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"He that can have patience, can have what he will."

~Benjamin Franklin

This issue of *The Florida Postconviction Journal* is a combination Summer/Fall issue. While we strive to provide a quarterly publication, the writing and publication of the FPJ is all done by Ryan Sydejko, the staff of my office, and myself. As a result, occasionally an issue of FPJ may not come out right at the beginning of each quarter. We strive to provide helpful information to Florida inmates and do not wish to merely load the newsletter with filler. Therefore, sometimes we may get behind a little bit in our publication schedule. This only occurs because we want to make sure that we are providing something of value to our readers. We hope that the quality of the information and advice in FPJ more than makes up for any small delay in publication.

If you find the information in our newsletter to be helpful, please spread the word and let others know about the free subscription for Florida prisoners. If you would like to see articles on specific legal issues in our upcoming newsletters, write us with your ideas. We obviously will not be able to address every request (nor will we be able to respond to every letter). But, we will do our best to disseminate information that our readers will find valuable. And, finally, please let us know what you like (or don't like) about our newsletter. We want to know if our publication is one that our readers will want to continue to receive. Particularly relevant comments may even be included in future issues of FPJ.

So, there you have it. We apologize for the delay in our latest newsletter and want to hear from our readers. Hopefully you find our latest issue to be informative and helpful. If so, please share it with others and spread the word about FPJ.

Loren Rhoton

Obtaining Copies of Evidence & Public Records From Uncooperative State Agencies

In Parish v. State, 2011 WL 1775740 (Fla. 4th DCA 2011) the Fourth District Court of Appeal addressed the issue of an inmate's difficulty in obtaining copies of a document that was admitted into evidence at trial. Following his conviction, the defendant sought a copy of the Miranda rights waiver form. Id. at *1. Parish began by serving multiple §119 public record requests on the Office of the State Attorney, the Clerk of the Circuit Court, and the Office of the Public Defender. Id. The Clerk's Office responded that it possessed a copy, and would deliver same upon payment of copying expenses. Id. Parish remitted payment, but the Clerk's Office responded that it, in fact, did not possess the Miranda rights waiver form. Id.

Utilizing the proper channels, Parish then pursued a Petition for Writ of Mandamus, requesting the Circuit Court to direct the State of Florida to perform it's statutory obligations and produce the requested document. Id. The State responded, arguing that it did not possess the document; instead, it argued, the Clerk of Court possessed the form. Id. Therefore, the petition should be dismissed as it was not sought against the proper party. Id. Adopting this rationale, the Circuit Court denied relief, directing Parish to take his document request up with the Clerk of Court (which Parish had obviously tried, and failed). Id.

Appeal was taken to the Fourth DCA, which reversed and remanded. Id. at *2. The DCA found two errors: (1) the State's response alleging the Clerk had the form was unsworn, and therefore could not conclusively refute Parish's assertions; and (2) the trial court should have granted Parish leave to include the Clerk of Court as a party to the Petition. Id. at *2. In dicta, the DCA also wrote that the Clerk should either turn over the form, or prove at an evidentiary hearing that it no longer possesses the form.

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

Challenging Habitual Offender Sentences: Rule 3.800 or 3.850?

In White v. State, 60 So.3d 1101 (Fla. 5th DCA 2011), Latarsa White challenged her habitualized sentences pursuant to Florida Rule of Criminal Procedure 3.800.

White had previously entered a plea of no contest to robbery and grand theft, and was sentenced as an habitual felony offender ("HFO"). Id. at 1102. Imposition of the HFO status came as the product of a stipulation between the State and White. Id. Following completion of her 48-month term of incarceration, White's probation was revoked after a violation and she was sentenced to 30-years imprisonment. Id. White's postconviction challenges began as she subsequently filed a Rule 3.850 motion, challenging counsel's performance at the violation of probation proceeding. Id. Said motion was denied, and affirmed on appeal. Id.

White then filed a Rule 3.800(a) motion alleging the HFO designation was improper as her prior felonies (possession of cocaine) did not qualify as proper predicate offenses. Id.

The District Court began by noting that typically, a Rule 3.800 Motion to Correct Illegal Sentence is the proper vehicle for addressing the lack of predicate felonies for HFO designations. Id. at 1103. In most situations, it's clear from the face of the record. Id. For example, the Court can simply view the file to determine whether: (a) documents exist to prove prior felony convictions; and (b) whether said convictions are of the proper variety to support an HFO designation.

This case, however, was different. Under these circumstances, the Court held, White should have challenged the designation under Rule 3.850. Id. Because White previously *stipulated* to the HFO designation, the State was not required to produce documentation proving the predicate offenses. Id. As a result, the trial court's record is silent (lacks documentation) as to White's claims. Because White cannot show, as clear from the face of the record, her designation is improper, White should have made this claim in her Rule 3.850 motion so the Court could hold an evidentiary hearing to accept evidence regarding the existence of prior felonies.

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Florida Supreme Court Limits Previously Accorded Constitutional Protections

by Loren D. Rhoton

On June 16, 2011, the Florida Supreme Court (F.S.Ct.), in State v. Powell, 36 F.L.W. S264 (Fla. 2011) [Powell I] reversed its previous ruling in State v. Powell, 998 So.2d 531 (Fla.2008) [Powell II], and limited the *Miranda* protections that it had previously afforded Florida arrestees. In Powell I, F.S.Ct. found that the *Miranda* rights read by Tampa Police to arrestees were unconstitutional, in violation of the Fifth Amendment of the U.S. Constitution, because said rights advised that an arrestee had the right to a lawyer prior to counseling, and the right to consult a lawyer during questioning, but did not properly inform the arrestees that they had the right to the presence of counsel during interrogation. Subsequent to the issuance of Powell I, the issue was appealed to the Supreme Court of the United States (S.C.O.T.U.S), which found that the Fifth Amendment does not require a warning that an arrestee has the right to the presence of an attorney during questioning when the arrestee is otherwise advised that he has the right to consult with an attorney before and during questioning.

Upon remand from S.C.O.T.U.S., the F.S.Ct. reconsidered its ruling in Powell I. Powell II concluded that its previous ruling was based entirely on federal constitutional principles and, further, that the *Miranda* warnings did not run afoul of any Florida Constitutional protections. As such, the holding in Powell I has now been reversed and the *Miranda* warnings in question are once again considered to be proper.

It is important that inmates considering seeking postconviction relief evaluate whether Powell II has any effect on their case. I always like to advise inmates to seek postconviction relief if it is available and it is prudent to do so. However, there are circumstances where a postconviction litigant can put himself in a worse situation by having a conviction overturned. Powell II creates such a concern and all postconviction litigants should evaluate Powell II's effect on their cases. It is possible that statements that were previously suppressed at trial, as per Powell I, may now come back to haunt a defendant as admissible evidence. In other words, just because a statement to police was previously inadmissible (as per Powell I), the exact same statement may end up being admissible (and, thus strengthening the State's case at retrial) if postconviction relief is sought and a new trial is granted.

For some, Powell II could possibly strengthen the State's case at retrial, or, conceivably, give the State additional facts with which it could even pursue enhanced charges. For others, Powell II may have no real effect on the strength of the State's case on retrial. Nevertheless, if suppressed statements were an issue in your case, it is advisable to review the Powell cases, determine what effect (if any) they may have on your case, and then act as is in the best interest of your case. In some situations, this may mean abandoning what previously seemed to be a strong postconviction motion. In other cases it may just be an additional consideration to be aware of. And, in some cases, it may make no difference whatsoever. But, it is better to be aware of Powell II now than to be surprised by its effect when it is too late.

Hearsay Evidence & VOP Hearings

In order to demonstrate a violation of probation, the State must prove by a greater weight of the evidence a willful and substantial violation of a condition of probation. Van Wagner v. State, 677 So.2d 314, 316 (Fla. 1st DCA 1996). Hearsay evidence is typically admissible in order to meet that burden. But, in order to prove a violation occurred due to commission of a new offense, direct non-hearsay evidence is required. Melton v. State, 36 Fla. L. Weekly D1354.

In Melton, a hearing was held on whether the probationer violated by smoking marijuana. Melton denied smoking marijuana. The probation officer who administered the drug test did not testify. The only evidence presented against the probationer was the testimony of a different probation officer who had no personal knowledge of the drug test. While the State conceded the evidence insufficient to support a VOP, the court revoked probation anyways. The probationer was also violated for failing to report.

The First District Court of Appeal reversed and remanded, reiterating that VOP's based upon commission of a new offense must be supported by direct, non-hearsay evidence. The DCA struck the revocation of the marijuana allegation, but left intact the failure to report, of which the testifying probation officer did have personal knowledge.

Reversible Error When Bailiff Improperly Communicates with Jury During Deliberations

by Ryan J. Sydejko

In Natan v. State, 2011 WL 1565994 (Fla. 2d DCA 2011), the Second District Court of Appeal was confronted with alleged improper conduct of a courtroom bailiff during jury deliberations. The facts revealed that as the jury was about to render a verdict, a juror informed the bailiff that a piece of evidence sent back with the jury had been mislabeled. Id. at *1. Although the piece of evidence bore the proper tag for Natan's case, it also apparently bore a tag for another, unrelated case. Id. Upon delivery of the evidence to the courtroom, the bailiff informed the Assistant State Attorney of the issue. Id. But, the bailiff also advised that "he had taken care of the situation, the ASA had some help, and not to bring it up." Id.

Several days later, after a judgment of guilt had been rendered by the jury, that same ASA wrote a letter to both the trial judge and Natan's counsel disclosing the bailiff's comments. Id. The ASA added that he personally knew the bailiff and believed his comments to be in jest, but felt a duty to disclose the comments. Id.

In reversing Natan's convictions for aggravated stalking and arson, the Second DCA cited the Florida Supreme Court's "per se reversible error rule when a bailiff has unsupervised communications with a jury." Id.; *see also* State v. Merricks, 831 So.2d 156, 161 (2002). This is significant, as it is unknown whether the bailiff actually improperly communicated with the jury. The bailiff's comments created a reasonable inference that words relating to the case at hand had been improperly exchanged with the jury. Based on the bailiff's statement to the ASA "that he had taken care of the situation, the ASA had some help, and not to bring it up," the Second DCA felt compelled to reverse the convictions. Natan, 2011 WL 1565994 at *1.

Support Services for Inmates & Their Families Available

If you have a suggestion for a group or inmate resource that should be listed in our newsletter, please contact us with the information and we will share any helpful information in future issues.

Innocence Project of Florida.
1100 East Park Ave.
Tallahassee, FL, 32301
Phone: (850) 561-6767
**Assists inmates with postconviction DNA innocence cases and helps exonerees in obtaining compensation for wrongful convictions.*

R.I.S.E. (Relations of Inmates Supporting Each-Other).
23184 Allen Avenue,
Port Charlotte, FL, 33980
Phone: (941)421-6907
Contact: Candy Kendrick
Email: RISEFLORIDA@Yahoo.com
**Offers support to the friends and families of Florida inmates. Programs include a carpool connection, Books for Inmates, a Christmas toy drive for children of inmates, assistance to out-of-state families visiting Florida inmates, new visitor seminars, and a newsletter.*

Florida Legal Services. www.floridalegalhelp.org
2121 Delta Blvd., Tallahassee, FL, 32303
Phone: (904) 385-7900
**Provides referrals in civil matters.*

Prisontalk.com. An Internet community/forum that provides general information and networking for families of inmates. Also, has Florida specific forum that addresses issues ranging from dealing with the D.O.C. to coping with incarceration.

Florida Justice Institute, Inc.
4320 Bank of America Tower
100 S.E. Second Street
Miami, FL, 33131
Phone: (305) 358-2081
Contact: Randall C. Berg, Jr.
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Did Law Enforcement Officer Misunderstand the Word "No"?

In Black v. State, 59 So.3d 340 (Fla. 4th DCA 2011), the Court reviewed a suppression issue pertaining to statements made following allegedly invoked Miranda rights. Black, the defendant, was charged and convicted of two counts of first-degree murder. Id. at 342. On the evening of his arrest, officers placed Black in a video-monitored interrogation room. Id. Officers provided Miranda warnings, which included the following exchange:

> Officer: Knowing and understanding your rights as I have explained them to you, are you willing to answer my questions without an attorney?
>
> Black: No.

Id. at 343. The officer then instructed Black to sign and date the form, after which Black provided a lengthy and detrimental video-recorded statement. Id. After a suppression hearing, the trial court held that the officer simply "did not comprehend Black's response of 'no'" and that the officer had not slept in a while. Id. at 344. Following a conviction on both counts and imposition of two life sentences, Black appealed, alleging the trial court erred in denying the motion to suppress. Id. at 342.

The Fourth District Court of Appeal overturned Black's convictions and sentences, holding that the trial court's order was not supported by competent and substantial evidence. Id. at 344. Notably, the DCA found that no officer testified to being tired or "missing" Black's responses (as the trial court held). Id. In fact, the officer specifically testified that he "clearly understood Black's responses." Id.

An important aspect of this case is the fact that Black's interrogation was video-recorded and played, in its entirety at the suppression hearing. Cases involving invocation of Miranda rights are difficult to win on appeal as the standard of review is quite high. Appellate courts are very deferential to the factual findings of lower courts as those lower courts are much better situated to evaluate live testimony and witness credibility. In a situation where video-recorders catch much of the testimony, however, and a DVD copy is available to the appellate court, a "much less deferential standard" will be utilized. Id. at 344.

In this case, the DCA was afforded the luxury of a video-recorded set of facts that "illuminate a bright line thereby permitting a clear and simple application of the exclusionary rule." Id. at 347.

The DCA held that there was but one "inescapable conclusion." Id. Because Black unequivocally invoked his right to counsel by answering 'no', and because the officer testified that he clearly understood Black's responses, it had no choice but to reverse Black's convictions and order a new trial. Id.

Pro-Se Inmate Filings and the Rebuttable Mailbox Rule

An important aspect of filing *pro se* documents while incarcerated is the Mailbox Rule. The Mailbox Rule simply states that a document is deemed filed the moment it is handed to Department of Corrections officials. *See* Haag v. State, 591 So.2d 614, 617 (Fla. 1992). The reasoning behind this is that incarcerated individuals entrust processing and timely delivery to a third-party (DOC officials) and have no further control over when and how the mail is actually sent. Id. For example, an institution may have incredibly slow outgoing mail, which could cause a filing to sit for days, meanwhile the period of limitations expires, to no fault of the inmate filer. The Mailbox Rule was developed to address this.

An concern has arisen, at least with some, regarding how to determine exactly which day the inmate turned over the document to DOC officials for purposes of mailing. That brings us to the case of Thompson v. State, 36 Fla. L. Weekly D968 (Fla. 2d DCA 2011).

In Thompson, Thompson's two-year period of limitations was set to expire on May 15, 2010. Id. at *1. Thompson certified that he placed his postconviction motion into the hands of DOC officials on May 12, 2010; but, the motion was not received by the Clerk of Court until June 16, 2010. Id. The trial court dismissed the motion as untimely. Id. (the motion was also denied as successive, but that is not pertinent to this discussion). The Second District Court of Appeal reversed the denial, finding that Thompson's pleading was, in fact, timely. Id. The majority reasoned that a document containing a certificate of service showing the date the document was placed into DOC hands is, for all intents and purposes, deemed filed with the Court on that same date. Id.; *see also* Thompson v. State, 761 So.2d 324, 326 (Fla. 2000). This holding, however, is not absolute.

Judge Villanti, concurring with the majority, added this caveat: the inmate's date certification is merely a presumption, and is therefore rebuttable by the State. Id. at *2. Judge Villanti then went on to instruct the State on how to make such challenges, by focusing mainly on prison mail logs. Id. Villanti also issued a warning to inmates who may wish to be dishonest, citing penalties for contempt of court and charges of perjury. Id.

The bottom line is to remember the importance of including certifications of when the mail was placed into DOC hands. Some institutions even use date-stamps requiring inmate signatures or initials when outgoing mail leaves an inmate's custody. Such a measure may allay Judge Villanti's worries while ensuring inmate's filings are not unjustly rejected by the Courts as untimely.

DCA Calls Out Circuit Court Judges for Repeated Improper Denials of Postconviction Motion

As the Second District Court of Appeal sees it, D'Angelo LaVelle Dixon is an impatient man. Dixon v. State, 60 So.3d 1179 (Fla. 2d DCA 2011). Dixon was convicted of aggravated battery with a deadly weapon, robbery with a firearm, and attempted first-degree murder. Id. at 1180. While his direct appeal was pending, Dixon filed his first postconviction motion in May 2005. Id. The motion was filed so quickly, Dixon did not even know the name of the lawyer appointed to represent him on direct appeal. Id. In September 2005, Judge Frederick Hardt dismissed the motion due to lack of jurisdiction. Id. Dixon did not appeal. Id. Then in October 2005, Judge Hardt "inexplicably" entered an order staying the dismissal of the postconviction proceeding. Id. A year later, the mandate from Dixon's direct appeal was issued, in November 2006. Id.

Judge Bruce Kyle then picked up the stayed postconviction proceeding, and denied it, holding that the issue should have been raised on direct appeal. Id. Dixon timely appealed Judge Kyle's order, but voluntarily dismissed it prior to a DCA ruling. Id.

Dixon then filed a proceeding in the DCA, alleging ineffectiveness of appellate counsel for failing to raise the issue. Id. The DCA denied the claim in November 2007. Id.

In November 2008, Dixon then filed a motion for postconviction relief, alleging seven grounds for relief. Id. A month later, the State's two-page response requesting denial of the motion based upon successiveness, since Dixon already filed one such motion. Id. Almost two-years later, In August 2010, Judge Christine Greider denied Dixon's motion for postconviction relief. Id. at *2.

The District Court, obviously unhappy it had to deal with Dixon's case, again, took great effort to pinpoint each error made by the circuit court judges. First, Judge Greider attached only a two-page document to her order, which obviously does not clearly refute all seven of Dixon's claims, as required under Rule 3.850. Second, the attachments do not support most of Judge Greider's factual and procedural representations. Third, Judge Greider grossly miscalculated the period of limitations (Rule 3.850 proscribes a two-year period, Judge Greider gave Dixon only *one day*).

Judge Greider also likely incorrectly found the motion successive, since Judge Hardt dismissed it as premature several years earlier. Id. at 1181. Besides the uncommon use of the circuit judge's names in the opinion, the DCA closed with the following:

> "In the twenty-one months that the November 2008 motion was pending below, we are inclined to believe that the trial court could have reached a better reasoned decision in accordance with the rules of procedure and due process. We have no way to judge whether Mr. Dixon has a claim worthy of serious consideration, but we know it has not received such consideration."

Id. at 1181. The DCA went on to note in a footnote, that Dixon's "flurry" of additional filings since Judge Greider's denial may also be affected by this ruling. Id. at fn. 5.

This case is noteworthy for a couple reasons. First, opinions such as this are fairly uncommon. DCA's do not usually call-out circuit court judges by name. In a way, the DCA nearly issued Judge Greider a public reprimand for her long-delayed, yet wholly inadequate disposition of Dixon's case. Secondly, this case is a useful tutorial in how not to begin the postconviction process. Even viable claims could get procedurally barred by using the wrong vehicle or filing at the wrong time, as Dixon nearly did. Dixon is fortunate that the Second DCA took the time to sort through his procedural labyrinth. Obviously, Judge Greider was not.

Quotable:

Judge Altenbernd, of the Second District Court of Appeal, offered this tidbit in Nieminski v. State, 2011 WL 1599572 (Fla. 2d DCA 2011):

> "It is undisputed that Mr. Nieminski, his girlfriend, his horse, and his three friendly dogs had been living at this grow house for approximately a month before the execution of the search warrant. Mr. Nieminski was not a trespasser on this property; he was both working and living full time at this location. We conclude that these undisputed facts, *in addition to providing a solid foundation for a country-western song*, are sufficient to satisfy Mr. Nieminski's threshold burden under the *Katz* analysis . . ."

Cell Phones and the Police: Where Will the Searching of Web-Enabled Phones End?

by Ryan J. Sydejko

In Smallwood v. State, 36 Fla. L. Weekly D911 (Fla. 1st DCA 2011), the First District Court of Appeal tackled the developing area of warrantless searches of electronic storage devices. As frequent readers of *The Florida Postconviction Journal*, you know that the issue of warrantless searches is governed by the Fourth Amendment which proscribes the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. Amend IV. As a *very* general rule, searches are reasonable only if officers obtain a warrant first. Coolidge v. New Hampshire, 403 U.S. 443, 449-453 (1971). There are, however, a litany of "specifically established and well-delineated exceptions to the warrant requirement." Katz v. U.S., 389 U.S. 347 (1967). For the purposes of this discussion, one such exception is the search incident to lawful arrest and the search of all items and containers within that person's reach. *See* U.S. v. Robinson, 414 U.S. 218 (1973). It is Robinson upon which the Court relied in upholding the officer's search in Smallwood.

In Robinson, the Supreme Court reiterated the legality of searches incident to lawful arrest, and further expounded on the principle, allowing officers to search any containers found upon the person, even without any "additional justification." Id. at 234. What this meant, effectively, is that officers could search locked luggage, bags, containers, etc, regardless of whether they potentially housed evidence of the purported offense. Id. This issue has become extremely hot as electronic devices, with near infinite storage capabilities, are now being routinely searched by law enforcement. In the instant case, Smallwood was arrested and his cell phone searched. Smallwood at *1. The officer justified the search, testifying that he looked at Smallwood's phone "too see if he took any pictures" that would "relate to the crime" because he "knew people sometimes do that." Id.

Smallwood challenged the legality of the search, giving rise to the instant case. Without going through the rather extensive history of searches incident to arrest, the District Court ultimately upheld the search. Id. (if you are interested in this principle, or believe it may have bearing on your case, you are highly encouraged to read the Smallwood case in its entirety; the Court begins the discussion with the very origin of the principal in *Chimel v. California*, 395 U.S. 752 (1969) and continues through the latest line of cases, including U.S. v. Finley, 477 F.3d 250 (5th Cir. 2007)).

Article I, section 12, of the Florida Constitution specifically provides that the right against unreasonable search and seizure as granted under the Florida Constitution "shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court." By doing so, the Florida Constitution actually removes the ability to decide such cases from Florida courts, and places them firmly into the hands of the nine United States Supreme Court justices. This process may work for some, but cases typically take years to finally reach the Supreme Court and can lag far behind newly minted legal issues; i.e. the search of ever expanding electronic devices. For example, in resolving the issue in Smallwood, the Florida Supreme Court applied the ruling in Robinson, a case from 1973. It would be hard to believe that the Robinson court, in 1973, foresaw applicability of their physical containers holding to tiny, electronic storage devices that can contain near infinite volumes of data and personal information.

Therein lies the problem. While a cell phone containing photographs actually has the photographs stored on it's memory (similar to a photo stashed in locked luggage), data is increasingly not being stored on the actual device. What, then, becomes of an email application? Emails that have been viewed on the device are then stored in the flash storage, but unviewed emails have yet to be downloaded from the server. From the Smallwood Court's holding, we can infer that all previously viewed emails are fair game since they are actually stored within the container, or phone, itself. If, however, the officer clicks on the email application, which then automatically downloads all new email, can the officer view it without a warrant? Further, what do we make of documents and photographs that are stored in the 'cloud', but are accessible from the device? Can the officer use the cloud application to gain access to those items? It could take years for constantly developing issues, such as those eluded to above, appear before the United States Supreme Court. In the meantime, Florida courts must rely on out-moded and out-dated interpretations based on the storage of physical items inside larger containers from cases decided in the 1960's.

The First DCA did certify the issue to the Florida Supreme Court, so stay tuned!

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