The Florida Postconviction Journal

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Free FPJ Back Issues Now Available Online

FPJ strives to empower prisoners to attack their convictions. To that end, we provide caselaw and legal self-help suggestions in each issue. We previously compiled FPJ back issues into a book. But, we have since published many issues. We have many requests for specific back issues. But, we charge no subscription fees to inmates, so we are limited in our ability to provide back issues on an individual basis. FPJ back issues are now available online at RhotonPostconviction.com. Back issues can be downloaded free of charge. While on the website, please check out the other helpful materials such as the Post Conviction Blog and the Prisoner's Resources page.

What Does Florida Constitutional Amendment 11 Mean for Florida Prisoners?

My office has received many inquiries about the effect of the passage of Florida Constitutional Amendment 11 on pre-existing minimum mandatory sentences. It seems that, as often happens, there is a lot of speculation that the passage of Amendment 11 last November means that previously imposed minimum mandatory sentences will be retroactively affected. At this point, it is too early to determine the ultimate effect of Amendment 11.

Amendment 11 proposed, in relevant part, a revision of Section 9 of Article X of the Florida Constitution, doing away with what is known as the *Savings Clause*. The Savings Clause banned the legislature from making retroactive changes to criminal sentencing laws. For example, if a minimum mandatory sentencing scheme was in place, but then later removed, the Savings Clause prevented the state from enacting retroactive legislation that would remove the minimum mandatory sentences for people already sentenced under the previous sentencing scheme that allowed them.

The Savings Clause previously read: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." As per the will of the Florida voters, the Savings Clause was amended to read: "Repeal of a criminal statute shall not affect prosecution for any crime committed before such repeal." Art. X, § 9, Fla. Const. Notably, the amendment removed the retroactivity prohibition as it pertained to the repeal of a criminal statute's effect on the punishment (i.e., sentence). Thus, under the newly amended Savings Clause, the Florida legislature has the ability to repeal a previously enacted sentencing scheme (for example, minimum mandatory sentences) and make the repeal retroactive to those convicted and sentenced prior to the repeal. (***Continued on page 3***).

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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. We strive 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.

About Mr. Loren D. Rhoton, Esq.

Loren D. Rhoton has been a member in good standing with The Florida Bar since his admission to practice in 1995. Mr. Rhoton's practice is exclusively dedicated to assisting Florida inmates with their criminal appeal/postconviction cases.

Mr. Rhoton is a member of Florida Bar Appellate Division. He is a member of the United States District Courts, in and for the Southern, Middle, and Northern Districts of Florida. He is licensed to practice before the U.S. Court of Appeals for the 11th Circuit, and is certified to practice before the U.S. Supreme Court.

Mr. Rhoton has investigated and pursued hundreds of postconviction cases. He has practiced in all phases of the Florida Judicial System, from misdemeanor county courts up to the Florida Supreme Court. He has been directly responsible for amendments to Florida Rule of Criminal Procedure 3.850 (the main vehicle for most postconviction actions). Furthermore Mr. Rhoton regularly practices before Federal District Courts and the United States Court of Appeals for the 11th Circuit.

Mr. Rhoton was previously appointed by the Florida Supreme Court to the Criminal Rules Steering Committee, Subcommittee on Postconviction Relief, which focused on rewriting Rule 3.850. He worked on the committee with judges and governmental officials to help improve the administration and execution of postconviction proceedings. In this role, Mr. Rhoton advocated for changes to benefit to post conviction litigants.

Mr. Rhoton has consulted and advised attorneys, judges, and Florida Bar prosecutors on post conviction law. He has testified as an expert on post conviction law.

Mr. Rhoton previously served on the Board of Directors of the Florida Prisoner's Legal Aid Organization, Inc.

Mr. Rhoton regularly researches, writes, and publishes articles on post conviction law. Selected articles of Mr. Rhoton's have been compiled an published in the legal self-help book, *Postconviction Relief for the Florida Prisoner,* and the companion publication, *Postconviction Forms for the Florida Prisoner.*

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(***Continued from page 1***). While Amendment 11 is potentially a major positive development in Florida sentencing laws, its effect on Florida prisoners has not yet been determined. The rumor mill has many believing that just by virtue of the passage of Amendment 11, all previously sentenced prisoners will automatically benefit from any changes to the Florida sentencing scheme. However, as of this date, that is not necessarily so.

As with any constitutional development of this type, there is plenty of legal wrangling going on to determine how Amendment 11 will affect already-imposed sentences. The undersigned has been informed by a number of inmates that some are filing motions within the courts to retroactively apply sentencing changes to their cases. Additionally, various legislators and public officials are working to determine and/or limit the applicability and effect of Amendment 11. On the positive side, state senator Darryl Rouson sponsored Senate Bill 704, which would automatically make any future criminal justice reforms retroactive, and would make all past reforms, including a 2014 change to drug laws and a 2016 change to a 20-year mandatory minimum on aggravated assault, apply to people currently in prison. However, as of this point, SB 704 has not been passed and its future is uncertain.

On the other side of the spectrum, Senate Bill 1656, proposes that any revision of an existing criminal statute only operates going forward unless expressly provided otherwise. In other words, for any revision of an existing criminal statute to be retroactive, the statute must specifically provide for such retroactivity, and, in the absence of such a retroactive provision, the revision of said statute shall only be prospective.

As of this date, there has been no definitive answer as to what Amendment 11 will mean for those already sentenced. There will no doubt be both legislative action and judicial review of anything that results from Amendment 11. FPJ will track the developments and update readers in future issues. But, for now, until the legislature and/or the judiciary defines Amendment 11's impact, any collateral/postconviction actions taken in reliance on Amendment 11 are likely premature.

Conviction for Use of Two-Way Communication Device in Aid of Felony Requires Proof of Actual Use

Section 934.215, Florida Statutes (2015), provides: "Any person who uses a two-way communications device, including, but not limited to, a portable two-way wireless communications device, to facilitate or further the commission of any felony offense commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." As is clear from the statutory language, the offense has two elements: "(1) the use of a two-way communications device (2) for the purpose of facilitating or furthering the commission of any felony offense." **(Continued on page 4)**

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Holt v. State, 173 So.3d 1079, 1082 (Fla. 5th DCA 2015). Critical to this offense is that the statute criminalizes the use of the communications device to further or facilitate a felony, not simply the mere possession of such a device during the commission of a felony. Therefore, the State must offer some evidence that the communications device was used in furtherance of the commission of the felony at issue. In Sanchez v. State, __ So. 3d __, 44 F.L.W. D1185 (2d DCA 5/3/2019), the defendant was convicted for use of a two-way device to aid in the commission of burglaries. The State presented evidence that a set of walkie-talkies was found in the spare tire compartment of the defendant's car after one burglary. But the State presented no evidence to establish that either Sanchez or any of his codefendants used the walkie-talkies to commit or facilitate the burglary. No one was seen with them or heard using them or talking on them. Moreover, the State offered no explanation for how the walkie-talkies could have been stowed in the spare tire compartment in the less-than-five minutes between the time the initial deputy saw the perpetrators get in the car and when the car was stopped. The State's evidence was legally insufficient to prove that either Sanchez or his codefendants used the walkie-talkies in furtherance of the burglary, and the trial court should have granted the motion for judgment of acquittal. Therefore, Sanchez reversed the convictions for §934.215.

"**"**A man who procrastinates in his choosing will inevitably have his choice made for him by circumstance**."**

-Hunter S. Thompson

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.

Williams v. State, 777 So.2d 947 (Fla. 2000) – Right to Belated Postconviction Motion – if postconviction counsel fails to timely file Rule 3.850 Motion, defendant has right to file belated appeal.

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.

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.,

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Defendant Has Right to Private Counsel

In Wilcox v. State, __ So. 3d __, 44 F.L.W. D1180 (5th DCA 5/3/2019), The defendant went to trial with a public defender. After jury selection and before openings private counsel appeared and asked to substitute in. The court denied a continuance, and counsel indicated he was ready and able to step in and represent the defendant at trial without a continuance. The court then denied the substitution. The 5th DCA found that the defendant was not acting in bad faith in seeking substitution after jury selection. It was further held that since private counsel was ready to step in and there would have been no delay, the trial court erred in denying the substitution of counsel and the conviction was reversed.

"To assert in any case that a man must be absolutely cut off from society because he is absolutely evil amounts to saying that society is absolutely good, and no-one in his right mind will believe this today."

-Albert Camus

Stand Your Ground Developments

The 2017 Stand Your Ground amendments apply to an offense pending when the change occurred. Horton v. State, __ So. 3d __, 44 F.L.W. D1078 (2d DCA 4/24/2019)

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Florida Supreme Court Clarifies PRR Statute

When a defendant is sentenced to prison, but is released from the county jail before being transferred to DOC due to time served, that release cannot subsequently serve as the predicate for a prison release reoffender sentence. State v. Lewars, 259 So. 3d 793, 795 (Fla. 2018) . The Lewars court resolved conflicting decisions from the First, Fourth, and Fifth DCAs, which held release from the county jail satisfied the predicate, ultimately disapproving State v. Wright, 180 So.3d 1043 (Fla. 1st DCA 2015), Taylor v. State, 114 So.3d 355 (Fla. 4th DCA 2013), and Louzon v. State, 78 So.3d 678 (Fla. 5th DCA 2012).

Dazarian Lewars was convicted of burglary of an unoccupied dwelling. Lewars was sentenced to a mandatory minimum term of fifteen years' imprisonment under section 775.082(9), the PRR statute, over his objection that the PRR statute did not apply to him. On appeal, the Second District agreed with Lewars

and reversed his PRR sentence, holding that Lewars did not qualify as a PRR because he was not "released from a state correctional facility operated by the Department of Corrections or a private vendor" within the three years preceding the burglary at issue, as required by the pertinent language of the PRR statute.

To support PRR sentencing, the trial court relied on the fact that Lewars had been released from a twenty-four-month sentence within the three years preceding the burglary. The legal issue concerning the applicability of the PRR statute centered on whether Lewars' release from that sentence satisfied the "released from" language of the PRR statute, given that Lewars served his prior twenty-four-month sentence entirely in the county jail, rather than in prison, due to his accumulation of 766 days' jail credit while he awaited a violation-of-probation hearing and sentencing. Although the sentencing order for the prior case committed Lewars to the custody of the DOC for a prison sentence, Lewars was never physically transferred to a prison facility. *Id.* After sentencing in that case, the local sheriff's office observed that Lewars had been sentenced to time served and contacted the DOC for instructions. Upon receiving confirmation from the DOC that Lewars was entitled to release, the sheriff had Lewars sign a "prison release form" sent by the DOC and then released him directly from the county jail. DOC records stated that Lewars was released from the "Central Office." However, it was undisputed that Lewars never actually set foot in a DOC facility before committing the burglary for which he was given a PRR sentence.

The Florida Supreme Court looked to the plain language of the statute and held: "release from a county jail does not satisfy the 'released from' element of statute's PRR definition. This language addresses the defendant's release from a 'facility,' not from the legal custody of a particular entity and not from a particular sentence length, and it requires that that facility be one 'operated by the Department of Corrections or a private vendor.' A county jail is not 'operated by the Department of Corrections or a private vendor.' ...Therefore, a defendant's release from a county jail is not sufficient to satisfy the plain language of section 775.082(9)(a)1." State v. Lewars, 259 So. 3d 793, 798–99 (Fla. 2018).

Trial Counsel Cannot Claim Reasonable Trial Strategy to Excuse Lack of Knowledge or Understanding of Law

Counsel's decisions based on his lack of knowledge or understanding of a rule or statute cannot constitute a reasonable trial strategy. But, the court cannot presume that counsel's failure to understand a rule constitutes prejudice. The defendant still is required to show that counsel's failures prejudiced him. See Amaro v. State, __ So. 3d __, 44 F.L.W. D1349 (Fla. 5th DCA May 24, 2019) for a discussion of prejudice in a case where counsel was unfamiliar with the rule regarding allowing jurors to ask questions and did not request that the court give the jurors the standard instruction regarding asking questions.

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Use of Reverse *Williams* Rule Evidence to Show Another Person Committed Offense

In a case where identity is the only issue, and the evidence placing the defendant at the scene of the crime is not overwhelming, the court errs in refusing to admit reverse *Williams rule* evidence of another crime committed several months later involving several similarities committed by a different person. Newby v. State, _ So. 3d _, 44 F.L.W. D1377 (Fla. 2d DCA 2019). The reverse *Williams rule* is simply the application of *Williams rule* principles to the circumstance in which a defendant (not the State) seeks to introduce evidence of similar crimes committed by a person other than the defendant, to show the defendant did not commit the offense for which he is being tried. *See* McDuffie v. State, 970 So.2d 312, (Fla. 2007). Although the risk of wrongful conviction is not present in this context, the Supreme Court has nonetheless held that reverse *Williams rule* evidence offered by a defendant must meet the same strict standard of relevance, and thus the same strict standard of similarity, as ordinary *Williams rule* evidence offered by the State. State v. Savino, 567 So.2d 892 (Fla.1990); *see also,* Huggins v. State, 889 So.2d 743, 762 (Fla. 2004) (explaining that Savino, "rejected the argument that the standard of similarity should be less strict when similar-fact evidence is offered by the defendant"). For a defendant to introduce evidence of similar crimes by another, to shift suspicion from himself to that other person, the "evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense." Savino, 567 So.2d at 894; *see also*, Allison v. State, 746 So.2d 518, 519 (Fla. 2d DCA 1999) (holding that the inquiry when the defendant sought to introduce reverse *Williams rule* evidence in a murder prosecution is "whether the State could have used this same testimony if [the other person] himself were on trial for the murder").

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