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Florida Drug Trafficking Statute Unconstitutional?

In one of the recent major postconviction developments in Florida, the United States District Court for the Middle District of Florida held that Florida's drug trafficking statute, Florida Statute §893.13, is facially unconstitutional as a violation of the Due Process Clause of the U.S. Constitution. Shelton v. Florida, 802 F.Supp.2d 1289 (2011), found that the trafficking statute amounts to a strict liability crime because it eliminates *mens rea* (guilty knowledge) as an element of drug distribution offenses. The potential effect of Shelton is to invalidate thousands of trafficking convictions in Florida. And, predictably, some of the Florida District Courts have scrambled to try to invalidate Shelton. *See*, Flagg v. State, 74 So.3d 138 (Fla.1st DCA 2011) and, Maestas v. State, 76 So.3d 991 (Fla. 4th DCA 2011).

I have received numerous letters from inmates about the status of Shelton in Florida. Currently, the Florida Supreme Court is considering the question in State v. Adkins, (case #SC11-1878), and an opinion is expected soon. Oral argument was heard in Adkins on December 6, 2011, and as of this date, the Florida Supreme Court has not yet issued its decision. Hopefully, by the printing of the next issue *FPJ*, the Florida Supreme Court will have ruled (and, of course, agreed with Shelton). Along with many others, we will be keeping a close eye on Shelton, and will alert *FPJ* readers of the result.

Loren D. Rhoton

Police Officer's Videotaped Statements: Hearsay or Verbal Acts?

Not all out-of-court statements are created equal. In State v. Holland, 76 So.3d 1032 (Fla. 4th DCA 2012), the Court was presented with a situation that involved a DUI stop, refused breath test, administration of field sobriety exercises and the conversations between the officer and Holland. Id. at 1033. One officer videotaped the encounter while another officer administered the tests and participated in the conversations. Id. The State chose not to call the officer whom conducted the videotaping. Id. The defense immediately moved to suppress the videotape based on the Confrontation Clause. Id. The State countered, arguing that the videotape was not hearsay, and, even if it was, the tape was nontestimonial. Id. The trial court granted the motion to suppress the videotape. Id. at 1034.

The appellate court began by holding that a refusal to submit to sobriety testing is admissible under the implied consent law, regardless of the videotape issue. Id.

The court next examined Holland's statements caught on videotape. Id. The court quickly found that Holland's statements constituted admissions of a party opponent, a clear exception to the hearsay rule under Fla. Stat. § 90.803(18)(a). Id.

The court next examined whether the officer's statements caught on video were admissible. The officer's directives during the sobriety exercises were both verbal and non-verbal, meaning the officer was likely giving verbal instructions on how to perform the tasks while simultaneously demonstrating how they were to be done. *See* id. The court held that the officer's statements were verbal acts: "utterance[s] of an operative fact that give rise to legal consequences." Id. Verbal acts are not hearsay because they are not admitted to prove the truth of the matter asserted, but rather to prove that statements were actually made.

While a finding that spoken words are verbal acts may appear to be judicial acrobatics, it is an important distinction to be aware of, especially in the postconviction context when rooting out meritless claims is critical to presentation of the motion. Always be mindful that an issue that appears obvious (i.e. that words are not acts) may in fact not be an issue at all.

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

Drafting Postconviction Claims: A Lesson in Brevity

As many Journal readers are likely aware, piling as many issues as possible into a postconviction motion is not typically a good strategy. Take for example, Cortes v. State, 2012 WL 933024 (Fla. 4th DCA 2012).

In Cortes, the defendant filed over seventy claims for relief. While Cortes' enthusiasm for research and writing should be commended, his approach to seeking relief is not. First, there is hardly a trial imaginable in which there were over seventy reversible errors committed. Even if Cortes did have a few good claims, they were almost certainly lost in the labyrinth of meritless issues. The Court found the motion abusive and littered with meritless and frivolous claims. As such, the trial court had discretion to strike the unintelligible motion.

The second problem with Cortes' strategy is that Rule 3.850 was recently amended to impose a fifty-page limit on postconviction motions. *See* Fla. R. Crim. P. 3.850(c). Truth be told, it is fairly rare for a postconviction motion to require more than fifty pages to properly allege and argue grounds for relief. Occasionally there are decades old cases with lengthy procedural histories that may require additional pages, but for the most part, postconviction motions should fall under that page limitation. If you find yourself greatly exceeding that limit, there are a few options. First, Rule 3.850 allows a movant to seek leave of court to file a lengthier motion upon a showing of good cause. Second, the movant should review his claims and edit as much as possible. Often times in legal writing, arguments can become redundant. In order to not lose the reader (i.e. judge), it is critical to keep the issues concise and directly to the point by limiting tangents and flowery language. Such writing takes practice, but can pay large dividends.

Equally important is ferreting out the bad claims. By doing so, you gain credibility with the court (who would realize you know what you're doing) and would prevent those claims from being lost in a sea of frivolity. We can all learn from the lesson in Cortes that throwing in every conceivable claim, and then some, provides the court sufficient grounds to deny the motion without ever even reaching the merits.

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Credibility: The Case of the Admittedly Dishonest Cop vs. The Sweet Old Grandma

by Ryan Sydejko

In State v. Beauprez, the Volusia County Circuit Court was recently faced with an all-too-common scenario. The facts were mostly undisputed.

Daytona police received an anonymous tip alleging drug activity at the defendant's home. Officers knocked and were greeted by the defendant's elderly mother. One officer claimed their presence was due to a "911 disconnect" and sought permission to enter. The grandmother permitted entry. A pellet gun was discovered in plain view and the grandmother permitted closer inspection. The officers continued to search. Officers testified that they sought, and received, permission to search further. The grandmother testified that no such permission was sought or granted. One officer opened a drawer in a piece of furniture and discovered drugs. Both parties agreed that the search of the drawer was illegal if conducted without consent of the grandmother. They also agreed that no laws were violated when the police lied to gain entry into the home. The crucial issue then, according to the defense, was credibility. The defendant asserted that the officer diminished his own credibility by admitting to being a liar (to gain entry). Notably, there was no impeachment of the grandmother.

In a fantasticly well-written order, the Circuit Court granted the defense motion to suppress the evidence. Judge Will wrote that it may surprise many Americans that police may, without legal ramifications, arrive at one's front door step, without probable cause, and tell an outrageous lie to gain entry. Further astonishing many is the fact that "the state is free to use the bounty of the intrusion to prosecute the homeowner and her guests for crimes discovered in the course of this journey into the heretofore private sanctum of the home." This procedure has evolved into a "knock and talk". The Court noted that this procedure has been very effective in arresting criminals, but noted that perhaps our society ought to aspire to loftier goals than mere expediency.

Dishonesty, as Judge Will wrote, is seldom without consequences for any person. Costs are significant when we teach young officers to lie to citizens, and when we teach citizens that officers are liars. Is honesty a virtue for families and individuals, but only optional for law enforcement? We, as a nation, are better than that. But, as the Court held, the law is the law.

Ultimately, this case was reduced to a credibility stand-off. Most often, the word of the officer is in conflict with the word of the defendant. Integral to our system of jurisprudence is the fact that one's propensity for truth is at least somewhat discernable "by examining his brushes with truth and dishonesty in the past." A liar cannot be trusted.

Judge Will found the State prevailed on the grounds that officers may lie to gain entry to homes. But, more importantly, the State did not prevail on credibility. Just as will all of us, police experience consequences when relying upon dishonest police conduct. Once character is damaged, it is difficult to reconstruct. As Judge Will wrote: "a little boy may falsely call 'wolf' only so many times before no one listens." "A liar, after all, is a liar."

New Prisoner Newsletter

In keeping with our efforts to inform prisoners about helpful services, the Florida Postconviction Journal is pleased to introduce The Florida Postconviction Legal Aid Organization, Inc. (FPLAO). FPLAO is now publishing a newsletter for inmates called the Florida Postconviction Legal Perspectives (FPLP). The FPLP addresses issues that are of interest to Florida prisoners such as promoting education and skilled court access for prisoners, as well as promoting accountability of corrections officials. To become a member and receive the monthly FPLP newsletter, contact FPLAO at: 5189 Stewart Street, Milton, Florida 32570. They can also be reached at: (850)454-7095; myfplp@aol.com; and, myfplp.org. Subscriptions cost $18.00 for prisoners, and, $26.00 for family members/individuals. [**The Florida Postconviction Journal is not affiliated with FPLAO or the 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. ANY INQUIRIES ABOUT FPLAO MEMBERSHIP MUST BE ADDRESSED TO FPLAO'S ABOVE-LISTED ADDRESS**).

Potential Sentence After Retrial In Capital Cases

by Ryan J. Sydejko

In D'Arcangelo v. State, 2012 WL 879283 (Fla. 2d DCA 2012), the Court was faced with the issue of whether a defendant, who was sentenced to life imprisonment on a first degree murder conviction, would be subject to capital punishment should he succeed on a motion for postconviction relief.

D'Arcangelo was convicted of first degree murder, but the jury split evenly on the issue regarding punishment. The trial court imposed a sentence of life imprisonment. Decades later, D'Arcangelo moved for postconviction relief based upon newly discovered evidence. After that filing, it was determined that D'Arcangelo may have been incompetent. The issue then became whether the death penalty was a potential sentence upon retrial. The reason being that a potentially incompetent D'Arcangelo would be seeking a new trial and subjecting himself to a death sentence, something a competent D'Arcangelo may not have elected to chance.

After proceedings in both the circuit court and District Court of Appeal, the State finally conceded that death was not possible upon retrial. The DCA agreed. The life sentence originally imposed operated as an acquittal of the facts that would have warranted a death sentence.

The Second District Court of Appeal held that a "penalty-phase proceeding in Florida is akin to a trial in which the State must prove its case for the death penalty, first to the jury and then to the trial court. The imposition of a life sentence following penalty proceedings is a determination that the State did not prove its case, and it is therefore an acquittal of the circumstances that would justify the death penalty." Because a potentially incompetent D'Arcangelo was no longer subjecting himself to a more severe sentence, counsel was permitted to proceed on his behalf.

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.

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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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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
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Technical Pleading Error or Violation of Due Process?

In Figueroa v. State, 2012 WL 1058893 (Fla. 2d DCA 2012), the defendant was charged with an offense entitled "Robbery with a firearm, F.S. 812.13, 775.087, 777.011, punishable by life felony." The body of the charging document set forth the facts, but failed to allege that Figueroa used a firearm during commission of the robbery. In other words, the title charged robbery with a firearm, while the body of the document charged mere robbery. Figueroa was convicted of robbery with a firearm and was sentenced as a habitual violent felony offender to life with a fifteen year minimum mandatory.

Figueroa raised, numerous times, the illegality of his sentence. In fact, he raised the claim so many times that the circuit court imposed sanctions for frivolous filings. On this final attempt, however, the District Court finally listened.

The Court began by recognizing that when a discrepancy between the heading and body of an charging document exists, the offense described within the body is the one in which the defendant is actually charged. After a thorough analysis, the Court found that the charging document in this case omitted an essential element of the offense; i.e. use of the firearm. That point is crucial, as it distinguishes Figueroa from other cases in which use of a weapon is not an element of the offense, but rather an enhancement.

Case law is clear that "a conviction on a charge not made by the indictment or information is a denial of due process." State v. Gray, 435 So.2d 816, 818 (Fla. 1983). Such a defect "can be raised at any time—before trial, after trial, on appeal, or by habeas corpus." Id. Despite these constitutional implications, the Court found that Figueroa was benefitting from "a rather technical pleading error."

Whether a simple "pleading error" or a violation of Figueroa's fundamental right to due process of law, the Court recognized that this case presented the "'uncommon and extraordinary circumstances' constituting manifest injustice." Thus, postconviction relief was due.

Figueroa's life sentence as a habitual violent felony offender with a minimum mandatory of fifteen years for armed robbery was reduced to no more than thirty years incarceration, with a minimum mandatory of ten years for simple robbery.

For the postconviction movant, review of the Figueroa opinion can be helpful as the Court provides a rather detailed analysis of when a charging document deficiency relates to the actual offense, or merely an enhancement. That distinction is critical when considering whether one's sentence merits postconviction review.

Mitigated Sentences and Requirement Defendant Demonstrate DOC's Inability to Render Care

In State v. Chubbick, 37 Fla. L. Weekly D582 (Fla. 4th DCA 2012), the Fourth DCA re-examined the requirement that a defendant demonstrate DOC's inability to render proper care in a motion to mitigate sentence based upon disability or illness. Florida appellate courts have uniformly held that in order to receive a sentence below the guidelines, the defense must show: (1) the defendant suffers from a mental or physical disorder; (2) he is amenable to treatment; and (3) such treatment is not available in DOC.

The controlling statute here is Fla. Stat. §921.0026(2)(d). The Legislature dictated that a sentence below the minimum was permissible if "the defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addition or for a physical disability, and the defendant is amenable to treatment." Because the Legislature did not explicitly require a defendant to prove DOC incapable of rendering adequate care, the Fourth DCA reversed a long line of cases and certified conflict with nine others. This additional element, the Fourth DCA found, was added in State v. Abrams, 706 So.2d 903 (Fla. 2d DCA 1998), and subsequently adopted and glossed over by every court since then.

In an earlier opinion, the Fifth DCA acknowledged that "a lack of available treatment in prison is not required under the statute. Although illness is not a 'get out of jail free card', a treatable physical disability is one of the circumstances where the legislature has chosen to re-invest trial judges with discretion to vary from sentencing guidelines." State v. Spioch, 706 So.2d 32, 36 (Fla. 5th DCA 1998).

Despite this early acknowledgment, every Florida court adopted the additional element inserted by Abrams. The difficulty in proving a negative (i.e. that treatment is not available) is very burdensome. The court provided an example where a defense expert had contacted DOC numerous times in order to get an explanation as to DOC's treatment procedures. As commonly happens, DOC officials were not entirely forthcoming. Thus, the defense had to rely on information from other inmates, which likely would be considered hearsay.

This information is important for those postconviction movants who have been recently conviction or whom have been granted a resentencing. While this decision doesn't "open the floodgates" as some have predicted, it does certainly provide the postconviction movant one more viable ground convince a judge that a shorter sentence is proper.

Tips for Choosing Legal Counsel

by Loren D. Rhoton

As reviled as attorneys are (and sometimes for good reason), they do serve an important function in our justice system. A well-trained and experienced lawyer can often make all the difference in the outcome of a case. There is an old adage that a man who has himself for a lawyer has a fool for a client. Clichéd as that saying is, there is a lot of truth in it. I always advise people not to represent themselves in any legal matters if they can avoid it. This especially applies to criminal appeals and postconviction motions. Unfortunately, there is no constitutional right to appointment of postconviction counsel and indigent prisoners usually have to represent their own interests in postconviction proceedings. However, if you are in a position to hire a lawyer for your postconviction case, it is strongly advised that you do so. This article gives some advice on choosing the right attorney in the postconviction setting.

A license to practice law enables an attorney to handle all manners of legal matters both in and out of court. However, the mere possession of a law license does not mean that an attorney is proficient in any given area of the law. Lawyers often focus their practices on a few areas of the law and have little to no practical legal knowledge outside of those areas. For this reason, it is important to make sure that your appellate counsel is experienced with postconviction matters. I have seen too many cases where trial level criminal defense attorneys attempt to handle criminal appeals or postconviction cases and, in the process, end up hopelessly bungling the cases. You want to make sure that you are hiring a competent and experienced postconviction attorney. Don't just hire any lawyer to represent your interests. So, how does one determine that a lawyer is experienced and competent?

There are many ways to learn about an attorney's qualifications. Firstly, one can inquire with the Florida Bar as to whether an attorney has ever been disciplined for misconduct. Any attorney who has practiced for any number of years will likely have had at least one bar complaint filed against him or her. The important inquiry is not if a bar complaint has ever been filed, but, whether the attorney has ever been disciplined. If the attorney has been disciplined, the actions of the Florida Bar will be public record and anybody can obtain a copy of the order imposing discipline on the attorney. If an attorney has repeated violations for failing to represent clients' interests or failure to communicate with clients, these are big red flags that the attorney's representation may be substandard. It is always acceptable to ask a prospective attorney about whether he or she has ever received any disciplinary action.

It is also important to ask the prospective attorney about his experience with postconviction cases. Ask how long the attorney has been in practice. Ask how many postconviction actions the attorney has handled. Ask how many postconviction evidentiary hearings the attorney has conducted. These questions will give some idea as to whether the attorney has any experience with postconviction cases.

If an attorney guarantees an outcome or says that you will likely win your case, be very careful about hiring such an attorney. The fact of the matter is that postconviction cases are very difficult to win and the majority of such cases are not successful. This is the unfortunate truth about postconviction cases. Therefore, if an attorney gives the indication that you will probably win on your case, it means one of two things: (1) he is lying to you in order get you to hire him; or, (2) he is inexperienced with such cases and has unrealistic expectations. Either way, such an attorney should be avoided. When I discuss a case's potential with a client, the most I can do is explain that the client has a viable postconviction claim and that there is the possibility of prevailing on the claim. Any attorney that goes beyond that is creating unrealistic expectations and giving false hope.

Have your family members speak with the attorney. See what kind of vibe they get from him. Does the lawyer present himself professionally? Does he have a physical office or does he work out of his home and use a P.O. Box for correspondence? This can be a red flag. When an attorney does not have a physical office, he or she can be more difficult to reach. A physical office in the same location over a period of time is one indicator of the a stability of the practice. And it is desirable to have such stability in the professional that is going to be handling your case for perhaps years to come.

Does the attorney answer your initial correspondence? Does he answer your questions to

Tips for Choosing Legal Counsel (continued)

your satisfaction? Or, does the attorney disregard your comments, suggestions and questions? Does he return your family members' phone calls? Is the attorney available for conferences when requested? These types of things at the beginning of the attorney/client relationship are potential indicators of how you will be treated as your case goes along. If the attorney is not responsive to your questions at the beginning of your case, such treatment will probably continue or worsen as your case goes on.

Finally, ask the prospective attorney for a copy of his written qualifications. This is a good indicator of the attorney's focus. Does he list a great deal of experience with family law or some other unrelated field? Or, do the written qualifications show that the attorney handles mostly postconviction cases? If the qualifications merely show a general practice with no specific area of focus, then the attorney may not be the ideal counsel for a postconviction action.

All of the above suggestions are meant to be helpful in the selection of a postconviction attorney. One final thing to keep in mind is that the client needs to trust his instincts in selecting the attorney. Does something about the things the attorney says make you feel uncomfortable? Or, does the attorney seem to be listening to your concerns and giving you straight answers to your questions? Follow your gut in this regard. I have heard too many people complain about their prior attorneys. They say that they just didn't trust the lawyer from the start, and, that such distrust was later confirmed. Take all of the above considerations into account and then go with the attorney that your instincts tell you is the right one. While all of this does not guarantee that you will hire the perfect lawyer, it certainly will increase the likelihood of satisfaction with the counsel that you choose.

Continuances: When Enough is Enough

Changing lawyers four times just before trial isn't always an advisable strategy. In Ramos v. State, 75 So.3d 1277 (Fla. 4th DCA 2011), the defendant's repeated attorney hiring of new attorneys had disrupted the trial court's calendar as the case had been set for trial five times. Id. at 1279. On the final calendar call, a Thursday, defense counsel, who was hired two to three months prior, stated that he was not ready for trial as additional time was needed to procure deposition transcripts taken by previous counsel. Id. The State had no objection. Id.

The trial court was displeased with the fact that Ramos had been awaiting trial for approximately a year and a half already, and denied a continuance, leaving the jury trial set for Monday. Id.

On Monday, the day of jury trial, defense counsel stated that he had obtained two of the transcripts, but two others were still needed, most notably the deposition of the victim. Id. Jury selection was then conducted, lasting until 8 p.m. Id. Because of the late hour, counsel was unable to pick up the remaining transcripts. Id. After opening statements the following day, the State located a copy of the victim's deposition. Id. While the State examined the victim, copies were made of the deposition. Id. Moments before cross-examination, defense counsel was provided a copy of the deposition. Id. A twenty minute recess was then taken so defense counsel could "breeze through" the deposition. Id. at 1280.

The District Court found that Ramos' own actions were to blame for the predicament. The Court found that Ramos contributed significantly to the lack of preparation time for his counsel since Ramos changed attorneys four times. Id. There was no evidence that any previous attorney had provided ineffective assistance, thus the predicament was of Ramos' own creation. Id. While defense counsel was hired two to three months before trial, he chose to wait until six weeks before trial to complain about a delay in obtaining transcripts. Id. This delayed action by counsel piled on Ramos' delays, further aggravating the situation.

The Court ultimately found that Ramos "reached the point where his right to adequate time for preparation for trial is counterbalanced by the right to the effective administration of justice." Id. at 1281. "His own actions and those of his private counsel of choice were responsible for the lack of adequate preparation time, if any." Id. While many judges are lenient to newly obtained counsel, there does come a time when a timely trial outweighs more defense delays. Understanding where that threshold exists is relevant both to trial strategy and to preparing viable postconviction issues.

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- Federal Habeas Corpus Petitions
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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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