Case Law Update
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Supreme Court of Florida

Eustache v. State, SC16-1712 (July 12, 2018)

The Supreme Court addressed, and answered in the affirmative, the following certified question of great public importance:

> WHERE A DEFENDANT IS INITIALLY SENTENCED TO PROBATION OR COMMUNITY CONTROL AS A YOUTHFUL OFFENDER, AND THE TRIAL COURT LATER REVOKES SUPERVISION FOR SUBSTANTIVE VIOLATION AND IMPOSES A SENTENCE ABOVE THE YOUTHFUL OFFENDER CAP UNDER SECTIONS 958.14 AND 948.06(2), FLORIDA STATUTES, IS THE TRIAL COURT REQUIRED TO IMPOSE A MINIMUM MANDATORY SENTENCE THAT WOULD HAVE ORIGINALLY APPLIED TO THE OFFENSE.

"[U]pon revocation of a youthful offender's probation for a substantive violation, the trial court is authorized to either impose another youthful offender sentence, with no minimum mandatory, or to impose an adult Criminal Punishment Code (CPC) sentence, which would require imposition of any minimum mandatory term of incarceration associated with the offense of conviction. Because the trial judge in this case was convinced by the parties that he lacked the discretion to reimpose a youthful offender sentence, Eustache is entitled to a new sentencing proceeding."

State v. Michel, SC16-2187 (July 12, 2018)

The Florida Supreme Court reviewed a conflict between the Fourth and Fifth District Courts of Appeal as to whether a sentence of life with the possibility of parole after 25 years for a juvenile convicted of first-degree murder was contrary to decisions of the Supreme Courts of the United States and Florida. The Florida Supreme Court, in Atwell v. State, 197 So. 3d 1040 (Fla. 2016), had previously required resentencing where such a sentence had been imposed and the defendant

had a presumptive parole release date for the year 2130, well beyond his life expectancy. In Michel, the Fourth District concluded that Atwell applied and required resentencing even when the convicted juvenile could obtain parole during his lifetime.

A three-justice opinion of the Florida Supreme Court held "that juvenile offenders' sentences of life with the possibility of parole after 25 years do not violate the Eighth Amendment of the United States Constitution as delineated by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017). The three-justice opinion discussed the recent *LeBlanc* decision, in which the United States Supreme Court discussed a geriatric conditional release program of the State of Virginia. The three justices concluded:

> We hold that juvenile offenders' sentences of life with the possibility of parole after 25 years under Florida's parole system do not violate "*Graham*'s requirement that juveniles . . . have a meaningful opportunity to receive parole." *LeBlanc*, 137 S.Ct. at 1729. Therefore, such juvenile offenders are not entitled to resentencing under section 921.1402, Florida Statutes.

A fourth justice, Justice Lewis, concurred in result only, without any written opinion. Three other justices dissented. The dissent opined that Atwell was still controlling; that LeBlanc was distinguishable because it arose in the context of federal habeas corpus proceedings under a different standard of review; and that the current status of the law on the issue was now in a state of confusion.

Tambriz-Ramirez v. State, SC17-713 (July 12, 2018)

The Supreme Court addressed the question of "whether convictions for aggravated assault, attempted sexual battery, and burglary with an assault or battery, which arose during a single criminal episode, violate the prohibition against double jeopardy." The Supreme Court approved the decision of the Fourth District, which "held that because burglary with an assault or battery does not necessarily include an aggravated assault or attempted sexual battery, Tambriz-Ramirez's convictions do not violate the prohibition against double jeopardy."

The Supreme Court discussed each of eight conflict decisions from the district courts of appeal which led to this decision, and found that none of those conflict

decisions applied the proper double jeopardy analysis. The Supreme Court then went through each of the offenses at issue, reviewed the statutory elements of each offense, and explained why burglary with a battery and attempted sexual battery each included a statutory element which was not included in the other. Because each offense included at least one element not included within the others, there was no double jeopardy violation. The Court explained that it was possible to commit a burglary with a battery without also committing an attempted sexual battery. The Court also rejected the defendant's argument that aggravated assault and attempted sexual battery were degree variants of burglary with an assault or battery. These offenses were not degrees of the same offense.

Rodriguez v. State, SC17-805 (July 12, 2018)

The Supreme Court addressed an issue regarding the proper standard of appellate court review for harmless error, and found that the Third District employed the wrong standard; the case was remanded for reconsideration under the correct standard.

In this case, the Third District's opinion cited and quoted section 59.041, Florida Statutes, which states: "No judgment shall be set aside or reversed . . . on the ground of . . . the improper admission or rejection of evidence . . . unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice."

The correct test for harmless error, as set forth by the Supreme Court in State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986), is "whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful."

In Re: Standard Jury Instructions in Criminal Cases – Report 2017-12, SC17-2266 (July 12, 2018)

The Supreme Court approved amended jury instructions as to multiple statutory provisions regarding the failure of sexual offenders or predators to comply with reporting requirements. These amendments were adopted pursuant to statutory changes set forth in chapter 2016-104, sections 1 and 3, and chapter 2017-107, sections 1-2, Laws of Florida, amending sections 943.0435 and 775.021, Florida

Statutes. The amendments are extensive and are intended to track the amended statutory language; copies of the newly approved instructions are appended to the Court's opinion, with new language in the instructions underlined and deleted language from the prior instructions denoted by struck-through type.

Eleventh Circuit Court of Appeals

United States v. Guevara, 15-14146 (July 11, 2018)

Guevara appealed convictions for causing or attempting to cause a car dealership to file Form 8300s with the United States Treasury Department that contained material omissions and misstatements of facts. The Eleventh Circuit affirmed the convictions and found the evidence sufficient, but reversed and remanded the sentence, due to the failure of the district court "to make and explain factual findings that adequately support the application of a two-level sentencing enhancement for obstruction of justice."

Guevara argued "that the evidence was insufficient to show that he caused or attempted to cause the false filings because there was no evidence that he ever tried to persuade, influence, coax, encourage, convince, threaten, or even request that Sanfer [car dealership] file Form 8300s containing misstatements as to Guevara's identity as the buyer of the vehicles." The Eleventh Circuit summarized the evidence which sufficed to sustain the statutory element at issue:

> . . . The evidence established that Boza informed Guevara of the Form 8300 requirement when Guevara purchased a Camaro for cash at the Miami Lakes Auto Mall in February. Accordingly, a reasonable factfinder could conclude that Guevara knew, prior to purchasing the Ferrari, Lamborghini, and Rolls Royce from Sanfer for cash, that Sanfer would have to file a Form 8300 for each of those vehicles. Armed with this knowledge, Guevera recruited and paid E.Q. to act as the straw buyer for the vehicles. Guevara's use of a straw man facilitated the filing of the Form 8300s containing material misstatements by suggesting to Sanfer that E.Q., not Guevara, was the buyer who should be listed on the Form 8300s – and, ultimately, the Form 8300s pertaining to each file were materially false because they listed E.Q., not Guevara, as the true buyer. Finally, the income

> reconstruction evidence indicated that Guevara purposely sought to evade the currency transaction reporting requirement of 31 U.S.C. s. 5331, lest the filing of such reports lead to an investigation of the income he was not reporting on his tax returns.

Additionally, there was no objection at trial to the Government's admission of computer-generated summaries of the Form 8300s submitted by Sanfer to the IRS, and the use of these, as opposed to either the original forms or certified copies thereof did not constitute plain error, even though the Government did not comply with the requirements of the best evidence rule.

The obstruction-of-justice sentencing enhancer is applicable only if the conduct was "'purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.'" This must be "willful" conduct on the part of the offender. Written findings of the district court are required to show that the statements were false and material, and to further show "how the statements significantly obstructed or impeded the investigation or prosecution of the offense." The district court, in this case, failed to make findings as to how Guevara obstructed or impeded the investigation or prosecution. The district court's findings in this case were "nothing more than vague, equivocal statements regarding Guevara's tax returns, use of a straw buyer to commit the crime with which he was charged, and initial misstatements to agents during the interview outside his home." The Court further agreed with Guevara that "it cannot be the case both that Guevera's motive for wanting Sanfer to file Form 8300s containing false information was to hide income he did not report on his tax returns, and also that Guevara's motive for hiding income by not reporting it on his tax returns was to impede any potential future prosecution he might face for wanting Sanfer to file Form 8300s containing false information."

First District Court of Appeal

Peoples v. State, 1D16-5875 (July 9, 2018)

In an appeal from a conviction for second-degree murder, the defendant raised issues related to his competency, his rejection of a plea of no contest, and his waiver of a jury trial. Prior to the commencement of the trial, the defendant's competency had previously been restored. He had a history of failing to take prescribed medication and the concomitant involuntary administration of the medication.

The most recent examination by a defense expert was one week prior to trial and that expert found the defendant competent. Defense counsel did not have any reason question that determination. At the outset of the proceedings, the defendant announced that he wanted to pursue a defense of insanity and that his counsel had not advised him as to what his defense would be. No notice of insanity had been filed. The prosecution advised the court that the defendant had failed to cooperate with experts that defense counsel had retained in conjunction with such a defense. The defendant blamed his lack of cooperation on his medications and wanted to discuss the matter with counsel.

Although the defendant wavered on the question of whether to waive a jury trial, he was ultimately adamant that he wanted a bench trial. The court inquired as to whether the defendant understood what he was waiving and the defendant said that he did, but he again raised the issue of the insanity defense and the desire to discuss it with counsel. The judge confirmed with jail staff that the defendant was taking his medication and then accepted the waiver of jury trial.

At the start of the bench trial the next day, the defendant stated that he wanted to enter a no contest plea. The court accepted the plea. During ensuing discussions regarding the sentence, when the defendant learned that the State was seeking a life sentence, he protested that that was not acceptable and that he thought he would get the lowest permissible sentence by entering the plea. The judge again explained the potential range of a sentence, and the defendant said that he understood and that he still did not want a jury trial. After further questioning, the court again accepted the plea of no contest and then imposed a life sentence. The defendant then interrupted and inquired if he could still have a trial. After further discussions which touched on the history of competency, malingering, exaggeration and manipulation, the judge permitted the withdrawal of the plea and proceeded with the bench trial. At the conclusion of the trial, the defendant was convicted and sentenced to life in prison.

The defendant argued that his equivocation during the initial discussions should have triggered a new competency evaluation. The First District disagreed. Mere equivocation does not suffice to trigger a competency evaluation. The fact that the trial court asked jail personnel whether the defendant was taking his medication did not compel a contrary conclusion. That was especially true in light of defense counsel's acknowledgment of the history of malingering, as well as the existence of the defense expert's finding of competency just one week earlier.

The sufficiency of the waiver of the jury trial was not preserved in the trial court and was therefore reviewed only for fundamental error. The defendant appeared to be raising challenges to both the adequacy of the waiver and the voluntariness of the waiver. The voluntariness issue related to the defendant's allegedly mistaken belief that he thought he would be proceeding with a defense of insanity at a bench trial.

In this case, although the in-court oral colloquy may have lacked essential inquiries, the court also obtained a formal written waiver signed by the defendant pursuant to Rule 3.260, and that was adequate as a matter of law.

As to voluntariness, the essence of the defendant's argument was that the court should have informed him that the insanity defense was not available, and that, having failed to do so, the waiver of the jury trial was invalid. The defendant relied on case law pertaining to the voluntariness of a guilty plea, and the First District would not apply those decisions to the issue of the waiver of a jury trial. Additionally, the defendant was not waiving an "available" defense when proceeding to the bench trial, as that defense was not available whether the trial was by jury or by the court. Additionally, there had been on-the-record discussions, with the defendant present, and apparently acknowledging them, to the effect that no notice of insanity had been filed and that it had been due to his lack of cooperation.

Last, the First District found the evidence was sufficient for second-degree murder. Proof of ill will, hatred, spite or evil intent could be found "when he stabbed the victim. Initially, we recognize that the circumstantial evidence here was sufficient as a matter of law to prove Appellant possessed the requisite mental state – no one 'accidently' or 'negligently' plunges a seven-inch knife blade six inches into the chest of another person." Also, the defendant had previously seen the victim and had described him as looking "life a punk." This created an inference of enmity towards the victim.

Brown v. State, 1D17-555 (July 9, 2018)

The trial court was found to have erred by failing to dismiss a charge of use of a firearm during the commission of a felony based on Rule 3.151(c), Fla.R.Crim.P.

Brown was in the process of buying marijuana and shot the victim. There were conflicting versions as to whether the shooting was in self-defense or was during a chase that ensued when Brown seized the bag of marijuana and fled with it

without paying. He was arrested for armed robbery, aggravated battery with a firearm, and use of a firearm during the felony. The firearm charge was not included in the original information because it was, according to a memo by the prosecutor, "combined in counts 1 and 2." At trial, Brown was acquitted on the armed robbery and its lesser offenses; the jury was deadlocked on the aggravated battery. The State then filed a second amended information, recharging the aggravated battery and adding the charge of the use of the firearm during the felony. At the second trial, Brown was found guilty on the firearm charge; the jury was again deadlocked on the aggravated battery.

Under Rule 3.151(c), "when a defendant has been tried on a charge of one of two or more related offenses, the charge of every other related offense shall be dismissed on the defendant's motion unless [1] a motion by the defendant for consolidation of the charges has been previously denied, or [2] unless the defendant has waived the right to consolidation, or [3] unless the prosecution has been unable, by due diligence, to obtain sufficient evidence to warrant charging the other offense or offenses." The prosecution had conceded that the firearm charge was related to the other charges; the defendant filed a motion to dismiss under this rule; and none of the three noted exceptions to the rule were established by the State.

The State's arguments in the appellate court were based upon a case which the First District distinguished, as it entailed "entirely different real estate transactions that occurred over the course of a two-year period and involved different alleged victims." Under those circumstances, the Court, in State v. Varnum, 991 So. 2d 918 (Fla. 4th DCA 2008), "held that the offenses were not 'related' to the offenses for which the defendant was previously tried and acquitted because the offenses were committed in a different manner and arose out [of] 'temporally separate episode[s]' that were only connected by 'similar circumstances and [the defendant]'s alleged guilt in all instances.' . . . By contrast, here, the use-of-a-firearm count arose out of the exact same criminal episode as the robbery for which Brown was previously tried and acquitted."

Veach v. State, 1D17-711 (July 9, 2018)

Veach was tried and convicted for the offense of conspiracy to commit the felony of tampering with a victim. This was based on a recorded jail telephone call "between Appellant and his former girlfriend and co-defendant."

Prior to trial, the 17-minute call was redacted to seven minutes, and the State agreed not to mention that the alleged tampering related to the victim in a lewd or

lascivious molestation case. Before opening arguments, the defendant sought a further redaction. In this portion of the recording, the defendant asked his former girlfriend/co-defendant, Lisa Harkins, "to 'let them know that somebody stole [my] phone' and asked Harkins to 'call the investigator's office tomorrow and find out who brought you that phone because you could go press charges on them. . . .'" The trial court concluded that this information was relevant to the prosecution and that its probative value outweighed any undue prejudice.

The First District agreed with the trial court: "Appellant placed the call to Harkins from another inmate's account, and the State offered the call because Appellant identified himself in the contested portion of the call, thus making the evidence relevant."

Additionally, the trial court did not err in limiting defense counsel's cross-examination of Harkins. The defense sought to ask Harkins "whether she intended to commit a crime when Appellant called her from jail." Her "intent was not relevant to the charges against Appellant and was not within the scope of direct examination."

Tripp v. State, 1D17-2545 (July 9, 2018)

The defendant was observed stumbling across a street in an apparent state of intoxication, and was approached by officers who smelled alcohol on him. The officers asked for identification, as the officers investigated a possible violation of a county ordinance. The officers noticed a bulge in the defendant's front pocket and asked if he had a firearm, to which he responded that he had a gun "tucked in the small of his back." He did not have a concealed-carry permit and was arrested for carrying a concealed firearm. On appeal, he challenged the denial of his motion to suppress the firearm. The First District rejected his argument for several reasons.

First, "the police had reasonable suspicion to think Appellant violated the county ordinance, and did not conduct an unlawful search by asking if Appellant had a weapon." Second, "even if the police did not have reasonable suspicion to detain Appellant for violation of the county ordinance, they had the lawful authority to conduct a welfare check on Appellant (despite the testimony of one officer that he was *not* conducting a welfare check.)" The county ordinance at issue defined the misdemeanor of disorderly conduct.

The First District further noted that "merely asking questions" did not constitute a search. Additionally, even if the question was the de facto equivalent of a *Terry* search, "which we do not think it was, the purported search was far less

intrusive than the typical pat-down permissible under *Terry* for determining the presence of a weapon."

C.T.T. v. State, 1D17-5163 (July 9, 2018)

The First District reversed a finding of guilt "for leaving the scene of an accident involving damage to unattended property." "While the evidence is sufficient to show that C.T.T. collided with the tree and fled, the State concedes that no evidence was admitted indicating any damage to the tree."

Commander v. State, 1D18-36 (July 9, 2018)

In pretrial proceedings in the trial court on a stand-your-ground motion, the prosecution conceded that the State had the burden of proving that Commander was not immune from prosecution as a result of the statutory amendment to section 776.032(4), which became effective June 9, 2018. The trial court denied the motion after an evidentiary hearing and Commander sought review by petition for writ of prohibition in the First District. In the appellate court proceedings, the State conceded that the trial court applied the erroneous burden of proof as a result of the trial court prosecutor's agreement that the amended burden should apply.

The First District "accept[ed] the state's concession of error because it is supported by the record and is consistent with the statute in effect at the time of the evidentiary hearing." The Court further noted the conflict between the Second and Third Districts as to whether the amendment to the burden of proof applies retroactively. See Martin v. State, 2018 WL 2074171 (Fla. 2d DCA May 4, 2018); Love v. State, 2018 WL 2169980 (Fla. 3d DCA May 11, 2018).

Burns v. State, 1D16-5113 (July 11, 2018)

The trial court sentenced the defendant to ten consecutive sentences of 30 years each, for multiple sex offenses. The First District reversed the sentences because the trial court improperly considered the defendant's lack of remorse. The judge had stated: "And the Court finds that you have really shown no remorse and denied that any of this took place." The appellate court further certified to the Supreme Court a question of great public importance: "May a sentencing court rely on a defendant's lack of remorse after the defendant has given a post-Miranda, sworn confession to the crime and has obviously lied under oath at trial about his guilt?"

McCray v. State, 1D18-0165 (July 11, 2018)

The Court reiterated is prior holding from Romero v. State, 105 So. 3d 550 (Fla. 1st DCA 2012), that *"Graham v. Florida*, 560 U.S. 48 (2010), does not apply to an 18-year-old defendant notwithstanding the juvenile nature of the defendant's mental and emotional development."

Second District Court of Appeal

Daniels v. State, 2D16-4840 (July 13, 2018)

On appeal from convictions for sale or delivery of cocaine, Daniels challenged the trial court's failure to conduct a Nelson hearing. The Second District reversed, finding that the trial court erred by not making the required preliminary inquiry.

Daniels filed a pro se petition seeking a Nelson hearing "and asserting that appointed counsel had violated Daniels' due process rights by agreeing to an early trial date for which counsel would not be prepared. Once it reviewed that petition, rather than denying it without a hearing, the trial court should have convened a preliminary Nelson inquiry to allow Daniels to be heard concerning whether he was unequivocally requesting that his court-appointed counsel be discharged and to ascertain all the reasons for his request. Because Daniels' petition was at least minimally sufficient on its face, the trial court's failure to conduct the preliminary Nelson inquiry requires reversal."

The appointment of stand-by counsel did not render the error harmless. "As this court has stated, 'while the failure to conduct an adequate Nelson inquiry is subject to an abuse of discretion standard and, presumably, a harmless error analysis, the failure to conduct any inquiry is per se error.'"

Jones v. State, 2D17-257 (July 13, 2018)

The Second District reversed a trial court's order "clarifying defendant's sentence" in which the trial court imposed special conditions of sex offender probation. The addition of specific conditions restricting contact with or proximity to children constituted a double jeopardy violation.

At plea and sentencing hearings, the parties agreed that there was no minor victim under 18 and that sex offender probation conditions required in cases involving minors would not apply. Jones had previously entered into a plea

agreement which provided for sex offender probation. At the sentencing hearing, the judge did not "orally enumerate the special conditions associated with the sex offender probation.

Jones' offense was traveling to seduce/solicit/entice a child to commit a sex act. That offense is not an enumerated offense under the sex offender probation statute, section 948.30(1), Florida Statutes. Subsequent to the sentencing in this case, the First District, in Snow v. State, 157 So. 3d 559 (Fla. 1st DCA 2015), held that for such non-enumerated offenses, the conditions of sex offender probation must be orally announced at sentencing, and non-announced conditions must be stricken. As a result of that case, the prosecution moved to clarify the sentence by orally pronouncing the special sex offender probation conditions. The trial court did that.

Subsequently, the Fourth District, in Levandoski v. State, 217 So. 3d 215 (Fla. 4th DCA 2017), held that the trial court need not specify each item contained within the imposition of sex offender probation conditions, and the Florida Supreme Court then upheld the Fourth District's decision in the conflict with Snow.

In this case, Jones entered the plea to the non-enumerated offense and was deemed to be on notice of the special conditions of sex offender probation at the initial sentencing. The State's effort to obtain a post-sentencing "clarification" was therefore unnecessary.

However, the trial court did err when it enhanced the sentence "by adding conditions . . . that are required when the victim was under eighteen."

E.M. v. State, 2D17-2521 (July 13, 2018)

The Second District held that the evidence of intent was insufficient to establish a burglary. "E.M. and a group of teenaged girls drove around town in a stolen Toyota Camry, used a garage door opener to gain entrance into a vacant house, parked the vehicle inside the garage, and remained in the house for some period of time." "[T]here was no evidence presented as to what, if anything, E.M. did or intended to do while inside the house. Various items in the house were found to have been damaged, and the front hood and roof of the Camry were severely dented."

The Second District also reversed the lower court's disposition as to criminal mischief, since the State nolle prossed that charge towards the end of the trial court proceedings.

Bolduc v. State, 2D17-2767 (July 13, 2018)

The Second District remanded this case to the trial court for further proceedings on a Rule 3.801 motion for jail credit, where the trial court relied on the State's response, but did not attach documents to refute the claim. The Court further noted some general principles regarding credit for prior time when it entails warrants or detainers and time served in another jurisdiction: "A defendant is entitled to receive jail credit for an offense after a warrant has been executed while he is being held in jail in another county; he is not entitled to jail credit on the basis of a detainer unless he is subject to release and is being held solely on the detainer. . . . We note, however, that a rule 3.801 motion is not the proper vehicle to seek an award of prison credit and that this claim is properly raised in a motion filed pursuant to rule 3.800(a)."

Martinez v. State, 2D17-2888 (July 13, 2018)

Dual convictions for driving with a suspended license and causing death, and DUI manslaughter, resulted in a violation of Florida's "single homicide rule." That rule "'provides that although a defendant can be charged and convicted under multiple criminal statutes for conduct causing another's death during one criminal episode, that criminal defendant can only be punished once for that death.'"

Brewster v. State, 2D17-3196 (July 13, 2018)

The trial court erred in dismissing an amended Rule 3.850 motion as successive. "Where a defendant files an amended motion before the postconviction court rules on the original motion and before the two-year time limit has expired, it is error for the postconviction court not to consider the merits of the new allegations."

Cendejas v. State, 2D17-3957 (July 13, 2018)

The trial court erred in summarily denying a Rule 3.850 claim that the defendant's plea was involuntary due to misadvice from counsel regarding the potential sentence. The trial court relied only on the signed plea form, "finding that the mandatory minimum and probationary terms were 'clearly contained within the written plea agreement, signed by' Mr. Cendejas." However, "'the existence of a signed, written plea agreement, by itself, is insufficient to refute a defendant's claim' that his plea was involuntarily entered.'" On remand, the trial court either had to

attach to transcript of the plea colloquy to its order if it refuted the claim, or otherwise conduct an evidentiary hearing.

Lewis v. State, 2D18-1126 (July 13, 2018)

On the eve of a first-degree murder trial, the defendant filed a petition for writ of prohibition in the Second District, based on the Stand Your Ground immunity findings that were made in the trial court. The Second District denied the petition without further discussion, but addressed what it found to be a problematic dilatory filing of the petition on the eve of the trial.

The evidentiary hearing was held in November, 2017, and the court issued its order denying the motion to dismiss on December 18, 2017. A jury trial was scheduled for March 26, 2018. On February 1, 2018, the defendant, in the trial court, sought clarification of the trial court's findings and requested further findings. The prohibition petition was filed March 22, 2018.

The Second District noted the complexity of the issues raised in the petition, which resulted in its issuance of a stay of the trial court proceedings. The Court stated that Lewis could have filed the prohibition petition as early as December, 2017, and that there was no requirement for the trial court to make further findings after the original order of denial.

The Court expressed its concerns about the absence of any jurisdictional time period for the filing of the prohibition petition and the consequences of a last-minute delay of a substantial trial:

> Here, the absence of a procedural process or, at a minimum, a jurisdictional timeframe for filing the petition for writ of prohibition resulted in the delay – at the last moment – of a first-degree murder trial. The last minute trial cancellation undoubtedly caused a significant hardship on the parties, witnesses, and the trial court. The fact that neither the Florida Rules of Criminal Procedure nor the Florida Rules of Appellate Procedure address the timing of Stand Your Ground motions to dismiss or petitions for writ of prohibition means that there is the potential for abuse by virtue of a defendant seeking what amounts to a last minute continuance.

> We encourage the Florida Bar Criminal Rules Committee and the Florida Bar Appellate Rules Committee to consider the need for rules addressing the issue. It would seem to be preferable for there to be a set time period for challenging these types of orders so that a trial court could refrain from setting trial until such time as the court knows that its ruling will not be subject to interlocutory review. We further note that in this case nothing in Lewis's initial filings in this court reflected the fact that a trial was scheduled to begin within days. It would be prudent for petitioners in this court to notify us that a trial or hearing in the lower court is imminent and that the matter filed in this court should be resolved before those proceedings go forward.

Third District Court of Appeal

Jackson v. State, 3D16-2371 (July 11, 2018) (on rehearing)

The Court withdrew its prior opinion and issued the current one. Jackson was convicted of trespass and misdemeanor battery, both of which were lesser offenses of the original charges; he was acquitted as to kidnapping. On appeal, he challenged a prosecutor's argument as a "golden rule" argument. The Third District found that comment to be proper and relevant.

The theory of defense "was that the incident didn't even happen, given the absence of any visible injuries on the victim which would be consistent with her description of the vicious attack by Jackson." The defense also noted inconsistencies in statements made by the victim to an officer. After these arguments were made by defense counsel, the prosecutor's rebuttal focused on the victim being put in a chokehold, while being dragged by her hair, and being hit on the head with a bottle, numerous times. The prosecutor then referenced defense counsel's argument that the victim was lying because Fire Rescue gave the victim an ice pack instead of clearing her up, because she was not bleeding.

In relevant part, the prosecutor then continued with the challenged comment:

> Think about what state of mind she's in. You heard the officer. He said trying communicating with her, and she

> was hyperventilating like she couldn't breathe. She was having a hard time.
>
> Think about the state of mind she's in at that point in time that all these questions were asked to her. What happened? What happened? And she's trying to deal with her own health issues while trying to interact with the police.

"'"Golden rule" arguments are arguments that invite the jurors to place themselves in the victim's position during the crime and imagine the victim's suffering.' . . . Closely related is the concept that closing argument 'must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.'"

In this case, the "State's closing arguments did not ask or invite the jurors to place themselves in the shoes of the victim to imagine her pain and suffering. Rather, the State pointed to the trial testimony and other evidence in an effort to rebut the defense theory (as argued in the defense closing) that the incident did not even happen, or at least did not happen in the manner and to the extent contended by the State." The prosecutor's argument related to the credibility of the victim's version of events. The argument was also for the valid purpose of asserting that "any inconsistencies between the victim's statements on the scene and her trial testimony could be explained by the victim's mental and physical state at the time she first spoke" with the officer."

Sardinas v. Junior, 3D18-1320 (July 12, 2018)

The Third District denied a habeas corpus petition in which the defendant challenged the trial court's revocation of bond. Sardinas argued that the State's motion was facially insufficient to constitute a request for pretrial detention under section 907.041, Florida Statutes, and Rule 3.131, Fla.R.Crim.P. As a result, Sardinas argued that trial court lacked authority to impose pretrial detention.

"To the extent Mr. Sardinas alleges in the petition that the trial court could not order pretrial detention absent a written motion filed by the State, the State expressly clarified on the record that it had filed a written motion and was seeking to revoke Mr. Sardinas' bond pursuant to Rule 3.131. Further once the State made clear on the record that it was seeking to have Mr. Sardinas held in custody, there was neither

an objection to the form of the State's request nor a request for a different form of written motion." The trial court had further asked if the defendant needed additional time to respond to the State's motion.

Fourth District Court of Appeal

D.M.B. v. State, 4D17-394, et al. (July 11, 2018)

> The Fourth District reversed an adjudication of delinquency based upon a violation of probation for loitering and prowling. The evidence of loitering and prowling was insufficient:
>
> The evidence adduced below was insufficient to establish – even under the preponderance of evidence standard – that appellant's actions rose to the level of incipient behavior pointing toward the threat of an immediate future crime. When the police located appellant, he was not engaged in conduct that came close to, but fell short of, the actual or attempted commission of the burglary. In fact, the burglary had already taken place and the juveniles were fleeing when police arrived at the scene. There was no threat of an immediate, *future* crime. At most, appellant's presence and conduct were "vaguely suspicious." [citation omitted]. When officers found him, appellant was not involved in behavior that officers wanted to prevent from ripening into a substantive offense. Instead, he was detained on suspicion of having already committed a criminal offense. . . .

Slaughter v. State, 4D17-1744 (July 11, 2018)

In an appeal from convictions for lewd or lascivious molestation of a child under the age of twelve, the Fourth District held that a prosecutor's comment in rebuttal closing argument did not constitute fundamental error and did not require reversal. The Court, however, wrote this opinion "only to further encourage the prosecution to exercise caution in closing argument and avoid injecting emotion and fear into the jury's deliberations."

The prosecution presented testimony from two "*Williams* rule witnesses who both testified that Appellant had also touched them when they slept over at Appellant's house." In closing argument, the prosecutor stated:

> I was watching a Smithsonian thing last night it had lions and it said that lions attack their prey when they're handicapped by darkness. That's what this Defendant did. He attacked M.D., he attacked L.M., he attacked S.H. when they were isolated in the room. He came in when they were supposed to be sleeping and he got – did what he wanted to do to them, touching them in a lewd or lascivious manner.

"While the prosecutor's statement indeed analogizes Appellant's predatory actions to the predatory actions of a lion, the analogy refers to the scenario in which the victims, or prey, are vulnerable. Furthermore, this statement fails to inflame into the ears and minds of the jury. This comment does not reach the egregious level of the prosecutorial comments that amount to fundamental error."

Brown v. State, 17-2033 (July 11, 2018)

Brown's probation was revoked on the basis of multiple violations. On Appeal, the Fourth District concluded that two of the three violations, related to payments to be made, had not been established by the evidence and were stricken. The Court, however, affirmed the revocation of probation, applying the principle that when it is clear that the trial court would have revoked probation based on the remaining violation(s), the appellate court will affirm the revocation.

Stukel v. State, 4D18-600 (July 11, 2018)

The trial court treated a Rule 3.800(a) motion as an untimely Rule 3.850 motion. That was an error by the trial court, because a claim that there is a disparity between oral and written pronouncements as to the sentence imposed may be raised in a motion under Rule 3.800(a). The trial court's order was nevertheless affirmed, without prejudice, because the defendant's motion failed to attach the sentencing hearing transcript which was needed to address the claim.

Robbins v. State, 4D18-929 (July 11, 2018)

The Fourth District granted a habeas corpus petition in which Robbins argued that prior appellate counsel failed to present the argument that the trial court applied the incorrect standard when it denied the defendant's motion for new trial. The case was remanded to the trial court with directions to reconsider the motion for new trial based upon the correct legal standard.

In the motion for new trial, the defendant emphasized a witness's inconsistent statements and argued that the verdict was contrary to the weight of the evidence. The trial court denied the motion: "'I agree with the State that it was a question of fact and the jurors got to see [defense counsel] challenge [the victim] with the prior inconsistent statements and it didn't make an impact on them.'"

The Fourth District viewed the trial court's rationale as an application of the "sufficiency of the evidence" standard. The motion for new trial, however, is reviewed by the trial court under the "contrary to the weight of the evidence" standard.

Fifth District Court of Appeal

Leppert v. State, 5D16-2238 (July 13, 2018)

On remand from the Florida Supreme Court, the Fifth District withdrew its prior opinion and issued the current opinion.

Leppert was convicted of first-degree murder and other offenses. Leppert "argued that the trial court erred in not having a jury determine whether she killed, intended to kill, or attempted to kill the victim." The Fifth District had previously held that the trial court did not err when it made the written findings required by section 775.082(1)(b), Florida Statutes, which sets forth findings needed to support the imposition of a life sentence on a juvenile offender.

The Florida Supreme Court subsequently addressed the issue and held that Alleyne v. United States, 570 U.S. 99 (2013), "requires the jury to make the factual finding under section 775.082(1)(b) as to whether a juvenile offender actually killed, intended to kill, or attempted to kill the victim.'"