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FDLE Lab Analyst Charged with Evidence Tampering

Earlier this year, inspectors with the Florida Department of Law Enforcement arrested former Florida Department of Law Enforcement (FDLE) Pensacola crime laboratory chemist Joseph Graves on charges of drug trafficking. Investigators believe Graves, while processing drug cases, stole prescription pain pills from evidence and replaced it with over the counter pills. Graves was charged with numerous counts of trafficking in illegal drugs. Graves was originally arrested on February 4, 2014, on charges of grand theft, 12 counts of tampering with or fabricating physical evidence and nine counts of trafficking in illegal drugs. In May of 2014 he was charged with an additional 41 counts of trafficking.

Graves became an FDLE crime lab analyst in December of 2005, working in the Pensacola crime laboratory, and was promoted to supervisor in July 2009. FDLE teams are inspecting evidence from all cases handled by Graves between 2006 and the present to confirm potentially-compromised cases. Graves worked on nearly 2,600 cases for 80 law enforcement agencies spanning 35 counties and 12 judicial circuits.

It is not yet known what impact Graves' misdeeds may have had on any individual cases. However, for defendants in whose cases Graves was involved, it is suggested that the specifics of his involvement in any particular case may be worth investigating for postconviction purposes.

Source- FDLE news releases of 2-4-14 and 5-7-14.

Prosecutorial Misconduct: Self-Defense and the Right to Remain Silent

In Floyd v. State, 129 So.3d 1214 (Fla. 1st DCA 2014), the Court was faced with an issue where the State attempted to impeach the defendant, at trial, with his post-arrest, post-Miranda silence. The State repeatedly questioned why, if the defendant had such a good self-defense claim, he did not tell the police about it. Id. at 1214-1215.

> "State: Okay. You told this jury that this Shooting was in self-defense. That's what your attorney has asked you and that's what your response was that you shot this man in self-defense?"
>
> Defendant: Yes.
>
> State: Okay. Then why did you say no, you didn't want to talk to the police . . .
>
> Why not talk to the police if what you are saying is true."

Id. at 1214. Defense counsel never objected. Id.

The DCA found that such questioning "clearly constituted comments on the [defendant's] right to remain silent." Id. at 1215. The Florida Supreme Court has held that if a comment is susceptible of being construed by the jury as a comment on a defendant's right to remain silent, such comment violates the constitutional right to silence, regardless of whether the comment comes in during impeachment or otherwise. State v. Hoggins, 718 So.2d 761 (Fla. 1998).

Thus, because defense counsel did not object, the DCA held that there was a possibility of prejudice to the defendant as his defense was self-defense, and his apparent failure to volunteer information to the police could be construed negatively. Floyd, 129 So.3d at 1215. Because the record materials were insufficient, the DCA reversed and remanded with directions to attach record materials clearly refuting the allegations or to conduct an evidentiary hearing.

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About Loren Rhoton, P.A.

Loren Rhoton, P.A. is a law firm that focuses exclusively on postconviction actions and inmate issues. The mission of Loren Rhoton, P.A. is to ensure that justice is accomplished in each and every case the firm undertakes. The firm's area of practice ranges from direct criminal appeals and postconviction actions to assisting inmates in dealing with the Florida Department of Corrections. Loren Rhoton, P.A., is a small firm, consisting of Mr. Loren D. Rhoton and Mr. Ryan J. Sydejko. The firm strives to keep a small caseload in order to give each case the individual attention it deserves. We are not a volume business. We do not accept every case that is presented to the firm for representation. A thorough review of any potential case will be conducted before the firm undertakes full representation. If you wish to have your case reviewed for representation, please contact Loren Rhoton for more information. If inquiring about representation, please do not send any materials to the firm that you wish to have returned to you.

Loren D. Rhoton, Esq.

Loren D. Rhoton is an attorney in private practice with the law office of Loren Rhoton, P.A., in Tampa, Florida. Mr. Rhoton graduated from the University of Toledo College of Law and has been a member in good standing with The Florida Bar since his admission to practice in 1995. The exclusive focus of Mr. Rhoton's practice is dedicated to assisting Florida inmates with their criminal appeal/postconviction cases.

Mr. Rhoton is a member of The Florida Bar's Appellate Division. He is also a member of the U.S. District Court, in and for the Middle and Northern Districts of Florida. Mr. Rhoton is licensed to practice before the U.S. Court of Appeals for the 11th Circuit and is also certified to practice before the U.S. Supreme Court. Mr. Rhoton regularly practices before Federal District Courts and the U.S. Court of Appeals for the 11th Circuit.

Mr. Rhoton typically deals with clients who have lengthy prison sentences. Mr. Rhoton has investigated and pursued hundreds of postconviction cases. He has practiced in all phases of the Florida Judicial System, all the way from misdemeanor county courts up to the Florida Supreme Court. Additionally, Mr. Rhoton has been directly responsible for amendments to Florida Rule of Criminal Procedure 3.850 (the main vehicle for most postconviction actions). Mr. Rhoton was appointed by the Florida Supreme Court to the Florida Criminal Rules Steering Committee, Subcommittee on Postconviction Relief, which focused on rewriting Florida Rule of Criminal Procedure 3.850. Mr. Rhoton worked on said subcommittee with judges and other governmental officials in an effort to improve the administration and execution of postconviction proceedings. Mr. Rhoton's role on said committee was to advocate for changes that were beneficial to postconviction litigants.

For over a decade, Mr. Rhoton authored a bimonthly article, *Post Conviction Corner*, for Florida Prison Legal Perspectives. Selected articles from *Post Conviction Corner* have been compiled and printed in a legal self-help book, *Postconviction Relief for the Florida Prisoner*. Mr. Rhoton also served on the Board of Directors of the Florida Prisoners' Legal Aid Organization.

Ryan J. Sydejko, Esq.

Ryan J. Sydejko is an attorney with the law office of Loren Rhoton, P.A. His practice focuses primarily on postconviction matters for those incarcerated throughout the State of Florida. He has argued cases before many circuit courts and District Courts of Appeal and has several published opinions. Mr. Sydejko has also presented cases to the Supreme Court of Florida and the U.S. District Courts for the Middle and Northern Districts of Florida.

Mr. Sydejko graduated from the University of Minnesota with a degree in political science and attended the University of Tulsa College of Law. As a student, he authored a law review article entitled: "International Influence on Democracy: How Terrorism Exploited a Deteriorating Fourth Amendment." The article, exploring how domestic terrorist threats have reshaped everyday law enforcement procedures, was published in the Spring 2006 edition of the Wayne State University Law School Journal of Law in Society. Mr. Sydejko also wrote articles for the Florida Prison Legal Perspectives. Mr. Sydejko is a member in good standing with the Florida Bar and is qualified to practice in all Florida state courts, as well as the Federal District Courts for the Middle and Northern Districts of Florida.

Notable Firm Cases

Dames v. State, 773 So.2d 563 (Fla. 2d DCA 2000) – Improper summary denial of Rule 3.850 Motion reversed & remanded for evidentiary hearing.

Dames v. State, 807 So.2d 756 (Fla. 2d DCA 2002) – First Degree Murder conviction vacated & new trial granted due to ineffective counsel

Battle v. State, 710 So.2d 628 (Fla. 2d DCA 1998) – Improper Habitual Felony Offender Sentence on violation of probation reversed & remanded for resentencing

Mitchell v. State, 734 So.2d 1067 (Fla. 1st DCA 1999) - counsel can render ineffective assistance for failure to argue boarded-up structure is not a 'dwelling' under arson statute

Caban v. State, 9 So.3d 50 (Fla. 5th DCA 2009) – counsel can be ineffective for failing to object to improper impeachment of defense expert witnesses in Shaken Baby Syndrome case

Graff v. State, 846 So.2d 582 (Fla. 2d DCA 2003) – attorney's misadvice as to potential sentence can amount to ineffective assistance of counsel sufficient to justify withdrawal of plea.

Campbell v. State, 16 So.3d 316 (Fla. 2d DCA 2009) – Manifest Injustice – summary denial of Rule 3.800 motion to correct illegal sentence reversed & remanded on manifest injustice grounds.

Thompson v. State, 987 So.2d 727 (Fla. 4th DCA 2008) – Reversal of Life Sentences – entitled to *de novo* resentencing upon correction of improper consecutive life sentences for murder and burglary.

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

Parker v. State, 977 So.2d 671 (Fla. 4th DCA 2008) – Sentence reversed & remanded for resentencing due to judicial vindictiveness.

Pacheco v. State, 114 So.3d 1107 (Fla. 2d DCA 2013) – Withdrawal of Plea – Post-trial motion to withdraw plea improperly summarily denied when facts cast doubt on movant's competency to enter plea

Easley v. State, 742 So.2d 463 (Fla. 2d DCA 1999) – counsel can render ineffective assistance for failure to investigate insanity defense.

Going Federal?
Two Important Exceptions to §2254's Exhaustion Requirement

by Loren D. Rhoton

To file a federal habeas corpus petition collaterally attacking a state conviction, the petitioner must make sure to first present all claims to the state courts. Title 28 United States Code §2254(b)(1)(A) provides that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that "the applicant has exhausted the remedies available in the courts of the State." In all cases in which state prisoner has defaulted his federal claims in state court pursuant to independent and adequate state procedural rule, federal habeas review of claims is barred unless the petitioner can demonstrate cause for default and actual prejudice as result of alleged violation of federal law, or demonstrate that failure to consider claims will result in fundamental miscarriage of justice. Coleman v.Thompson, 501 U.S. 722 (1991). *Cause* under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him. The Supreme Court wrote, "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, (1986). For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel...or that 'some interference by officials'...made compliance impracticable, would constitute cause under this standard." Id. Under the cause and prejudice test, it was difficult for petitioners to show cause and prejudice for failure to exhaust based upon the failures of the state-level collateral counsel. However, several years ago, the Supreme Court allowed several exceptions to the exhaustion

Continued

Exceptions to §2254's Exhaustion Requirement (cont.)

requirement if collateral claims were not exhausted at the state level due either to ineffectiveness of collateral counsel, or lack of such counsel. Martinez v. Ryan, 132 S.Ct. 1309 (2012).

It was previously held that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.'" *See* Maples v. Thomas, 132 S.Ct. 912, 922 (2012). Coleman reasoned that "because the attorney is the prisoner's agent...under 'well-settled principles of agency law,' the principal bears the risk of negligent conduct on the part of his agent." Maples, 132 S.Ct. at 922. However, as was later addressed by Martinez, Coleman's procedural default in the state court occurred when his counsel failed to timely file a notice of appeal of the denial of a postconviction petition.

Martinez noted that Coleman did not address whether attorney errors in **initial-review collateral proceedings** may qualify as *cause* for a procedural default. The alleged failure of counsel in Coleman was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner's claims had already been addressed by the state habeas trial court. Martinez thus recognized a key difference between initial-review collateral proceedings and other kinds of collateral proceedings, to wit: when an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim. Martinez further noted that if an attorney's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no federal court could review the prisoner's claims. Martinez, 132 S.Ct. at 1316.

It has now been recognized that the initial-review collateral proceeding is typically the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, and the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court looks to the merits of the claim of ineffective assistance, no other court has addressed the claim, and the "defendants pursuing first-tier review...are generally ill equipped to represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error. Halbert v. Michigan, 545 U.S. 605, 617, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005).

Coleman recognized that an attorney's errors during direct review may provide cause to excuse a procedural default because if the appellate attorney is ineffective, the prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain an adjudication on the merits of his claims. See Colman, 501 U.S. at 754 ; Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating an ineffective assistance of trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. Halbert, 545 U.S., at 619, 125 S.Ct. 2582. To present a claim of ineffective assistance at trial in accordance with the state's procedures, then, a prisoner likely needs an effective attorney.

The Martinez Court wrote that the same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, might not comply with the state's procedural rules or may misapprehend the substantive details of federal constitutional law. The Supreme Court further noted that while confined to prison, a prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

Thus, Martinez carved out several exceptions to Coleman's general proposition that collateral counsel's negligence does not constitute cause for failure to exhaust issues at the state-level. Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding (such as a Rule 3.850 motion for postconviction relief) acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a

Exceptions to §2254's Exhaustion Requirement (cont.)

state requires a prisoner to raise an ineffective assistance of counsel claim in a collateral proceeding (such as is required by Florida Rule of Criminal Procedure 3.850), a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding (3.850 motion), where the claim should have been raised, was ineffective under the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, meaning that the prisoner must demonstrate that the claim has some merit. Martinez 132 S.Ct. at 1319.

Martinez avoided a holding that provides a constitutional right to effective assistance of counsel at initial-review collateral proceedings; therefore a postconviction petitioner does not necessarily have the right to have counsel appointed for 3.850 proceedings. However, if such counsel is not appointed (or if collateral counsel is ineffective in failing to present meritorious issues at the initial-review phase of the state court proceedings), then such may demonstrate the necessary cause and prejudice to excuse a petitioner's failure to exhaust collateral claims in the state courts. As such, Martinez does provide federal habeas corpus petitioners with valuable exceptions to the exhaustion requirement of Title 28 United States Code §2254, and may help a petitioner salvage issues that were ignored or neglected by collateral counsel in state proceedings.

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Miami, FL, 33131
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United States Supreme Court: Searches of Cell Phones Incident to Arrest Require Warrant

In June, the United States Supreme Court handed down a potentially landmark unanimous decision, holding that a warrant is generally required prior to searching the data on cellular telephones incident to a lawful arrest. Riley v. California, No. 13-132. The Riley decision was the product of two separate cases, combined for the purposes of the Supreme Court's hearing. This article will discuss only on Riley himself.

Riley was initially stopped for driving with expired registration tags. It was then discovered that Riley also had a suspended driver's license. Riley's car was then impounded, and an inventory search of the vehicle was performed. Concealed and loaded firearms would found under the car's hood. A "smart phone" was also seized from Riley's pant's pocket. One officer searched the phone, finding indications that Riley was a gang member. A second officer, specializing in gangs, further examined the phone, and found digital photographs of Riley with guns and vehicles. One such vehicle had been used in an earlier shooting. Law enforcement then charged Riley with that earlier shooting, including attempted murder. Evidence from the phone, including gang activity and photographs were entered at trial, and Riley was ultimately found guilty.

As many *Journal* readers are likely aware, the Fourth Amendment protects all people from unreasonable searches and seizures. Typically, reasonableness means obtaining a warrant. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995). Of course, numerous exceptions to this general rule have been carved out over the past few centuries. Equally troublesome for courts have been defining the scope of each such exception. The exception debated in this case is the century-old 'incident to lawful arrest' exception.

The Court's opinion in Riley presents a very detailed, yet concise, history of the incident to arrest exception to the warrant requirement. The three main cases, compromising what is commonly referred to as the "trilogy", are Chimel v. California, 395 U.S. 752 (1969), United States v. Robinson, 414 U.S. 218 (1973), and Arizona v. Gant, 556 U.S. 332 (2009).

The Court noted that while a "mechanical" application of the trilogy may support a warrantless search of a cell phone, there is an important distinction between the physical evidence contemplated by our Founding Fathers and the past century's worth of case law, versus the now commonplace treasure troves of digital data. As the Court noted, a Martian visiting our planet could easily conclude that a cell phone is a part of human anatomy. Cell phones and their computing power did not exist only a handful of years ago, and were nearly inconceivable only a few decades ago.

The ultimate inquiry, the Court wrote, was "assessing, on the one hand the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."

Of particular import to the legitimate government interests, unlike physical evidence, digital data does not present an imminent threat to officers nor is it subject to destruction of evidence once confiscated by law enforcement.

The Court spend a considerable portion of the opinion detailing the extent to which one's privacy interests are involved when searching a cell phone. The vastness of information contained on the device itself, as well as that accessible through it to the internet, "bears little resemblance" to the brief physical searches typical in prior incident to lawful arrest cases. In fact, the term "cell phone" is a bit of a misnomer, as these "minicomputers . . . could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." In today's reality, "the sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet."

This does not, however, in every case, prevent law enforcement from taking precautionary steps to avoid remote-wiping or automatic data encryption. The Court provides examples that may be justified by another warrant exception: the exigent circumstance. In such (albeit limited) situations, officers could conceivably detach a phone's battery, place the phone in a radio wave-proof "Faraday bag"; or, if a phone is discovered in

Cell Phones (cont.)

an unlocked state, the automatic-lock feature could be disabled to prevent automatic data encryption.

The Court specifically wrote that its holding "is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest."

"Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."

The importance of this decision is fairly broad. Law enforcement now have a persuasive reason to avoid fishing expeditions and pretextual stops. Stopping a vehicle for expired tags, such as in Riley, and then searching the entire car and cell phone, will no longer be a routine practice. Now, officers will know, before a stop is made, that they will need probable cause to get at the driver's phone.

Reopening Postconviction Issues Due to Fraud or Mistake

Once a postconviction motion has been denied and affirmed on appeal, it is very difficult to obtain any further review of the matter in the state courts. However, there are some circumstances that can result in the matter being reconsidered by the courts. One such circumstance is if the order denying relief resulted from some sort of fraud or misunderstanding of facts by the court. Any order obtained by fraudulent representation to a court may be recalled and set aside, whether entered in a civil or criminal case. State v. Burton, 314 So.2d 136 (Fla. 1975). Court orders that are the product of fraud, collusion, deceit, or mistake may be set aside at any time. Id. The power to set such orders aside is an inherent power of the courts of record and one which is "essential to insure the true administration of justice and the orderly function of the judicial process." Id. In fact, a final order procured by fraudulent testimony against a defendant in a criminal case is deserving of no protection and due process requires that the defendant be given every opportunity to expose the fraud and obtain relief therefrom. State v. Glover, 564 So.2d 191 (Fla. 5th DCA 1990). The courts' inherent power to correct criminal judgments based upon fraud, deceit or mistake applies to all orders/judgments of the courts, including judgments rendered in post conviction proceedings. *See* State v. Crews, 477 So.2d 984 (Fla. 1985) [trial court had authority to entertain defendant's second motion for post conviction relief when testimony produced by State at first post conviction hearing was false and constituted fraud on the court]; Booker v. State, 503 So.2d 888 (Fla. 1987).

In Booker v. State, 503 So.2d 888 (Fla. 1987), the defendant was convicted of first-degree murder, sexual battery and burglary and was sentenced to death. Booker filed two separate post conviction motions, both of which were denied by the trial court. Id. Booker moved the trial court to reopen the hearing on his second motion for postconviction relief in which the court rejected his claim of ineffective assistance of trial counsel. Id. Booker alleged that the order denying relief had to be reopened because it was based upon fraudulent testimony. Id. Specifically, Booker contended that trial counsel's testimony indicating that he had relied exclusively on two court appointed psychiatrists to determine whether there was evidence of mental mitigating factors constituted a fraud upon the court. Id.

In reliance upon State v. Burton, 314 So.2d 136 (Fla. 1975), the trial court held an evidentiary hearing based upon Booker's claims of fraud. Booker at 889. In fact, the Booker Court acknowledged that the trial court's actions in holding such a hearing was the proper procedure, stating: "*Burton* stands for the proposition that an order procured by fraud upon the court, including an order denying a motion for postconviction relief, may be set aside at any time." Id.

Thus, in some limited circumstances (i.e., fraud, collusion, deceit, or mistake), a prior denial of a postconviction motion may be subject to further review.

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New Unlisted Downward Departure Basis Recognized by Fourth DCA

For all non-capital felonies committed after October 1, 1998, the total sentence points as calculated pursuant to Fla. Stat. 921.0024, set a minimum permissible sentence. *See* Fla. Stat. 921.0026(1). A sentencing court may depart from that minimum, and impose an even lower sentence, known as a downward departure sentence, via one of the statutorily listed reasons. Fla. Stat. 921.0026(2). The statute adds, however, that the list of permissible reasons is "not limited to" those expressly provided by the statute. Fla. Stat. 921.0026(2). What this means in practice is that a sentencing court is free to accept non-listed downward departure rationales, so long as they are supported by competent, substantial evidence and not otherwise prohibited. State v. Simmons, 80 So.3d 1089, 1092 (Fla. 4th DCA 2012).

In State v. Montanez, 133 So.3d 1151 (Fla. 4th DCA 2014), the Court considered a newly utilized downward departure rationale concerning a defendant's third and fourth DUI conviction. Id. at 1152.

At sentencing, the defendant's sister testified that the defendant had gone through a "very rough" divorce, was a good father to two young children, and cared for his mother. Id. The defendant scored out to a minimum of 12.45 months incarceration, but received a downward departure sentence for each DUI of two-years community control followed by three-years probation. Id. at 1153. Over the State's objection, the sentencing judge found the downward departure sentence "justified under Fla. Stat. 921.0026 as the defendant was experiencing great difficulty in his personal life due to his divorce which made him more susceptible to substance abuse." Id.

Although the Fourth DCA did not unanimously agree that such a rationale is legally permissible, the majority did hold that the trial court's downward departure rationale was not prohibited by law. Id., *but see* Gerber, J., dissenting at 1154.

Unfortunately for the defendant in this case, the Fourth DCA ultimately found the trial court's rationale unsupported by the evidence. Id. at 1153-1154. The Fourth DCA took umbrage with the fact that the evidence came from the defendant's sister who, although she testified to the substance abuse, she did not testify in a manner linking the defendant's personal struggles to susceptibility to substance abuse. Id. Because this link was not drawn by any evidence, the Fourth DCA reversed the downward departure and remanded for resentencing.

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An updated and revised collection of Loren Rhoton's articles are 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 Second Edition is specifically directed toward those pursuing postconviction relief.

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Pro Se Pitfalls: Sanctioning Abusive *Pro Se* Petitioners

Florida courts have recently dealt with pro se postconviction petitioners and their successive, frivolous, and multiple filings. Two court opinions from June 2014 illustrate both sides of the issue.

First, In Gaston v. State, 2014 WL 2587722 (Fla. 4th DCA 2014), the defendant was on appeal from the denial of his Rule 3.850 motion for postconviction relief. The DCA noted that Gaston had previously filed one Rule 3.800 motion and one Rule 3.850 motion. The issue raised in Gaston's second Rule 3.850 motion, the subject of the instant case, was not addressed in any previous postconviction motion, yet the trial court had still entered an order barring all future filings by Gaston.

The DCA ultimately denied the postconviction issue raised by Gaston, but reversed the trial court's prohibition against future filings. The DCA noted that although Gaston was not due any postconviction relief, the issue he raised was based upon a discrepancy in the record and was therefore, at least minimally, understandable. In that sense, the trial court abused its discretion in prohibiting future filings since the issue was not successive or repetitive and appeared to have been advanced in good faith. Jordan v. State, 36 So.3d 796 (Fla. 1st DCA 2010).

Alternately, in Bush v. Crews, 39 F.L.W. S412 (Fla. 2014), the Florida Supreme Court addressed a situation in which the postconviction petitioner had filed approximately a dozen postconviction motions over the course of a decade. Following his direct criminal appeal, Bush had filed several postconviction motions, numerous requests for extraordinary writs, and multiple other motions. The Supreme Court entered an order directing Bush to provide a reason why sanctions should not be entered against him. Bush responded by filing a motion for rehearing seeking clarification and a reiteration of previously raised postconviction claims. Bush further asserted that all his claims were raised in good faith. The Supreme Court disagreed, and sanctioned Bush by prohibiting all future pro se filings and further, ordered the Clerk of Court to send copies of the order to the Department of Corrections for further punishment.

Blanket Prohibition of Read-backs Impermissible

In Moody v. State, 2014 WL 2616501 (Fla. 5th DCA 2014), the defendant appealed from convictions of attempted first-degree murder with a firearm, attempted second-degree murder, retaliating against a witness causing bodily harm, and possession of a firearm by a convicted felon.

The issue presented in Moody pertained to the read-back of testimony. A read-back is typically defined as a jury's request to have a certain portion of a witness' trial testimony read-back in order to assist the jury during deliberations. The general rule is that a trial court has great discretion on a case-to-case basis whether such a request should be granted.

In Moody, during both opening and closing statements at trial, the State instructed the jury that testimony read-backs would not be allowed. The defense objected, but was overruled by the trial court whom stated that is was the judge's courtroom policy to prohibits testimony read-backs.

The Florida Supreme Court previously found a trial court to have committed *per se* reversible error by "instructing the jury, over the defense's objection, that it could not have testimony read back during deliberations." Moody (citing Johnson v. State, 53 So.3d 1003 (Fla. 2010). While judges do have wide latitude in handling requests for read-backs during deliberations, a judge cannot mislead a jury into believing they are absolutely prohibited. Hazuri v. State, 91 So.3d 836, 846 (Fla. 2012).

The DCA reversed and remanded for a new trial, noting the important role a jury plays in our criminal justice system. While read-backs of testimony may cause delays and occasionally reconfigure a court's docket, these are necessary accommodations that must be made to ensure jurors have all the tools necessary to render life-altering verdicts in criminal cases. Courts do have discretion whether to permit testimony read-backs, but, as the DCA held in Moody, no discretion was exercised. Instead, the "the judge imposed a blanket policy that prohibited any read-back of testimony. Such a policy runs afoul of the supreme court's holding in Johnson."

Reasserting the Right to Remain Silent

by Ryan Sydejko

The Fifth District Court of Appeal was recently faced with a case in which a 19-year-old confessed and was convicted of robbing and murdering his drug-addicted father. Horne v. State, 2013 WL 6331664 (Fla. 5th DCA 2013).

In Horne, the defendant was interrogated by police at the police station. It is undisputed that, at the outset, Horne was read his Miranda rights and provided a sufficient waiver. The interrogation was recorded on DVD and lasted for two-and-a-half hours. Multiple intermissions occurred when law enforcement swapped out the interrogating officer.

Horne was initially interrogated by Officer Loydgren. Loydgren tried to get information out of Horne relevant to the firearm used in the murder. Horne's response: "I'm done talking." Loydgren subsequently tried to determine the last time Horne had spoken to his father. Horne's response: "Last night I talked to him. I'm done talking . . . Can I go home now?" Loydgren then stated: "Not right yet. You don't want to talk to me anymore then?" In response to that question, the appellate court noted, Horne sat back in his chair, crossed his arms, and shook his head 'no.'

Making no progress, law enforcement waited a few minutes and sent in a second officer, Detective Faulkingham. Faulkingham introduced himself, and Horne replied that he was tired and wanted to go home. Faulkingham immediately tried to get into the details of the case, but Horne replied: "I'm done talking." Faulkingham continued, and ultimately Horne discussed the murder and admitted to purchasing the firearm and shooting his father.

On appeal, Horne argued that although he initially waived his right to remain silent, that he unambiguously reasserted that right, requiring law enforcement to cease the interrogation.

The Fifth DCA noted that although the right to remain silent is of constitutional magnitude, it can be foregone through a voluntary, knowing, and intelligent waiver. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). Waiving the right, however, does not cause it to forever vanish. The right may be reasserted "at any time, even in the midst of a police interrogations, and bring a halt to questioning." Horne (citing Deviney v. State, 112 So.3d 57, 74 (Fla. 2013).

The issue is what constitutes reassertion of the right to remain silent. The United States Supreme Court wrote in Miranda that the right may be reinvoked "in any manner." Miranda, 384 U.S. at 473. The Court subsequently curtailed that broad language, holding the reassertion much be "unambiguous." Davis v. United States, 512 U.S. 452, 459 (1994); *see also* Berghuis v. Thompkins, 560 U.S. 370, 371 (2010).

Florida courts have given more color to the terminology in order to provide guidance to trial courts faced with similar issues. A defendant's assertion need not arise "with the discrimination of an Oxford don", but he must clearly state the person's intentions "so that a reasonable police officer would understand the defendant's desire." Davis, 512 U.S. at 459 (Souter, J., concurring in judgment). For practical purposes, Florida courts have held that a reassertion of the right to remain silent is "unambiguous" or "unequivocal" when "a reasonable police officer under the circumstances would understand that the suspect is invoking the right." Womack v. State, 42 So.3d 878, 883 (Fla. 4th DCA 2010).

The court in Horne concluded that Horne's repeated statements ("I'm done), inquiries ("I'm ready to go home. Can I leave?), and his actions (leaning back, arms folded, shaking his head 'no'), all amounted to unambiguous reassertions of his constitutional right to remain silent. Furthermore, the Horne Court noted that law enforcement realized this, as the questioning was briefly discontinued as a second detective was rounded to up re-attempt the first failed interrogation. The Court also went on to compare Horne's situation to that of Deviney and Pierre v. State, 22 So.3d 759 (Fla. 4th DCA 2009), two very analogous cases that may give prospective postconviction movants a better understanding of the intricacies of evaluating the potential merit of a postconviction claim.

Ultimately, the Court reversed Horne's convictions and remanded for a new trial, this time without admitting into evidence Horne's inculpatory statements made after several attempts to end the interrogation. In applying the harmless error test, the Court simply found that Horne's confession "was by far the most damaging evidence presented in the trial, and we cannot say that the State met its burden of proving that there is no reasonable possibility that the error contributed to Horne's conviction."

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