

Florida Prison Legal Perspectives Update

by Loren D. Rhoton

In 1999, I had the opportunity and pleasure to become acquainted with the Florida Prisoner's Legal Aid Organization, Inc. (FPLAO) and its newspaper, the Florida Prison Legal Perspectives (FPLP). At that time, I was greatly impressed with the efforts of the FPLAO founder, Bobby Posey, and his wife Teresa. From inside prison, with the assistance of Teresa, Bobby managed to run an organization that zealously advocated for inmates and their families. Through FPLAO and FPLP, Bobby and Teresa tirelessly fought for the rights of inmates and their loved ones. I admired Bobby for his efforts, and, consequently, offered my services to the non-profit FPLAO group in the form of providing *pro bono* legal advice to the organization and submitting articles for an ongoing legal self-help column (*Post Conviction Corner*) in FPLP.

Through the years, I became friends with Bobby and Teresa and my respect for them and their efforts only continued to grow. It is with great sadness now that I write that Bobby Posey passed away near the end of 2009. All Florida inmates were certainly

better off for having Bobby Posey on their side. Without a doubt, Bobby Posey will be missed by many. With Bobby's passing, both FPLAO and FPLP have ceased to exist. Without question, the absence of FPLAO will leave a great void for its many members who counted on the FPLP for the advocacy, news and advice that were relevant and meaningful to inmates. My office, Loren Rhoton, P.A., will be attempting, in its own small way, to carry on the spirit of FPLAO with a quarterly newsletter dedicated to prisoners' interests. As the main focus of my office is criminal appeals and postconviction issues, the content of my newsletter will consist mainly of self-help legal articles (much like the *Post Conviction Corner* articles that I regularly published in FPLP). The newsletter, as it develops, will also likely contain case law updates and perhaps helpful articles from inmate contributors. I know that this newsletter will not be as varied or in-depth as FPLP, and I can only hope that my efforts will be helpful to the people who previously relied on FPLP for advice and information.

This premier issue is dedicated to Bobby Posey.

Lone Opportunity to Amend Postconviction Claims Pursuant to *Spera v. State*

As many postconviction litigants are likely aware, *Spera v. State*, 971 So.2d 754 (Fla. 2007), provides the opportunity to amend claims found facially insufficient by the trial court. Many courts have dealt with the extent to which the ability to amend must be made available. For instance, the First DCA has held that a single opportunity to amend is adequate. *Nelson v. State*, 977 So.2d 710 (Fla. 1st DCA 2008). But, what if the movant does not timely act on that opportunity?

In *Williams v. State*, 35 Fla. L. Weekly D100, the First DCA answered that question. In *Williams*, the defendant filed a *pro se* twenty-issue Rule 3.850 Motion for Postconviction Relief. The court summarily denied most claims, but granted an evidentiary hearing

on others. The defendant subsequently obtained counsel whom filed a motion to amend the summarily denied claims pursuant to *Spera*. An evidentiary hearing was held, and the court ruled on the claims from the evidentiary hearing, before counsel had amended the facially insufficient claims.

The First DCA ruled that because counsel was given the opportunity to amend, of which he chose not to act, *Spera* was satisfied and any claim he may have had under *Spera* was deemed waived.

The importance of the Court's holding in this case is that *Spera* only requires a single *opportunity* to amend. In the event the postconviction litigant chooses not to, or fails to, act during that window of opportunity, any *Spera* claim may be waived.

The hiring of a lawyer is an important decision that should not be based solely on advertisements.
Before you decide, ask us to send you free written information about our qualifications.

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

Second District Court of Appeal Rules on Abandoned Investigative Technique

In its recent case, *Smith v. State*, 2010 WL 21178, the Second District Court of Appeal (DCA) addressed the use of the FBI's recently abandoned use of comparative bullet lead analysis (CBLA) as newly discovered evidence in postconviction cases.

In thousands of cases, spanning decades of jurisprudence, the FBI used a technique of comparing spent cartridges to unused ammunition to determine whether they were from similar batches. In *Smith*, an FBI special agent offered similar testimony, linking the defendant to homicides in 1989 and 1990. Over two decades later, in a November 2007 joint-investigation by the Washington Post and CBS News' "60" Minutes, a former FBI chief concluded that CBLA could not reliably support the proposition that a particular bullet came from a particular box of ammunition. The research further discovered that the FBI had abandoned this technique several years earlier, in 2004, but had failed to notify anyone as to why a investigatory technique utilized for decades was now suddenly being discontinued.

The defendant in *Smith* had filed a Florida Rule of Criminal Procedure 3.850 Motion for Postconviction Relief alleging that evidence indicated a scientific theory advanced by the State at his trials (in 1989 & 1990) had been recently discredited and abandoned, constituting newly discovered evidence.

The Court, citing its decision in *Clark v. State*, 995 So.2d 1112 (Fla. 2d DCA 2008), reversed the trial court and remanded the defendant's motion for an evidentiary hearing on the newly discovered evidence claim, holding that the defendant "alleged that evidence that CBLA has been discredited and abandoned was unknown at the time of his trials and could not have been discovered by the use of due diligence."

For individuals with offenses pre-dating the FBI's 2004 cessation of the use of CBLA, it may be prudent to review your materials, as well as *Smith* and *Clark*, to determine whether the State offered testimony regarding CBLA, as a potential avenue to seek postconviction relief may have opened.

On the third Friday of each month, Loren Rhoton can be heard discussing postconviction issues that are of interest to prisoners and their families on the radio show, *Justice for All*. *Justice for All* is hosted by Pastor Dana Jackson and broadcasts every Friday from 11 a.m. to Noon on WOKB a.m. 1680 out of Orlando, Fla. The radio show can also be heard online at: www.wokbradio.com.

Preservation of the Attorney-Client Privilege While Incarcerated

by Ryan J. Sydejko

A fundamental aspect of legal representation requires that a client be permitted to discuss his legal affairs with his attorney, in private, and with openness and candor. Failing to provide an attorney with all known aspects of one's case, for fear of public dissemination of those communications, could negatively impact the overall representation of a client. Therefore, a client must be provided a forum to discuss his case. Traditional sanctity of the attorney-client privilege emanates from common law, and was later encompassed in the Sixth Amendment to the U.S. Constitution. See *U.S. v. Melvin*, 650 F.2d 641 (5th Cir. 1981).

The Florida legislature has also spoken regarding this privilege, codifying that persons who seek legal advice may have their confidential communications with attorneys protected. See Fla. Stat. § 90.502. This allows clients to refuse to disclose, and prevents attorneys from breaching the confidentiality. *Id.* There are several criteria that must be satisfied prior to a proper invocation of the privilege, and it is important that any potential client review the pertinent statute to ensure that all criteria are met. See *id.* This article focuses on one of those criteria, namely that the communication between an attorney and client are confidential only if they exclude unnecessary third parties. Fla. Stat. § 90.502(1)(c).

Preservation of the attorney-client privilege by incarcerated individuals can frequently become rather onerous, especially in light of the requirement that third parties be excluded from the conversation. A communication is only protected by the attorney-client privilege when intended to be confidential and was made under circumstances in which it was reasonably expected to be confidential. *Melvin*, 650 F.2d at 645. Obviously, securing any privacy in order to enjoy a confidential communication is a tall order for those incarcerated in Florida. This is why it is vital for inmates and attorneys alike, to understand and properly invoke their right to speak in private. One way for an inmate to enjoy a privileged attorney-client communication is in-person at the institution. While such face-to-face communication may be ideal, it is rather burdensome. Inmates move frequently, and are rarely housed near their attorneys. Furthermore, such an arrangement places an undue financial burden on inmates, as most attorneys would charge for the time spent traveling to a from a distant institution. These were likely both

considerations when the Florida Administrative Code was drafted regarding inmates and telephone use.

Section 33-602.205 of the Florida Administrative Code is entitled "Inmate Telephone Use." In that section, an inmate's telephone privileges are set forth. Applicable to the instant article is subsection (3), which pertains to "Calls to Attorneys." Subsection (3)(a) sets forth that "Inmates *shall* be allowed to make *private* telephone calls to attorneys upon presentation to the warden or his designee of evidence that the call is necessary . . . except as authorized by warrant or order of court, telephone calls to attorneys made pursuant to this section shall *not be monitored* or electronically recorded." *Id.* (emphasis added).

There are several points worthy of further discussion regarding subsection (3)(a), but this article will focus on the privacy mandate. Privacy, as in exclusion of third parties, is of the utmost importance, as an inmate may wish to keep the conversation from the prying ears of prison officials. Herein lies the problem at many institutions. Several institutions set up inmate phone calls in the office of the classification officers. Most often, the classification officer is sitting beside the inmate throughout the call. In such a scenario, the call is not "private" as required by subsection (3)(a), and, further, it waives the attorney-client privilege as a third party is present. This could ultimately permit the classification officer to relay portions of the conversation to supervisors or prosecutors. Institutions are required to designate an area where private calls can occur, without the presence of an officer. Occasionally, this will take some prodding by the attorney, and perhaps a phone call to the warden's office.

Lastly, absent a warrant or other court order, the telephone line cannot be monitored when the legal phone call is set up by the attorney pursuant to subsection (3)(a). Institutions are permitted, however, to monitor phone calls made by inmates from their calling lists. Therefore, it is preferable to schedule phone calls through classifications to ensure the call is on a secured line.

The attorney-client privilege is sacred and emanates from hundreds of years of common law. One should not take it lightly or be forced into unknowingly waiving it. Therefore, inmates, and their attorneys alike, may wish to review the Code in order to ensure their communications are truly private, thereby preserving the attorney-client privilege.

BUY THE BOOK – ON SALE NOW

Postconviction Relief for the Florida Prisoner

A compilation of Selected Legal Self-Help Articles

A collection of Loren Rhoton's articles is now available in one convenient book geared towards Florida inmates seeking justice in their cases. Insights based on professional experience, case citations, and references to the relevant rules of procedure are provided. This book is specifically directed toward those pursuing postconviction relief.

To order, send \$20 in the form of a money order, cashier's check or inmate bank check (no stamps, cash or personal checks please) to Loren Rhoton, P.A., 412 East Madison Street, Suite 1111, Tampa, Florida 33602, or order online at www.rhotonpostconviction.com.

Miranda: The Right to Remain Silent Versus Actual Silence

One investigative technique of law enforcement officers is to question a suspect numerous times in an attempt to extricate a confession. As many are aware, *Miranda* warnings serve to protect the accused, by informing them of rights they may exercise to prevent undesirable or repetitive questioning. One such right is the right to remain silent.

In *Dyer v. State*, 16 So.3d 990 (Fla. 3d DCA 2009), the Third District Court explained the difference

between invocation of the right and practice of the right. In *Dyer*, the defendant "ignored detectives and stared at the wall" during questioning. Eventually, after several attempts at interrogation, the defendant spoke and offered inculpatory statements. The Court held that because the defendant merely practiced the right to remain silent, and did not specifically invoke it, the inculpatory statements were admissible. Because the defendant never invoked his right to remain silent, the Court wrote, he could not avail himself of the protections afforded by the right.

To Subscribe to The Florida Postconviction Journal:

The *Florida Postconviction Journal* is currently being provided, free of charge, to Florida inmates who are interested in receiving the helpful advice and information contained in the newsletter. If you wish to have your name added to the newsletter's mailing list, please fill out the form below and mail it to Loren Rhoton, P.A., 412 East Madison Street, Suite 1111, Tampa, FL 33062. For non-inmates interested in subscribing to the newsletter, please forward a money order in the amount of \$25 for a one-year subscription.

Name	DC#	

Institution Name and Street Address		

City	State	Zip

The Florida Postconviction Journal

page 6 of 6

a quarterly publication of Loren Rhoton, P.A.

Loren Rhoton, P.A.

Postconviction Attorneys

412 East Madison Street
Suite 1111

Tampa, Florida 33602

Tel: 813-226-3138

Fax: 813-221-2182

Email:

lorenrhoton@rhotonpostconviction.com

rsydejko@rhotonpostconviction.com

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

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

The Florida Postconviction Journal

a publication of Loren Rhoton, P.A.

412 East Madison Street

Suite 1111

Tampa, FL 33602

CHANGE SERVICE REQUESTED

Name
Institution
Street Address
City, State, Zip