The Florida Postconviction Journal

Volume 3
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a quarterly publication of Loren Rhoton, P.A.

Spring 2016

Happy New Year!

Belated Happy New Year to all of our subscribers. It looks like the criminal justice system has started off on the right foot this year with the Supreme Court's issuance of *Hurst v. Florida*, which found unconstitutional the Florida capital sentencing scheme. The *Hurst* opinion will be addressed below and we will continue to monitor it throughout the course of its legal development in the courts. For now, at least, it seems that the Florida Supreme Court is staying executions until such time as it determines the effect of the *Hurst* ruling on inmates currently on death row.

Let's hope that *Hurst* portends good things for the Florida justice system in general, as well for any of our readers to whom Hurst may apply.

Thanks for reading FPJ. If you know someone who might benefit from the articles in our newsletters, please provide them with the FPJ address so that they can ask to be placed on our subscription list. Thanks again for reading. We wish all of our subscribers a Happy New Year and the best of luck with challenging your cases.

Florida Executions on Hold

On January 12, 2016, in and 8 to 1 vote, The Supreme Court held that Florida's capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for imposition of a death sentence, violates the Sixth Amendment right to jury trial. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Hurst is a long overdue ruling on the applicability of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, to the Florida capital sentencing scheme. In *Apprendi*, the Court held that "any fact that "exposes the defendant to a greater punishment than that authorized by the jury's verdict is an 'element' that must be submitted to the jury" and found by the jury to exist beyond a reasonable doubt, *Alleyne v. U.S.*, 133 S.Ct. 2151 (2013). In *Ring v. Arizona*, 536 U.S. 584 (2002), the *Apprendi* requirement was found to apply to jury findings in a death penalty case. *Hurst* says that *Ring* applies to Florida's death penalty scheme as well.

There are many questions that are left open to be decided by the courts with regard to the *Hurst*. For example, it is not known if *Hurst* is retroactive, and if it is, to what date. *Ring* was decided in 2002. So it is up for debate as to whether *Hurst* is applicable to cases that were in the pipeline at the time of *Ring*. *Ring* was found to be a procedural ruling that did not require retroactive application. Therefore, the State may end up arguing that *Hurst*, likewise, should not be applied retroactively to cases that were not in the appellate pipeline at time of the issuance of *Hurst*. Alternatively, it could possibly be found by the courts that any cases that were in the appellate pipeline at the time of the issuance of *Ring* fall under *Hurst*. These are matters that will have to be hashed out in the courts for years to come. (Hopefully it does not take 14 years, as it did from the issuance of *Ring* to *Hurst*).

Hurst leaves the retroactivity question open. Another issue is whether *Hurst* errors are harmless error or not. The Supreme Court remanded *Hurst* to the Florida Supreme Court for harmless error analysis. Further, it is not clear if the required jury findings must be unanimous. In short, *Hurst* is a good start, but there are many questions left open as to how it applies to Florida defendants. The many open questions will be addressed by the Florida Supreme Court, and probably the federal courts. In the meantime, it appears that the Florida Supreme Court may be staying executions until such time as the open questions are definitively answered.

It certainly it appears that *Hurst* might benefit those who are currently under death sentences. What is not clear is how *Hurst* might benefit those convicted of first-degree murder, but serving life sentences. For example, if a defendant entered a guilty plea to first degree murder in order to avoid being sentenced by a particular judge, is his plea rendered involuntary by the fact that the defendant would have opted for a jury trial had he known that the jury would have to make the necessary findings for the imposition of the death penalty? Questions such as this may benefit those pursuing postconviction relief. However, it is too early to tell exactly how *Hurst* cases will play out. FPJ will monitor the legal developments relating to *Hurst* and keep our readers informed.

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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.

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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.

The Proper Standard for Claims of Newly Discovered Evidence in Plea Cases

Claims of newly discovered evidence have varying standards, depending upon the manner in which the case was resolved at the trial court level. In cases in which a guilty plea was entered, the Florida Supreme Court has enunciated a two-prong test that is a blend of *Strickland* and the standard post-trial newly discovered evidence standard.

First, the newly discovered evidence must not have been known by the trial court, the party, or counsel at the time of the plea (and it could not have been discovered through the exercise of due diligence). *Long v. State*, 2016 WL 264329 (Fla., Jan. 21, 2016).

Secondly, the defendant must demonstrate a reasonable probability that, but for the newly discovered evidence, the defendant would not have entered a plea and would have insisted on going to trial. Id. It needn't be proven that the defendant would have been acquitted at trial, but the strength of the State's case against the defendant should be considered in determining the defendant's credibility regarding the insistence on proceeding to trial. *Grosvenor v. State*, 874 So.2d 1176, 1181 (Fla. 2004). In making this determination, the court should consider the likelihood of success at trial, the plea colloquy, and the difference between the plea sentence and the maximum possible sentence. *Id.* at 1181-1182. It is important to consider these points when evaluating the viability of a potential claim of newly discovered evidence.

Common issues in pro se filings of newly discovered evidence are the due diligence requirement and the credibility of the defendant's assertion that a trial would have been sought. Address these points up front. For instance, if the newly discovered evidence is an FBI report issue two months ago, state the date of issuance and when it was first obtained. If the evidence is of an older nature, explain the efforts used to locate the evidence and why discovery was only recently made.

As for the defendant's credibility, the court is going to weigh the evidence to determine whether the defendant is actually credible about his desire to proceed to trial. Again, address this up front. Explain why certain physical evidence or testimony isn't all that bad. Explain whether the new evidence gives rise to a new defense theory. Be clear and forthright with the court. Courts here these claims all the time and can easily determine the weakest claims. Addressing these matters up front also disarms the State Attorney's response and gives the defendant much-needed credibility.

Admission of "Generally Unreliable" Report from "Incompetent" Former Medical Examiner Violated Constitution, But Violation was Harmless

FPJ readers that have followed posconviction developments over the past several years are likely familiar with former medical examiner Dr. Sashi Gore. In *Rosario v. State*, 175 So.3d 843 (Fla. 5th DCA 2015), the District Court dealt with an instance in which the State admitted Dr. Gore's autopsy report in a case several years after the report had been issued. The main consideration was what, if any, Confrontation Clause issues arose since Dr. Gore was not called to testify when the report was admitted.

In April 2001, Rosario was living with the victim's mother and her two children. The victim was a four-year-old child. At trial, evidence showed that while exiting a vehicle, the child became tangled in a seatbelt and fell, striking his head on the concrete. Despite excruciating crying, Rosario gave the child a shower and put him to bed. In the middle of the night, the mother was awoken by Rosario who was making sounds in the garage. At that time, Rosario indicated that the child was not breathing. The mother wanted to telephone 911, but Rosario retrieved two firearms and threatened to kill the mother if she made any such call. Eventually the mother telephoned 911. The child was pronounced dead hours later.

Dr. Gore performed an autopsy that same day, finding the cause of death "undetermined." In November 2001, Dr. Gore amended the autopsy report to include additional injuries, but did not change the cause of death. Then, in February 2002, Dr. Gore met with law enforcement and child protective services and changed the cause of death to "homicide" by asphyxiation.

It was not until 2008 or 2009 that the mother advised police what Rosario had allegedly done, as she feared for her life. In April 2010, Rosario was charged with first-degree murder and aggravated child abuse.

Since Dr. Gore had been removed as Chief Medical Examiner, the State listed its expert witness as the new Medical Examiner, Dr. Jan C. Garavaglia.

The State's theory at trial was that Rosario suffocated the child to stop the child's crying. Dr. Gore's autopsy report was admitted over the defense's Confrontation Clause objection. Dr. Garavaglia testified that the cause of death was asphyxiation due to compression of the child's neck.

The defense called Dr. Stephen Nelson, Chief Medical Examiner for another district in Florida. Dr. Nelson testified that the cause of death was undetermined, just as Dr. Gore had originally found. Dr. Nelson noted other potential causes of death, such as infection and abnormal organ size.

Dr. Garavaglia and Dr. Nelson agreed that Dr. Gore was "generally unreliable." Both agreed that Dr. Gore's autopsy contained errors and inconsistencies.

The District Court began the analysis with "little difficulty" in determining that Dr. Gore's autopsy report constituted hearsay: "It included out-of-court statements made by Dr. Gore and was offered by the State to prove the truth of the matters asserted in the report, i.e. that [the child's] death was a homicide, among other things."

The next step was to determine whether the autopsy report was testimonial in nature. The District Court noted that, by law, medical examiners "serve the criminal justice system as medical detectives", especially in cases of suspicious deaths. Thus, the Court concluded that such autopsies are presumptively testimonial in nature. Additionally, because of the manner in which Dr. Gore ultimately arrived at his conclusion, the primary purpose of the report was to create evidence for use at trial.

As a result, because Rosario was unable to cross-examine Dr. Gore as to the report, the Sixth Amendment right to confront witnesses against Rosario was violated. The Court ultimately concluded, however, that the error was harmless.

"The ultimate goal of the Confrontation Clause is to ensure reliability of evidence." While Dr. Gore's report, itself, was unreliable and not trustworthy, the Court found that when viewed in the full context of evidence presented to the jury, that one report was insignificant; i.e. it did not affect the verdict. This was based heavily upon the fact that Dr. Gore was unanimously found to be incompetent and unreliable. Thus, the jury was likely persuaded by Dr. Garavaglia's findings that were intentionally separate from that of Dr. Gore's. In other words, absent Dr. Gore's report, there remained ample evidence to support a conviction. In the Court's words: "there is no reasonable possibility that the admission of the report affected the outcome of the trial."

Correction of Jail Credits

Florida Rule of Criminal Procedure 3.801 provides that a court may correct a sentence that fails to allow a defendant credit for all of the time spent in the county jail before sentencing. A motion to correct jail credit must be filed within one year of the time that the sentence became final. Fla. R. Crim. P. 3.801(b). A motion filed under Rule 3.801 shall be under oath and include: (1) a brief statement of the facts relied on in support of the motion; (2) the dates, location of incarceration and total time for credit already provided; (3) the dates, location of incarceration and total time for credit the defendant contends was not properly awarded; (4) whether any other criminal charges were pending at the time of the incarceration noted in subdivision (c)(3), and if so, the location, case number and resolution of the charges; and, (5) whether the defendant waived any county jail credit at the time of sentencing, and if so, the number of days waived. No successive 3.801 motions will be allowed, so it is advisable to make sure such a motion includes all of the necessary information and is factually accurate.

Improper Denial of Motion to Disqualify Judge

When a defendant moves to disqualify a judge, the judge must rule on the motion, based solely on its legal sufficiency. Fla. R. Jud. Admin. 2.330(f). If a judge goes beyond that, and instead tries to refute the claims of impartiality, the judge exceeds "the proper scope of his inquiry and on that basis alone establishe[s] grounds for his disqualification." *Bundy v. Rudd*, 366 So.2d 440, 442 (Fla. 1978).

In *Greenwood v. State*, 177 So.3d 88 (Fla. 2d DCA 2015), that is exactly what happened. The defendant filed a motion to disqualify Judge Helinger from her case. At the outset of a pretrial hearing, the judge provided defense counsel with an order denying the motion as legally insufficient. Notably, the order did not address the factuality of the allegations contained therein. Instead, during the hearing, Judge Helinger took the time to attempt to refute those allegations.

The District Court reversed the order and remanded with directions to appoint a successor judge.

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Deadly Stabbings: Manslaughter v. Second-Degree Murder

by Ryan Sydejko

What differentiates manslaughter from second-degree murder when a deadly stabbing is involved? The Second District Court of Appeal was faced with this situation in *Sandhaus v. State*, 2016 WL 347357 (Fla. 2d DCA, Jan. 29, 2015).

In *Sandaus*, the defendant and his brother met up at an Orlando bar around 1:30 a.m. Shortly after arriving, a bouncer asked the two to leave, at the request of another bar patron. This patron was on probation for a battery on Sandhaus and a part of the probation required no contact with Sandhaus.

The two brothers and three bouncers exited the rear of bar. One bouncer offered the brothers another drink as he went to find the bar manager. At this point, the brothers suspected their removal was at the request of the probationer. The brothers and two bouncers began to argue, and quickly escalated into a physical fight. Surveillance cameras captured the entire incident. One bouncer, Torres, initiated the physical altercation by pushing, shoving, then hitting Sandhaus' brother. In response, Sandhaus pulled out a knife and stabbed Torres to death. The entire altercation lasted twenty-five seconds.

Sandhaus unsuccessfully pursued both Stand Your Ground and defense of his brother. He was eventually convicted of second-degree murder and sentenced to forty-five years incarceration. Defense counsel unsuccessfully moved for a JOA on second-degree murder, arguing manslaughter was the proper conviction. The District Court began by examining the definitions of second-degree murder and manslaughter.

Second-degree murder is defined by conduct that is imminently dangerous to another person and evinces a depraved mind, characterized by acts that (a) a reasonable person would know is likely to cause serious bodily injury or death; (b) is done due to ill will, hatred, spite or evil intent; and (3) nature of the act indicates indifference to human life. *State v. Montgomery*, 39 So.3d 252, 255-256 (Fla. 2010). Notably, courts have determined that an impulsive overreaction to an attack does not, by itself, prove ill will, hatred or spite. *Morgan v. State*, 127 So.3d 708, 718 (Fla. 5th DCA 2013) and *Antoine v. State*, 138 So.3d 1064, 1073 (Fla. 4th DCA 2014). Typically, second-degree murder is committed by a person who knows the victim and has had an opportunity to develop the requisite level of enmity toward the victim. *Light v. State*, 841 So.2d 623, 626 (Fla. 2d DCA 2003).

Manslaughter, on the other hand, is the killing of another person by act, procurement or culpable negligence, without lawful justification. Fla. Stat. 782.07(1) (2011).

In this case, the District Court noted several key facts that were undisputed: "neither of the brothers knew any of the bouncers before that night, there was no indication of ill will or hatred displayed by or against the brothers until the arguing and shoving began, nobody threatened physical harm to anybody before the fight actually broke out, and nobody mentioned or displayed a weapon prior to the altercation."

As a result, the District Court found that no reasonable jury could have concluded the Sandhaus' stabbing of the bouncer as the product of ill will, malice, hatred, spite or an evil intent. On the other hand, a reasonable jury could have found that Sandhaus "impulsively overreacted to seeing [the bouncer] hitting [Sandhaus'] younger brother." Thus, the trial court erred in failing to reduce the conviction from second-degree murder to manslaughter.

For the postconviction petitioner, it is important to note that in this case, defense counsel timely and properly brought this issue to the trial court's attention, thus preserving the issue for direct appeal. Remember, how and when a postconviction claim is raised often depends upon how the issue was handled (or not handled) previously in the case.

Postconviction petitioners should also be careful to contrast this case with *Antoine v. State*, 138 So.3d 1064 (Fla. 4th DCA 2014). In that case, Antoine was trying to break up a fight when one of the victims punched Antoine in the face. The two victims then reached for their weapons, prompting Antoine to fire at them. As one victim turned to flee, Antoine shouted "You want some, too?" and shot the victim in the back.

The District Court found Antoine's conviction for second-degree murder proper as his shooting was not an impulsive overreaction, but instead the administration of street justice after being punched and insulted by the victim's decision to flee. Thus, the jury could reasonably have determined, from Antoine's actions, that he evinced the necessary ill will, hatred, spite or evil intent.

Failure to Impeach Victim with Inconsistent Statements

Defense counsel's failure to impeach a victim with prior inconsistent statements can amount to the ineffective assistance of counsel. In *Smith v. State*, 2016 WL 358637 (Fla. 2d DCA, Jan. 29, 2016), the Second District Court of Appeal dealt with this issue in the context of an appeal of a summarily denied postconviction motion.

In *Smith*, the defendant was charged with and convicted of lewd and lascivious assault of a minor under the age of sixteen. In his 3.850 motion, Smith alleged that counsel was ineffective for failing to investigate and impeach the victim with prior out-of-court statements to third parties.

The District Court reversed the summary denial of this claim, first noting that the victim's testimony was the only evidence connecting Smith to the offense and found the victim's credibility critical to the State's case. An evidentiary hearing is necessary when the postconviction motion identifies the witness, provides what the testimony would have been, states they were available to testify, and alleges prejudice by the witness' absence. See *Bulley v. State*, 900 So.2d 596, 597 (Fla. 2d DCA 2004). Postconviction petitioners should be aware that such claims are often couched as claims of newly discovered evidence, which Rule 3.850 now requires attachment to the motion of an affidavit. Fla. R. Crim. P. 3.850(c).

Partial Read-Backs Constitute Reversible Error When Placing Undue Emphasis on Particular Statements

In *Gormady v. State*, 2016 WL 231125 (Fla. 2d DCA Jan. 20, 2016), the District Court considered an issue on direct appeal pertaining to a partial read-back of a witness' trial testimony.

The State's case against Gormady relief heavily upon the testimony of Detective Johnson. Detective Johnson testified to pulling over the vehicle, suspecting anxious behavior, searching the vehicle, discovering drugs, drug paraphanalia, and a firearm, arresting Gormady, and to receiving Gormady's confession.

Sometime during deliberations, the jury requested a read-back of a portion of Detective Johnson's testimony; i.e. that portion relating to Gormady's alleged confession. The record was clear that Gormady's confession was addressed during direct, cross-examination, and re-direct. Thus, defense counsel requested that Detective Johnson's entire testimony be read back. Instead, and over a defense objection, the trial judge provided the jury with the option to cease the read-back at their own discretion.

Once read-back of the direct examination was nearly complete, the two jurors requested the read-back stop. The trial court informed the jury that Detective Johnson continued to address Gormady's statements on cross and re-direct, but the jury still wished to conclude the read-back.

The District Court noted that trial courts are afforded broad discretion relative to read-backs. *Mullins v. State*, 78 So.3d 704, 705 (Fla. 4th DCA 2012). And partial read-backs can be permissible. *Avila v. State*, 781 So.2d 413, 415 (Fla. 4th DCA 2001). However, a partial read-back is not permissible if it misleads or places undue influence on particular statements. *Garcia v. State*, 644 So.2d 59, 62 (Fla. 1994). In *Mullins*, the Fourth District Court found a partial read-back improper because the jury was not told that the read-back included only the direct examination, which obviously favored the State's version of the events. *Mullins*, 78 So.3d at 706.

The District Court held in this case that the trial court effectively delegated its discretion in allowing read-backs by permitting the jury to unilaterally modify the scope and extent of the read-back. Additionally, it was found that Detective Johnson's testimony was "crucial" to the State's case and reading-back only the direct examination served to unduly emphasize the State's version of events.

When reviewing a trial court's decision to allow a partial read-back, a postconviction petitioner should consider several factors, including whether and how defense counsel objected and whether the portion actually read-back to the jury "served to emphasize a version of events favorable to the State and diminish a version favorable to the defense." *Id.*

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Advisability v. Availability: More Pro Se Pleading Pitfalls

A pro se postconviction petitioner must be extremely vigilant with the pleading requirements. Courts are seldom as forgiving as the First District Court of Appeal in *Miller v. State*, 2016 WL 231741 (Fla. 1st DCA, Jan. 20, 2016). In *Miller*, a pro se petitioner sough belated appeal following denial of a motion for postconviction relief.

Miller alleged that following denial of the postconviction motion, he discussed with counsel "what should be done." Counsel allegedly advised that a second postconviction motion was the best course of action. Thus, Miller did not appeal.

The applicable authority is Florida Rule of Appellate Procedure 9.141(c)(4)(F)(i) which lays out the requirements for seeking a belated appeal. The rule provides that belated appeal will be permitted when (1) the petitioner is misadvised as to the availability of appellate review; or (2) the status of filing a notice of appeal. The court drew an important distinction between the allegations made by Miller and the Rule's requirements.

Miller did not request counsel to pursue an appeal, so (2) doesn't apply. The Court did not find the point dispositive as Miller did not request an appeal because counsel advised a different course of action (i.e. filing a second postconviction motion).

Additionally, Miller did not allege that counsel misadvised as to the availability of appellate review, thus (1) doesn't apply. The Court drew the very important distinction between Miller's allegation that counsel advised a different course of action versus misadvising of the right to appeal. In other words, Miller alleged misadvice as to the *advisability* of an appeal, rather than the Rule's requirement of misadvice as to the *availability* of an appeal. To strip it down further, it's the difference between what a petitioner *can* do, and what a petitioner *should* do.

The Court did show Miller an act of kindness, however, and dismissed the petition for belated appeal, but permitted Miller a window of opportunity to file a new petition curing the *can* versus *should* pleading deficiency.

For pro se postconviction petitioners, don't expect this type of leniency when it comes to pleading requirements. Years of experience have shown that the majority of these legally insufficient pro se claims end up unsuccessful. Know which rules apply and use them as a checklist during final review to ensure, at a minimum, that every pleading requirement has been met.

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Anonymous Tip Insufficient to Support Warrantless Search

In *A.P. v. State*, 2016 WL 165381 (Fla. 5th DCA, Jan. 15, 2016), the District Court heard an appeal from the denial of a motion to suppress. In A.P., an anonymous tipster telephoned police, claiming that a black male with dreadlocks was possibly dealing drugs outside a specific address. The tipster did not provide a name, phone number or any other information.

An officer arrived at the address and observed the defendant and a Hispanic male sitting in a vehicle. The officer further observed a second car pull up and briefly stop near the defendant's vehicle. Then several houses away, a burglar alarm went off. The second vehicle left the scene, followed shortly by the defendant's vehicle.

The officer, on foot, shined a flashlight into the defendant's car and ordered it to stop. At that time, the officer observed a marijuana stem on the center console and ordered the occupants to "stay put" while he briefly investigated the burglar alarm. It was determined the burglar alarm was a false alarm. When asked whether the defendant consented to a search, the defendant turned over a small baggie containing marijuana.

The District Court noted several points leading to the conclusion that the officer did not have reasonable suspicion to stop and search the defendant. When an anonymous tip is received, law enforcement must develop some sort of corroboration for the tip, as anonymous tips fall on "the very low end of the reliability scale in terms of justification for a stop." In this case, the officer did not observe any activity to corroborate the tip (notably, the record did not establish whether the defendant had dreadlocks). The fact that a burglar alarm went off several houses away, likewise, did not indicate the defendant was engaged in selling drugs.

Perhaps most relevant to postconviction petitioners is the court's final finding. The District Court also held that since the initial police activity was illegal, the State bore the burden of establishing by 'clear and convincing evidence' that had been an break in the chain of illegality sufficient to dissipate the taint of the initial illegal police search. Many *Postconviction Journal* readers may be more familiar with the concept as the 'fruit of the poisonous tree' doctrine. Essentially, what it meant to A.P., is that since the initial stop was illegal, the fact that A.P. arguably voluntarily turned over the drugs is inapposite. Because the stop was illegal, and because there was no break in the events, the marijuana should have been suppressed.

A Defendant's Right to Consult with Counsel Exists Even During Examination of the Defendant

The right to counsel is guaranteed by the Fifth and Sixth Amendments to the United States Constitution. And Florida law affords even greater protections of that right. *Leerdam v. State*, 891 So.2d 1046, 1049 (Fla. 2d DCA 2004). In *Mears v. State*, 2016 WL 231374 (Fla. 4th DCA, Jan. 20, 2016), the extent to which Florida law protects a defendant's right to consult with counsel was tested.

In *Mears*, the defendant was on the witness stand testifying at trial when the State requested a sidebar. Before the jury was brought back in, defense counsel requested a moment to confer with the defendant. The trial court denied the request. Defense counsel informed the trial court that a case existed which provided a defendant the right to consult with his attorney, even while the defendant was testifying. The trial court gave defense counsel ten minutes to find it. Defense counsel was unable to do so, resulting in the trial court denying the request.

On appeal, the District Court reiterated its holding in *Burgess v. State*, 117 So.3d 889, 892-893 (Fla. 4th DCA 2013), in which it held

> "[N]o matter how brief the recess, a defendant in a criminal proceeding must have access to his attorney. The right of a criminal defendant to have reasonably effective attorney representation is absolute and is required at every essential step of the proceedings. Although we understand the desirability of the imposed restriction on a witness or party who is on the witness stand, we find that to deny a defendant consultation with his attorney during any trial recess, even in the middle of his testimony, violates the defendant's basic right to counsel."

In this case, defense counsel properly preserved the error by objecting and moving for a mistrial, thus it was addressed on direct appeal.

When Multiple Convictions Are Involved, Know What Relief is Available for Each Separate Conviction

by Ryan Sydejko

Postconviction petitioners must always remain aware of what relief may be available in their cases. Many petitioners seek vacation of their judgment and sentence. But that can become a less straightforward when multiple counts and sentences are involved. For instance, counsel's ineffective assistance may only apply to one of many counts. Take the case of *Williams v. State*, 2015 WL 5965155 (Fla. 3d DCA, Oct. 14, 2015).

The proffered evidence showed that Williams and two co-defendants trailed the victim to her home. Upon arriving, Williams put a gun to the victim's head and demanded her bag, not realizing the victim did not have the bag in her hand. When the victim pushed back, Williams intentionally shot the victim in the abdomen.

Williams entered an open plea to a three-count information: attempted felony murder, attempted armed robbery, and conspiracy to commit armed robbery. Williams was sentenced to 50-years incarceration on the first count, and terms of 15-years incarceration on each of the remaining counts.

Following an unsuccessful direct appeal, Williams filed a pro se motion for postconviction relief in which he argued that counsel was ineffective for allowing Williams to plead guilty to an illegal information. Williams argued that the intentional act relief upon for attempted felony murder (pointing a gun at the victim) was the same intentional act alleged in the attempted armed robbery count. The trial court summarily denied the claim, but the District Court found Williams' argument persuasive, and remanded. The District Court also appointed a public defender to assist Williams before the trial court.

The public defender immediately recognized a problem, and requested that postconviction relief specifically apply to only the attempted felony murder charge. Williams desired the plea, judgment, and sentence to remain in effect as to the remaining counts (which received concurrent 15-year terms). Following an evidentiary hearing, however, the trial court found Williams' original counsel ineffective and vacated the judgment and sentence on all counts. In an uncharacteristic move, Williams appealed, arguing that only the attempted felony murder should be vacated.

The District Court conducted a thorough analysis of the interplay between felony murders, the underlying felonies, and the intentional acts required to support both. If any reader questions the charging document in their felony murder case, they may find the *Williams* decision enlightening.

Ultimately, the District Court determined, contrary to the lower court's finding, that trial counsel was not ineffective.

The District Court began by noting that the charging document was, in fact, defective. The defect could have been addressed by trial counsel through either a motion to dismiss (Fla. R. Crim. P. 3.190(c)(4)) or a demand for a statement of particulars. Fla. R. Crim. P. 3.140(n). The State would then have responded by either amending the charging document or supplying the necessary particulars to support the charges. In either case, the defect could be easily remedied. The District Court found persuasive the fact that Williams was not misled as to what the State was charging; i.e. Williams knew the State was charging a shooting during a robbery gone awry. Furthermore, the charging document still charged a crime, it simply overlapped. And, as mentioned above, had this overlap been brought forth in a timely manner, it would have been easily remedied.

As a result, the District Court, acting en banc, receded from its previous opinion regarding Williams' postconviction appeal. The District Court also vacated the trial court order (which vacated all counts), and went back in time to affirm the denial of Williams' original motion for postconviction relief.

There are several lessons that can be taken from this case. The purpose of this article is to alert *FPJ* readers of the need to be very careful when asking for relief. Know which claims apply to which counts. State exactly the relief desired. Be specific. Williams was not careful in his original filing and ended up getting more than he desired, necessitating him to appeal relief most postconviction petitioners would gladly accept. And, in doing so, the District Court realized some additional problems and went back in time to deny everything, sending Williams right back to where he started: with a 50-year sentence.

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