack your judgment and sentences. I hope that you empower yourselves with this information and use it to your benefit. And hey, let's hope that incoming Governor Rick Scott doesn't allow the Clemency Board to get mired down in clemency petitions from teen heartthrob David Cassidy or funk superstar George Clinton.

Prosecutor's "No Other Reasonable Explanation But Guilt" Closing Argument Improper

In Evans v. State, 26 So.3d 85 (Fla. 2d DCA 2010), the Court was again presented with an allegation of improper prosecutorial comments during closing argument. A brief recitation of the facts is necessary: in 2005 the Pinellas County Sheriff's Office executed a search warrant on a suspected drug house. Id. at 87-88. Upon entering, eight individuals were found inside. Id. at 88. The defendant was found in the bathroom, on the toilet, directly across the hall from the bedroom. Id. At that time, the defendant was wearing rubber gloves and possessed nearly $1,800 in twenty dollar bills. Id. In the bedroom across the hall, officers found more rubber gloves, crack cocaine, razors, a drug ledger, rental car keys and a digital scale. Id. Officers believed that bedroom was used as the production and distribution center for the crack cocaine, and opined that the defendant's rubber gloves were used to protect himself during that process. Id. The defendant was tried and convicted of drug trafficking. Id. at 87.

Because the cocaine was found in a separate room from the defendant in a house with numerous occupants, the State had to prove Evans had constructive possession of the drugs. Id. at 89.

To do so, the prosecutor argued during closing that "if [Evans] wasn't guilty, wouldn't there be some reasonable explanation for him wearing those gloves." Id. at 91. He continued: "And be very clear, evidence that there is no reasonable explanation for him having those gloves on except that he was in control of the east bedroom." Id. Counsel's repeated objections and motion for mistrial were overruled. Id. The Second DCA ultimately held that the prosecutor's statements amounted to improper comment on the defendant's right not to testify. Id. at 91-92. Such argument could effectively cause the jury to believe that the defendant was required to introduce evidence or testify in his own defense. As a result, a new trial was granted. Id. at 92.

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

Officer's Opinion that Defendant Acted Like Typical Drug Trafficker is Error

In Austin v. State, 44 So.3d 1260 (Fla. 1st DCA 2010), the First District Court of Appeal found reversible error when a Florida State Trooper testified at trial that the defendant acted like a typical drug trafficker. Id. at 1261-1262. The trooper, who was neither tendered nor accepted as an expert witness, testified that drug traffickers frequently utilize third-party rental cars so they can disclaim any drugs which may be found in the vehicle; or, so the suspect can flee from the vehicle and not be traced back to it. Id. at 1262. Defense counsel objected, but the trial court permitted the testimony, holding that "these are factors [law enforcement] are taught to look for, which makes it a relevant area of inquiry." Id. The error was compounded by the prosecutor when he reiterated the trooper's testimony during closing, arguing that it was sound drug trafficking practice to use third-party rental cars so as to avoid law enforcement detection. Id.

The First DCA began by noting: "testimony about the general behavior of certain kinds of offenders is inadmissible as substantive proof of a defendant's guilt." Id. Such characteristics may give rise to suspicion, but is inadmissible to prove a drug offense was committed. Id. The Court further noted the danger of allowing officers to testify as the trooper did, as it invites juries to convict the defendant by association, rather than on the evidence presented at trial. Id.

The trooper's testimony was not harmless error because it directly negated the defense. Id. at 1263. The defendant asserted that his wife had rented the vehicle and, unbeknownst to the defendant, the vehicle contained large quantities of drugs. Id. The State offered no evidence that the defendant actually knew of the drugs. Id. Essentially, the trooper's testimony allowed the State to avoid proving the element of knowledge by instructing the jury to assume the defendant knew of the drugs because he was acting like a drug trafficker. Id. For these reasons, the Court found the trooper's testimony regarding general behavior patterns of drug traffickers to be reversible error.

To Order Back Issues of

***The Florida Postconviction Journal*:**

Please send a check or money order made payable to Loren Rhoton, P.A. in the amount of $3.50 per issue. Also, please designate the Volume and Issue number of each issue desired (found on the first page of each issue). Allow two to three weeks for delivery.

Pro Se Postconviction Appellate Briefing: Which Issues to Include in the Initial Brief?

by Ryan J. Sydejko

A trial court may utilize any number of rationales for denying postconviction claims. Some commonly utilized rationales include: untimeliness (Fla. R. Crim. P. 3.850(b)), successiveness (Fla. R. Crim. P. 3.850(f)), facial insufficiency (Spera v. State, 971 So.2d 754 (Fla. 2007)), and simple denial on the merits. While the trial court has many rationales available, all denials fall into two procedural categories: summary or post-evidentiary hearing. A postconviction movant must be cognizant of the procedural mechanism used by the trial court when preparing the initial brief to the District Court of Appeal. This article focuses on the varying briefing procedures as dictated by the trial court's denial.

Appeals from the denial of postconviction relief are governed by Florida Rule of Appellate Procedure 9.141. If the trial court did not conduct an evidentiary hearing in the case, the appellant is permitted, but not required, to file an initial brief. Fla. R. Crim. P. 9.141(b)(2)(C). If the appellant chooses to so file, the brief is due within fifteen days of the filing of the notice of appeal. Id.

In the event the trial court did conduct an evidentiary hearing on the claims, then the appellant is required to file an initial brief on appeal. Fla. R. Crim. P. 9.141 (b)(3)(C).

Such a procedure appears relatively straightforward: if the trial court granted an evidentiary hearing on the claims, and appeal is taken, then an appellate brief on the issues is required. Fla. R. Crim. P. 9.141(b)(2)(C). If the trial court summarily denied the issues, then an appellant can opt not to file a brief and rely on previous pleadings in support of his/her position. See Fla. R. Crim. P. 9.141(b)(2)(C). A dilemma arises, however, regarding multi-issue postconviction motions, when an evidentiary hearing is held as to some claims, while other claims are summarily denied.

It is fairly common for postconviction movants to raise multiple grounds for relief in Rule 3.850 motions. In fact, such a practice is important as, in most cases, only a single Rule 3.850 motion will be permitted. Fla. R. Crim. P. 3.850(f) ("A second . . . motion may be dismissed if the judge finds that it fails to allege new or different grounds . . . or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure."). Thus, appellants, especially those proceeding pro se, are placed in a difficult position: utilize limited page space to brief arguably improperly summarily denied claims; or, focus on the claims that had an evidentiary hearing, and allow the appellate court to review the summarily denied claims on its own. The appellate courts are split on how to proceed under such circumstances.

In Walton v. State, 35 Fla. L. Weekly D856 (Fla. 2d DCA 2010), the Second District Court of Appeal addressed a situation in which a postconviction movant had filed a Rule 3.850 motion alleging twenty-four grounds for relief. Id. at *1. All claims were eventually denied by the trial court, but in different manners: some were denied as clearly refuted by the record; some were procedurally barred; some were facially insufficient or conclusory; and two were denied on the merits after an evidentiary hearing. Id. On appeal, Walton focused his briefing on those issues denied as procedurally barred and those clearly refuted by the record. Id.

The appellate court affirmed those grounds which the trial court found clearly refuted by the record, as well as those grounds found to be procedurally barred. Id. The appellate court did, however, reverse the trial court's holding on the eight grounds previously deemed facially insufficient. Id. The appellate court acted despite the fact that these grounds were not briefed by Walton. The appellate court reasoned that it had the inherent power to reverse and remand improperly summarily denied grounds despite a lack of briefing, pursuant to Fla. R. App. P. 9.141(b)(2)(D) which deals with summarily denied postconviction issues. Id. Subsection (D) states: "Unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." Fla. R. Crim. P. 9.141(b)(2)(D).

The Second DCA interpreted that provision to mean that the appellate court is required to review all summarily denied claims. Id.

In dissent, Judge Kelly argued that when an appellant chooses not to brief a particular issue, the appellant implicitly abandons that issue. Id. at 3. Judge Kelly relied on the position that the appellate court lacks critical information when ruling on un-briefed issues, as the appellant does not state his

Continued on next page

belief why the trial court's ruling was incorrect, the State/Appellee is not afforded a reasonable opportunity to state their position on the un-briefed issue, and the appellate court is not even instructed whether the appellant desires to pursue the ground. Id. Without this information, Judge Kelly "see[s] no reason why we should not conclude that [Walton] has abandoned those claims." Id. at 4.

More recently, the Fourth DCA has echoed Judge Kelly's position. See Prince v. State, 40 So.3d 11 (Fla. 4th DCA 2010). In Prince, the Court held that any non-briefed grounds are waived by the appellant. Id. at 12. In a nod to Walton, the Fourth DCA conceded that briefs are not required in appeals from summary denial of Rule 3.850 motions. Id. at 13. But, the court wrote, should an appellant opt to file a brief, the brief must present argument as to all grounds the appellant feels contain error. Id. Justifying this position, the court noted that appellate courts "may be needlessly reviewing many claims which the appellant no longer disputes." Id.

Not only did the Prince court certify conflict with Walton, but the court also made a specific request: to amend the Florida Rules of Appellate Procedure to permit the district courts to require postconviction appellants to file initial briefs in all cases. Prince, 40 So.3d at 13. This request arguably implies that the Fourth DCA recognizes that the Rules, as currently drafted, do not entirely support their position. The Prince court certified conflict with the Walton decision and has not yet been resolved by the Florida Supreme Court.

The moral of this story is quite simple: in the case of mixed summary and non-summary post-conviction denials, as a pro se appellant, brief all issues believed to have been ruled in error by the trial court. This may very well be a burdensome task for the untrained pro se appellant. Of course, the Florida Supreme Court may eventually resolve this conflict in favor of the Second DCA's position in Walton; but, until then, it is vital for pro se postconviction movants to fully brief each and every issue in order to avoid Price-like involuntary waivers.

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.

Innocence Project of Florida.
1100 East Park Ave.
Tallahassee, FL, 32301
Phone: (850) 561-6767
**Assists inmates with postconviction DNA innocence cases and helps exonerees in obtaining compensation for wrongful convictions.*

R.I.S.E. (Relations of Inmates Supporting Each-Other).
23184 Allen Avenue,
Port Charlotte, FL, 33980
Phone: (941)421-6907
Contact: Candy Kendrick
Email: RISEFLORIDA@Yahoo.com
**Offers support to the friends and families of Florida inmates. Programs include a carpool connection, Books for Inmates, a Christmas toy drive for children of inmates, assistance to out-of-state families visiting Florida inmates, new visitor seminars, and a newsletter.*

Florida Legal Services. www.floridalegalhelp.org
2121 Delta Blvd., Tallahassee, FL, 32303
Phone: (904) 385-7900
**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.*

To Subscribe or Change Your Mailing Address to *The Florida Postconviction Journal:*

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.

Please Check One:

☐ New Subscriber

☐ Change of Address

Name DC#

Institution Name and Street Address

City State Zip

Did the Offense Really Occur in a Dwelling?

by Loren D. Rhoton

The question of whether a building or property is a "dwelling" can become a very relevant issue when determining the level of certain offenses. For example, a simple burglary (one where there is no assault or battery and the defendant is not armed) of a *dwelling* amounts to a second degree punishable by 15 years imprisonment. F.S. §810.02(3). On the other hand, if the act committed was actually simple burglary of an unoccupied structure or conveyance (as opposed to a dwelling), the offense is a 3rd degree felony, punishable by up to 5 years incarceration. F.S. §810.02(4). Likewise, the nature of a building as a dwelling or structure is relevant to the charge of arson. Arson of a dwelling is a 1st degree felony, punishable by up to 30 years. F.S., §806.01(1)(a). But, arson of an unoccupied structure is a 2nd degree felony. F.S., §806.01(2). Thus, the question of whether a building is a *dwelling* or a *structure* can make a great deal of difference in the ultimate sentence in a burglary or arson case. This is an element of burglary and arson cases that is sometimes overlooked and is worth investigating for any defendants convicted of burglary or arson of a dwelling.

F.S. §810.011(2) provides that "dwelling" means "a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof."

Thus, there are many factors that must be analyzed to determine whether a building or property is a dwelling. One such question is whether the property at issue is a part of the curtilage (the land or yard adjoining a house). A common question is if an unattached garage is part of the curtilage of a dwelling. In Martinez v. State, 700 So.2d 142 (Fla. 5th DCA 1997), it was held that an unattached garage from which the defendant stole a tool was not part of the curtilage of the home. In Martinez the defendant was convicted of burglary of a dwelling. The burglary of a dwelling conviction arose from Martinez's theft of a tool from the garage of the victim's home. The victim testified that a driveway ran from the street to his two-car garage. The victim further said that the garage was not attached to his home and that his property was not enclosed with a fence. Martinez argued at trial that the garage was not part of the curtilage and, thus, he could not be found guilty of burglary of a dwelling. The trial court disagreed and Martinez was found guilty of burglary of a dwelling.

On appeal, the Fifth DCA noted that the Florida Supreme Court addressed the issue of what constitutes "curtilage" for the purposes of the burglary statute in

Continued on next page

State v. Hamilton, 660 So.2d 1038 (Fla. 1996). The Hamilton Court held that "some form of an enclosure [is necessary] in order for the area surrounding a residence to be considered part of the 'curtilage' as referred to in the burglary statute." The Martinez Court then noted that to enclose commonly means to surround on all sides. Martinez at 143. As such, it was held that the property in question was not "enclosed." Consequently, Martinez's conviction for burglary of a dwelling was vacated and the case was remanded for the trial court to enter a judgment of guilty of the lesser-included charge of burglary of a structure. Id. at 144.

Another relevant question regarding a building's dwelling status is whether the building is habitable. For the purpose of establishing that a 1st degree arson of a dwelling has been committed, the temporary absence of tenants will not cause the house to lose its character as a dwelling if the absence is not unreasonably prolonged and there is an intention to return. But, a house which is abandoned as a dwelling and closed up, or which is converted to some purpose other than human occupancy, ceases to be a dwelling. Sawyer v. State, 132 So. 188 (Fla. 1931); PPM v. State, 447 So. 2d 445 (Fla. 2nd DCA 1984); and Mitchell v. State, 734 So.2d 1067 (1st DCA 1999). In Mitchell, the 1st DCA noted that the "dwelling" in question had been vacant from 1994 through 1996 and had been cited with numerous housing violations that made the building uninhabitable. As such, the Mitchell Court held that a "vacant, damaged, boarded-up house is not a 'dwelling' within the meaning of section 806.01…when there is no evidence the owners intend to return." Mitchell at 1068.

In light of the above, it is always worthwhile to investigate whether a building is actually a dwelling for the purposes of a burglary or arson conviction. These questions are often overlooked by trial attorneys and can result in a defendant being convicted of a more serious offense than the offense that actually occurred. The question of a building's status as a dwelling can be raised on appeal if properly preserved at trial. Or, alternatively, if trial counsel failed to address the issue, it can be raised in a Rule 3.850 motion as a claim of ineffectiveness of counsel for failure to challenge the dwelling status of the building in question. (That is what happened in Mitchell). If said issue is raised in a 3.850 motion, both ineffectiveness of counsel and resulting prejudice must be demonstrated, as per the ineffectiveness test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Either way, it is always worth considering if the property in question actually qualifies as a dwelling for the purpose of the burglary and arson statutes because reduction in the severity of the offense will likely result in a significant reduction of the resulting sentence.

Defendant Entitled to Resentencing Twenty-One Years After Sentencing Guidelines Declared Unconstitutional

In Williams v. State, 35 Fla. L. Weekly D2396, the Third District Court of Appeal reversed and remanded for resentencing a case in which a defendant was sentenced under a scheme later held unconstitutional. The procedural history of the case is critical.

In 1967, the defendant (Williams) was convicted and sentenced to life for first-degree murder. Id. at *1. The defendant was ultimately paroled. Id.

On October 1, 1983, new sentencing guidelines went into effect. Fla. Stat. § 921.001(4)(1) (1983). On October 13, 1983, the defendant committed, and was later convicted of, aggravated assault and sale of cocaine. Williams at *1. Williams was sentenced to four years incarceration with a three year minimum mandatory sentence, pursuant to the 1983 guidelines. Id. The four year sentence was imposed consecutively to the life sentence. Id.

In 1989, the Florida Supreme Court found the 1983 sentencing guidelines unconstitutional for the period of October 1, 1983 through June 30, 1984. Id. Thus, any persons whose crimes date was between those dates "were entitled to be resentenced." Id.; *see also* Smith v. State, 537 So.2d 982, 987 (Fla. 1989).

The State of Florida countered, arguing that Williams' postconviction endeavor should have been procedurally denied, as Williams previously raised a similar claim. Williams at *1. The District Court rejected this argument, finding the manifest injustice exception applicable as Williams received a lengthier sentence than would otherwise have been permissible. Id.; *see also* State v. McBride, 848 So.2d 287, 291-292 (Fla. 2003).

The State alternatively argued that in 1984, when Williams was sentenced, Williams had made an affirmative election to be sentenced under the 1983 sentencing scheme. Williams at *2. The District Court found this argument entirely unpersuasive since, at the time of sentencing, sentencing under the 1983 guidelines was *mandatory*. Id. Therefore, Williams could not possibly have made any such election. Id.

As of 2010, Williams had yet to receive the resentencing to which he was "entitled." Williams at *1. Thus, the District Court reversed and remanded, directing the trial court to appoint an attorney and hold a resentencing hearing. Id. at *2.

Appellate Counsel Ineffective for Failing to Seek Supplementation of Argument

In Asberry v. State, 32 So.3d 718 (Fla. 1st DCA 2010), the First District Court of Appeal addressed appellate counsel's failure to request permission to supplement argument during a direct appeal.

Asberry, the defendant, was convicted of murder in Duval County, Florida. Id. at 719. He appealed to the First DCA and appellate counsel filed an initial brief on July 30, 2008. Id. The State then responded, filing an answer brief in October 2008. Id. Without any further filings, the First DCA issued its ruling on March 26, 2009. Id. Appellate counsel's ineffectiveness arose, however, from his (or her) failure to seek supplemental argument based upon a similar case ruled on by the First DCA in the interim. Id. In that case, the court found fundamental error based upon defective jury instructions. Id. (citing Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA, February 12, 2009). Asberry subsequently petitioned the First DCA, alleging that appellate counsel was ineffective for failing to bring the Montgomery decision to the attention of the court. Because the same erroneous jury instruction was given in both Asberry and Montgomery, the court was compelled to find Asberry's appellate counsel ineffective.

It is important to remember that criminal law is an ever evolving body. Especially in today's environment, where cases may remain pending for months or years, a petitioner and his counsel must remain vigilant in researching and updating any applicable case law. Of course, this may also work to a petitioner's detriment should case law arise which counters the petitioner's claims. Ethics require counsel to also present this new case law. Doing so builds a vital rapport and lends credibility to both the petitioner and his counsel. As the *pro se* litigant likely already knows, never stop researching!

Inadequate Plea Colloquy Allows Former Juvenile Offender to Withdraw Plea Five Years Later

by Ryan J. Sydejko

The Fourth District Court of Appeal was recently presented with the following situation in State v. S.S., 40 So.3d 6 (4th DCA 2010): In March 2003, a juvenile, S.S. entered a no contest plea (the offense is not identified in the court's opinion). Id. at 7. Adjudication was withheld and the juvenile was placed on probation, which was ultimately successfully completed in November 2003. Id.

In December 2007, the juvenile applied for a position in a nursing program and learned that her criminal record could not be sealed or expunged. Id. As a result, in June 2008, the juvenile filed a Rule 3.850 Motion for Postconviction Relief alleging her plea was involuntary. Id. As expected, the State immediately responded that the juvenile's motion was untimely. Id.

The juvenile then filed a "Petition for Writ of Error *Coram Nobis*" alleging that: (1) the plea had not knowingly been entered; and (2) counsel affirmatively misadvised the juvenile regarding her eligibility for expunction of her criminal record. Id. at 7 n.1. (Sidenote: *coram nobis* is an infrequently used common law vehicle for asserting that the court's previous ruling was premised on alleged errors of fact). Basically, the juvenile argued that she was unaware of the consequences of her plea. Id. at 7. The requested relief was withdrawal of the plea. Id. The State again adopted their typical rationale for denial, asserting that the juvenile's petition was fatally flawed because: (1) the petition was untimely; (2) the petition was legally insufficient; and (3) the juvenile had failed to demonstrate prejudice. Id.

The trial court held an evidentiary hearing and made several critical findings. Id. First, the trial court found the plea colloquy into the juvenile's comprehension of the plea offer absent, thereby constituting fundamental error. Id. Secondly, it was found that counsel provided affirmative misadvice regarding expunction of the criminal record. Id. The sum of these errors led the court to find "the plea colloquy was insufficient to the point of being void." Id. Because the petition was timely (filed within 1-year of discovery that the criminal record could not be sealed), the court held:

> "Now based upon that, and I say this with some reluctance, the Court finds that with those findings, the Court has the obligation to grant the motion."

Id. at 8. The State appealed. Id.

The Fourth DCA begins analysis by noting that the State possessed no statutory authority for taking appeal from an order permitting a defendant to withdraw a plea. Id. The Court did, however, construe the State's appeal as a petition for writ of certiorari and accepted jurisdiction. Id.; *but see* id. at 9-10 (Taylor, J., concurring in part and dissenting in part, for argument supporting State's right to appeal).

Reaching the merits, the Court found that the juvenile's plea suffered from "multiple infirmities":

(1) Juvenile not placed under oath;
(2) Juvenile not questioned about her understanding of the plea agreement;
(3) Juvenile not questioned about the possible dispositions or consequences;
(4) Juvenile not asked whether she understood rights being waived pursuant to the plea.

Id. at 9. Under these circumstances, the Court found "the colloquy was so brief, it was almost nonexistent." Id. Also pertinent, the Court held, was the fact that the juvenile demonstrated prejudice as it was established that she would not have entered plea had counsel properly advised her as to expunction. Id. Further, because the motion was filed within 1-year of discovering the error, the juvenile's claim was timely filed. Id. Finding the trial court did not depart from the essential requirements of the law, the Court denied the State's petition for writ of certiorari. Id.

This case demonstrates the importance of fully understanding all consequences surrounding plea agreements. It is vital that before entering a plea, a defendant discuss with his or her attorney not only the direct consequences (such as incarceration or probation), but also the indirect consequences (revocation of licenses, permanency of criminal record, etc). These are all considerations that should not be weighed lightly. In the event that counsel did not discuss these, or improperly advised (as was the case here), postconviction relief may be available.

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

- Direct Appeals
- Belated Appeals
- Rule 3.850 Motions
- Illegal Sentence Corrections
- Rule 9.141 Petitions
- Federal Habeas Corpus Petitions
- Clemency Petitions and Waivers

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.

The Florida Postconviction Journal
a publication of Loren Rhoton, P.A.
412 East Madison Street
Suite 1111
Tampa, FL 33602

CHANGE SERVICE REQUESTED

Name
Institution
Street Address
City, State, Zip