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Florida Supreme Court Finds Trafficking Statute Constitutional

In a move that disappoints many, the Florida Supreme Court has held that §893.13, which criminalizes the possession of various drugs, is constitutional and does not violate due process. Previously, the United States District Court for the Middle District of Florida held, in Shelton v. Florida, 802 F.Supp.2d 1289 (2011), that the trafficking/possession statute amounted to a strict liability crime because it eliminated *mens rea* (guilty knowledge) as an element of drug distribution offenses. However, in reviewing a constitutional challenge to §893.13, the Florida Supreme Court found that the statute did not punish essentially innocent conduct, there was no constitutional right to possess controlled substances or to be ignorant of the nature of the property in one's possession, and any concern about punishing innocent conduct was obviated by allowing a defendant to raise affirmative defense of an absence of knowledge. State v. Adkins, --- So.3d ----, 37 F.L.W. S449, (Fla.2012). Thus, Adkins upheld the constitutionality of §893.13.

Also, on the heels of the Adkins decision, the 11th Circuit Court of Appeals reversed the Middle District's ruling in Shelton. Shelton v. Secretary, DOC, 23 Fla. L. Weekly Fed. C 1469 (11th Cir. 2012). Although the reversal in Shelton never actually ruled upon the due process question, the effect is, for the time being, to shut down collateral claims based upon Shelton v. Florida, 802 F.Supp.2d 1289 (2011).

It is currently unclear if Shelton or Adkins will be further pursued in the federal courts. We will keep an eye on the issue with hopes that the unconstitutionality of §893.13 will be adequately addressed. In news in this regard will be published in future issues of *FPJ*. In the meantime, people with convictions under §893.13 would be wise to continue collaterally attacking their convictions based upon the rationale of Shelton v. Florida, 802 F.Supp.2d 1289 (2011), with the hopes that either the 11th Circuit or the United States Supreme Court will address the issue head on.

Loren D. Rhoton

Burglary with Assault Qualifies for PRR Sentencing

In Hackley v. State, 95 So.3d 92 (Fla. 2012), the Florida Supreme Court recently settled inter-district conflict over the question of whether Burglary with Assault is a qualifying offense for Prison Releasee Reoffender sentencing. It was held that Burglary with Battery is not a qualifying PRR offense because it is not an enumerated offense under the statute and does not come under the catchall category that includes "[a]ny felony that involves the use or threat of physical force or violence against an individual."

On the other hand, since an assault necessarily requires "threat by word or act to do violence to the person of another," Burglary with Assault does come under the catchall category and, thus, does qualify for PRR treatment.

Court Errs in Refusing Read-Back of Testimony

In Johnson v. State, 37 Fla. L. Weekly D2217 (Fla. 5th DCA 2012), during jury deliberations, a note was sent to the judge seeking a read-back of trial testimony. The trial court refused, telling the jury: "I don't do [read-backs]" and instead instructed the jury "to rely upon their collective memories of the testimony." Defense counsel objected, but was overruled.

The District Court reversed the conviction, holding that while a trial court has great discretion in determining whether to grant a read-back request, it cannot mislead the jury into believing read-backs are prohibited. *See* Hazuri v. State, 91 So.2d 836 (Fla. 2012). As a result, Johnson was granted a new trial. For an extensive discussion regarding how requests for read-backs should be handled, see the Florida Supreme Court's opinion in Hazuri.

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.

Biomechanics Experts & Shaken Baby Syndrome

In Council v. State, Fla. L. Weekly D1721 (Fla. 1st DCA 2012), Council was found guilty of aggravated child abuse. At trial, the State alleged that the victim suffered from Shaken Baby Syndrome and introduced expert medical testimony in support of that position.

Council, in order to combat such testimony, retained his own doctor, an expert in biomechanics. The trial court did not permit the defense's expert who would have testified that the victim's injuries could have been caused by an accidental fall from a day bed. The trial court reasoned that the defense expert's testimony would have confused the jury because such testimony in the field of biomechanics could not translate into a medical diagnosis regarding the extent of the victim's injury.

The trial court was correct in one regard: that a biomechanics expert is not qualified to give a medical opinion regarding the extent of an injury. Stockwell v. Drake, 901 So.2d 974, 976 (Fla. 4th DCA 2005). But, the defense expert in Council was not offering an opinion as to the extent of the injury, but rather an opinion that the victim's injuries could have been caused by an accidental fall from a daybed and that shaking alone could not have cause such injuries. The District Court found that such opinions went to causation based upon the mechanism of injury and therefore fell within the field of biomechanics.

The District Court also found that the error was not harmless. Although the defense did present other expert testimony at trial, that expert had not conducted studies on brain injuries resulting from short falls; nor was he allowed to testify that the victim's injuries could not have been caused by shaking. It was therefore determined that the trial court abused its discretion in excluding the defense expert's testimony which was relevant and would have assisted the jury in resolving a highly contested factual issue (there was no eyewitness testimony nor any direct evidence of intentional abuse). As a result, the District Court reversed and remanded for a new trial.

Claims of Newly Discovered Evidence & Confusion as to the Applicable Standard

by Ryan Sydejko

It is not uncommon for the criminally accused to locate evidence which was not available at the time of their trial. Such evidence can take many forms, from physical evidence to eyewitness testimony, to recanted trial testimony. Some even involve business records or government documents not previously available. The method most frequently used to challenge's ones conviction after such findings is a claim of newly discovered evidence pursuant to Rule 3.850.

The Rules set forth the pleading requirements: the evidence is new and could not have been discovered with due diligence before trial, the new evidence is material, and would have probably changed the verdict. Fla. R. Crim. P. 3.600(a)(3). The standard for granting a new trial based upon newly discovered evidence is the same under Fla. R. Crim. P. 3.600(a)(3) as the postconviction claim under Fla. R. Crim. P. 3.850(b)(1). Totta v. State, 740 So.2d 57, 58 (Fla. 4th DCA 1999).

Once those elements are alleged in a pleading, there appears to be confusion amongst some courts as to what standard of review to apply. The objective of this article is to review the proper standard so potential postconviction movants know ahead of time what a trial court may do.

After the motion is filed, the postconviction court has two findings to make: (1) whether the motion is facially sufficient; and (2) whether an evidentiary hearing is warranted. Nordelo v. State, 93 So.3d 178, 185 (Fla. 2012). The distinction between these two is important and often confused by State Attorneys responding to the claims and by the postconviction courts when summarily denying the claims.

For instance, in Nordelo, the defendant filed a postconviction newly discovered evidence claim, asserting that a co-defendant had new testimony of exculpatory nature. Id. at 180. The postconviction court held a hearing to determine whether an evidentiary hearing was required. Id. at 181. After this preliminary hearing, the court concluded that the evidence did not qualify as newly discovered as it could have been obtained earlier through the exercise of due diligence, and therefore summarily denied the claim. Id. The appellate court affirmed, additionally holding that Nordelo's claim was conclusively refuted by the record as the State presented overwhelming evidence of guilt during trial. Id. at 182.

In dissent, Judge Cope wrote that the trial and appellate courts commingled the two separate preliminary findings. Nordelo v. State, 47 So.3d, 854 856-858 (Fla. 3d DCA 2010). Judge Cope observed the distinction between the requirements to (a) plead the existence of newly discovered evidence; and (b) the heightened requirement to establish due diligence during an evidentiary hearing. Id. "The pleading requirement is lower; the proof requirement is higher." Id. The Florida Supreme Court has encountered similar confusion, and wrote the following explanation:

> The postconviction trial court appears to have *incorrectly applied the heightened requirements to establish due diligence during an evidentiary hearing to evaluate the allegations at a pleading stage.* However, permitting a newly discovered evidence claim to proceed to an evidentiary hearing does *not* establish that the recanted testimony qualifies as newly discovered evidence as a matter of law. (citation omitted) The newly discovered evidence claim remains to be factually tested in an evidentiary hearing to determine whether the defendant has demonstrated that the successive motion has been filed within the time limit for when the statement was or could have been discovered through the exercise of due diligence. (citation omitted) The motion here was sufficiently pled to allow the opportunity to prove through the testimony of witnesses that the threshold requirement of due diligence was satisfied. Accordingly, the postconviction trial court erred in summarily denying this claim on the basis that the pleading failed to sufficiently satisfy the due diligence requirement at that stage of the proceeding. Davis v. State, 26 So.3d 519, 526 (Fla. 2009) (emphasis in original).

In Nordelo, the court reversed the decision, finding the same confusion. Remember, the postconviction court has two preliminary decisions to make: (1) whether the motion is facially sufficient; and (2) whether an evidentiary hearing is warranted. It is not proper for the court to delve into due diligence without providing the opportunity to prove that element in an evidentiary hearing. The standard to get a hearing is lower, the standard to succeed in gaining relief is much higher. Nordelo, 47 So.3d, at 856-858. Keep these differing standards in mind when pleading the claim, and also should a motion for rehearing become necessary.

When Judges and Prosecutors are "Friends"

by Ryan J. Sydejko

In Domville v. State, 2012 WL 3826764 (Fla. 4th DCA, September 5, 2012), the court was faced with a situation where the lower court judge and prosecutor were Facebook friends.

Domville had filed a motion to disqualify the trial judge based upon a fear the judge could not be fair and impartial given the judge's friendship with the prosecutor and attributed adverse rulings to that relationship. The lower court denied the motion as legally insufficient.

The appellate court began by noting that a motion for disqualification is legally sufficient if "the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial." Domville, citing Brofman v. Fla. Hearing Care Ctr., Inc., 703 So.2d 1191, 1192 (Fla. 4th DCA 1997). The movant needn't prove an actual bias, but instead merely that an objectively reasonable person in a similar situation would also fear a lack of impartiality.

The court turned to a Judicial Ethics Advisory Committee opinion for guidance. JEAC Op. 2009-20 (Nov. 17, 2009). The Committee concluded that the Florida Code of Judicial Conduct precludes a judge from becoming "friends" on social networking sites with lawyers appearing before that judge. The danger is that a public acknowledgment of that friendship could convey to others the impression that the lawyer is in a special position to influence the judge. Domville, citing Fla. Code Jud. Conduct Canon 2B.

Because Domville had "alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial", the court quashed the order denying disqualification and remanded.

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Introduction of Unrelated Firearm Constitutes Reversible Error

Metayer v. State, 89 So.3d 1002 (Fla. 4th DCA 2012), involves nearly everything one would expect from a Hollywood script: money, drugs, girl friends that hide money and drugs, rival drug dealers, and a triple shooting.

Victims Operle and Jacobs were friends and had been drinking all night. They returned home around 5:30 a.m. and drank more alcohol and smoked a cigar rolled with marijuana and cocaine. Later that morning, defendant Metayer and co-defendant Young contacted Operle. Operle was friends with Young, as both were known drug dealers.

They all sat down to have breakfast while Young and Jacobs completed a drug deal. Everyone then took out and compared their guns. While the guns were on the table, Young stood up and shot Jacobs in the chest. Operle tried to run, but was shot in the shoulder. Young pointed the gun at Operle's face and pulled the trigger, but the gun jammed. Young then kicked Operle in the face. Operle had a seizure and went temporarily unconscious.

Young told Metayer to finish Jacobs off. Metayer got up, grabbed a gun, stood over Jacobs, and shot him in the face. Jacobs died at the scene. While Operle played dead, Young stook Operle's shoes, wallet and watch.

Meanwhile, victim Hunt was sleeping in the bedroom. Young burst into the room and shot Hunt in the back. Young pulled the trigger again, but the gun jammed. Young then shot Hunt again, just above the hip. Hunt passed out.

Young was arrested the next day, and police recovered guns, drugs and money from Young's girlfriend's house. Metayer was arrested about six months later at his mother's house. Two guns were recovered from Metayer's house.

One of the issues at trial was who shot whom, and with which gun. One of the guns recovered from Young's girlfriend's house matched casings found at the scene. The guns recovered from Metayer's house did not match any casings, but the firearms expert did testify that one of Metayer's guns could have been used, there just wasn't any conclusive evidence.

The District Court held that it was error to admit Metayer's two guns into evidence at trial. In order to admit a gun, there must be a "sufficient link between the weapon and the crime." A gun different from the one used in a crime is not relevant to prove that the crime occurred. Therefore, the error was not harmless as evidence of irrelevant collateral crimes is presumed harmful.

Standards Will Differ Depending Upon Statutory Vehicle Used in Pursuit of Postconviction Relief

When pursuing postconviction relief, it is critical to understand the standard of review that applies to each claim. In researching the claims, remember that the same claim may have different standards, depending upon which postconviction vehicle is used; i.e. Florida Rules of Criminal Procedure 3.800 or 3.850.

In Kelsey v. State, 37 Fla. L. Weekly D2242 (Fla. 2d DCA 2012), a *pro se* inmate, Kelsey, had filed a Rule 3.800(a) motion to correct an illegal sentence. Kelsey had alleged a scoresheet error. The circuit court summarily denied relief, finding that even if an error had occurred, the same sentence could have been imposed.

At this point, some explanation is needed: when attempting to fix a scoresheet error under Rule 3.800(a), the court will utilize the "could-have-been-imposed" test. Brooks v. State, 969 So.2d 238 (Fla. 2007). Essentially, if the same sentence could have been imposed with a corrected scoresheet, no relief is due. This is a difficult burden to meet.

If, however, relief is sought pursuant to Rule 3.850, the "would-have-been-imposed" test applies. State v. Anderson, 905 So.2d 111 (Fla. 2005). In that situation, it must be clear that the trial court would have imposed the same sentence, had it had the benefit of reviewing the correct scoresheet. Brooks, 969 So.2d at 241-242.

In Kelsey, the District Court did not appear to take issue with the trial court's ruling that Kelsey's claim failed under the could-have-been-imposed standard. Luckily for Kelsey, though, the motion had been filed within Rule 3.850's two-year period of limitations. Thus, the District Court attempted to treat Kelsey's 3.800 motion as a 3.850 motion. In doing so, the District Court explicitly stated that: "if treated as a motion filed pursuant to rule 3.850, it appears that [Kelsey] would be entitled to relief because the 'would-have-been-imposed' test, rather than the 'could-have-been-imposed' test, would apply." Because Kelsey's 3.800 motion did not meet the statutory requirements for a rule 3.850 motion, the District Court was ultimately unable to treat the motion under rule 3.850. Thus, the case was remanded to the lower court with directions that Kelsey be provided an opportunity to amend the claim in a facially sufficient rule 3.850 motion.

This case provides multiple important lessons for the pro se litigant: know which standard of review applies to the claim, know that the standard may change depending on the vehicle, and ensure the motion meets all of the statutory prerequisites.

Limiting Scope of Evidentiary Hearing Testimony

by Loren D. Rhoton

It has long been a concern of mine that testimony given during a postconviction evidentiary hearing will be used against my client at a retrial. This is because when a 3.850 motion involves questions of attorney ineffectiveness, the movant must waive his attorney-client privilege relating to conversations with the original trial/plea attorney. *See*, Lopez v. Singletery, 634 So.2d 1054 (Fla. 1993). Likewise, if the postconviction movant has to testify to support any claims, there is the possibility that the prosecutor could attempt to exploit the situation to elicit admissions about the case from the defendant, which could then later be used against the defendant at a retrial (if one is granted). Unfortunately, there is no Florida caselaw that adequately addresses this situation. As a result, I have made it my pet issue to get the Florida Courts to address such a situation.

In any postconviction case where an evidentiary hearing is granted, the above concerns will likely arise. Therefore, I advise filing a motion, prior to the evidentiary hearing, asking the court to limit the use of any privileged/protected testimony solely to the 3.850 proceedings. It should be argued that while the testimony of the trial attorney and/or the defendant are clearly relevant to the ineffectiveness of counsel claims under consideration by the court, the applicability of said evidence should be limited solely to the postconviction proceedings. In other words, it would be fundamentally unfair to allow any evidence adduced in the 3.850 proceedings to be later used against the defendant at a new trial (should one be granted). The waiver of the 3.850 movant's attorney-client privilege only occurs because of the claim of ineffectiveness of counsel. Thus, should the court grant the 3.850 motion based upon a finding of ineffectiveness of trial counsel, the defendant should not be punished as a result of his attorney's failures. Instead, the defendant should be placed in the position that he was prior to trial, i.e., that no privileged material should be presented against him.

The waiver of the attorney-client privilege and the right to remain silent should be construed narrowly so as to preclude use of confidential information at a new trial or retrial (should such a trial be granted). In Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003), it was held that the scope of a habeas corpus petitioner's waiver arising from claim of ineffective assistance of counsel extended only to litigation of the federal habeas petition; and, therefore, the attorney-client privilege was not waived for all time and all purposes, including the possible retrial of the petitioner, if he was successful in setting aside his original conviction or sentence. Likewise, addressing the same issue, U.S. v. Pinson, 584 F.3d 972, 978 (10th Cir. 2009) held that a court must impose a waiver no broader than needed to ensure the fairness of the proceedings before it.

Also, in Simmons v. U.S., 390 U.S. 377, 394, 88 S.Ct. 967, 976 (1968), it was noted that where testimony of the defendant was required to support a 4th Amendment suppression claim, an undeniable tension is created between the protection against illegal searches and seizures and the 5th Amendment protection against self-incrimination and, therefore, "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." A similar dilemma is created when a postconviction movant must testify at an evidentiary hearing; in order to support the burden of proof about ineffectiveness of a trial attorney attorney, a defendant may have to testify and thus be subjected to questions about his case. If said testimony would later be used against the defendant at a retrial, then a tension is created between the defendant's 5th Amendment right to remain silent and his ability to adequately pursue his 6th Amendment right to effective assistance of counsel. Just as with Simmons, such a dilemma should be remedied by limiting the use of the postconviction movant's testimony to the collateral proceedings and precluding any use of his testimony at a retrial.

The matters addressed in this article present what appears to be a novel but important question of law in Florida. I recommend that the above arguments be raised for any 3.850 evidentiary hearing where the trial attorney and/or defendant will have to testify. It is recommended that a motion be filed in advance of the evidentiary hearing and that a ruling on the motion be requested from the court before any testimony and or evidence is presented at the 3.850 evidentiary hearing.

The Importance of Knowing Filing Deadlines & How They Are Properly Calculated

One of the most important things to keep in mind for any person navigating the legal system, whether *pro se* or as a licensed attorney, is filing deadlines. Determining which time frames apply to which motion or order can often times be quite difficult, especially for the incarcerated acting *pro se*. In other instances, the time frame is obvious, but tolling may come into play. This is especially true when calculating the time for filing a Federal Writ of Habeas Corpus.

Tolling, or the lack thereof, can eliminate one's ability to appeal to the District Court of Appeal. *See* Outlaw v. State, 2012 WL 3822128 (Fla. 2d DCA, September 5, 2012).

In Outlaw, an order denying relief was entered against Outlaw. Counsel subsequently filed a motion for rehearing, but it was filed more than fifteen days after entrance of the final order. The lower court did eventually rule on the motion. The problem, however, was that was done after the thirty day period that Outlaw had to file his notice of appeal to the District Court.

Outlaw subsequently attempted an appeal, but the District Court found that it did not have jurisdiction because the notice of appeal was untimely. Outlaw was not saved by the fact that a motion for rehearing was filed since it was untimely and therefore did not toll the thirty day period. Additionally, the period was not tolled by the fact that the lower court acted upon the untimely motion for rehearing. *See* Reid v. Cooper, 955 So.2d 31, 32 (Fla. 3d DCA 2007) ("holding that an untimely motion for rehearing is a nullity and does not toll the time in which to file an appeal).

In other words, Outlaw missed out on an opportunity to appeal the lower court's decision because of a misunderstanding as to the calculation of a period of limitations. It is absolutely critical that readers of *FPJ* be aware of not only the period of limitations, but also how to properly calculate that period so as not to inadvertently waive valuable appellate opportunities.

Indigent Inmate Appealing 3.800 Denial Entitled to Record on Appeal

As many postconviction movants have realized, it can occasionally be difficult to get a clerk of court to properly prepare the record on appeal. And, in some cases, it may even be difficult to get the clerk of court to prepare the record at all.

In Williams v. State, 2012 WL 4801246 (Fla. 2d DCA 2012), the District Court was faced with a petition from a *pro se* inmate who alleged that the clerk of the lower court refused to prepare the record on appeal. Williams had moved the circuit court for an order directing the clerk to prepare the record, at no cost. But, the circuit court held that while Williams could file the postconviction motion at no cost, Williams was not similarly entitled to preparation of the record at no charge. Thus, the clerk of court demanded payment for the record.

Williams subsequently petitioned the District Court via a writ of mandamus and a writ of prohibition. While these were not the best vehicles, the District Court was able to determine what Williams had intended, and interpreted his petition as addressing the District Court's authority to control preparation of the record under the Florida Rules of Appellate Procedure.

The Court agreed that Williams was entitled to preparation of the record on appeal, at no cost. To do otherwise, the court reasoned, "would result in an unlawful chilling of a criminal defendant's right to appeal or otherwise challenge the propriety or constitutionality of the conviction or sentence. Id. (quoting Schmidt v. Crusoe, 878 So.2d 361, 367 (Fla. 2003).

Importantly, however, the District Court noted that Williams was not entitled to a free personal copy of the record. Instead, only the official record, sent to the District Court, would come at no cost. Should Williams desire a personal copy, that would requirement payment of the clerk's invoice.

Should a *pro se* inmate ever encounter a clerk refusing to prepare the record, review of Williams could be beneficial at it provides a great roadmap as to how to address the situation, citing the relevant statutes and rules, as well as discussing the proper vehicles for such review.

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