

Case Law Update  
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Supreme Court of Florida

[Gonzalez v. State](#), SC17-1146 (Sept. 13, 2018)

The Supreme Court affirmed the denial of a Rule 3.851 motion and addressed two claims. First, the claim that trial counsel was ineffective for failing to properly argue a motion for change of venue (based on extensive pretrial media coverage) was conclusively refuted by the trial court record. There was only a general allegation that voir dire was cursory, and Gonzalez did not identify any individual juror who was either biased or not properly rehabilitated. Defense counsel had prepared and used a juror questionnaire inquiring about exposure to pretrial publicity.

Next, Gonzalez argued that counsel was ineffective for failing to challenge the indictment based on alleged interference with the grand jury by the sheriff. This claim was insufficiently pled as it was based purely on speculation. The motion referred to the sheriff's general practice of greeting prospective jurors in the parking lot and giving them his business card and thanking them for appearing.

[Brown v. State](#), SC17-1538 (Sept. 13, 2018)

The Supreme Court affirmed the denial of a Rule 3.851 motion. The only claim addressed by the Court was that counsel was ineffective for failing to object to an improper comment made by the prosecutor in closing argument.

The prosecutor's comment, in a first-degree murder case, where premeditation was at issue, purportedly quoted Brown as saying, "I told you I'd kill you, I had it in my mind to kill you, I've wanted to kill you for several days. I wanted to kill someone to take out my frustration." The trial court conducted an evidentiary hearing, and defense counsel explained that he considered objecting, "but based upon the prosecutor's demeanor and tone he did not believe the prosecutor was attempting to quote Appellant. Instead, he believed the prosecutor was providing a general comment on the evidence presented at trial. This decision was based on his professional judgment and experience and falls within the wide range of professional assistance required by *Strickland*. Thus, Appellant fails to show that counsel's

performance was deficient.” Additionally, Brown failed to demonstrate prejudice from this, as the “record provides ample evidence that Appellant’s actions were premeditated.”

### First District Court of Appeal

#### [Williams v. State](#), 1D17-2302 (Sept. 14, 2018)

The First District affirmed multiple convictions. There was no abuse of discretion in denying a pretrial motion to exclude evidence of a dispute between the defendant and his wife. The State argued that the domestic dispute was inextricably linked to the charged offenses. No further facts are provided in the opinion.

#### [Bessellieu v. State](#), 1D17-4699 (Sept. 14, 2018)

In a rule 3.850 motion, the defendant argued that trial counsel was ineffective for failing to challenge an information based on the State’s failure to sign the information. The First District affirmed the trial court’s denial of the motion and found the claim to constitute an abuse of the judicial process by challenging the allegedly defective information through a claim of ineffective assistance of counsel. “Had defense counsel objected to the criminal information being filed without the State’s signature, the State could have merely signed the information; thus, there is no possibility that Appellant was prejudiced.” And, a direct challenge to the sufficiency of the information could be raised only on direct appeal, not through a Rule 3.850 motion.

#### [Duke v. State](#), 1D17-5118 (Sept. 14, 2018)

After Duke pled no contest to possession of a firearm by a convicted felon, he reserved the right to appeal the denial of a suppression motion; the First District affirmed.

Duke sought to suppress evidence “found on several USB drives that had been stolen from him, his identification from the files on those drives, and the firearm seized from his vehicle upon his arrest.” The First District found that no Fourth Amendment search occurred, and, if one did, “it was lawful because it was based on the consent of the person who had possession of the drives and who the officers reasonably believed had the apparent authority to consent to a search of the drives.”

Duke had reported the burglary of his vehicle and claimed that USB drives were stolen during the burglary along with other items. The police report, however, did not list the USB drives amongst the stolen property. Hampton was arrested on unrelated charges and consented to a search of his house “and he specifically led the officers to an air conditioning vent where he had hidden some USB drives. He told the officers that this was the ‘mother lode’ and that the drives contained ‘some sick shit.’” The officers did not know the drives were stolen.

The officers opened a video file which appeared to show a sexual battery. They did not look at others and turned the drives over to the sex crimes unit. They then questioned Hampton further, and Hampton consented to a search of all of the drives. Hampton had said that he had only viewed one video file and described the one that was consistent with the one initially viewed by the officers.

Since Hampton led the officers to the USB drives, “the officers did not conduct a search within the meaning of the Fourth Amendment when they opened one of the USB drives and viewed a video file on the drive.” Alternatively, the officers could rely on the apparent authority of Hampton to consent, “so long as that reliance is reasonable under the totality of the circumstances.” Here, it was reasonable, as the officers did not know the drives were stolen, and Hampton had said that he had obtained the drives in exchange for drugs.

### Second District Court of Appeal

[Braine v. State](#), 2D17-807 (Sept. 14, 2018)

Braine’s request at sentencing for a withheld adjudication was properly denied as the trial court lacked discretion to do that.

Under section 775.08435, Florida Statutes, one of the limitations on the trial court’s authority is: “Notwithstanding any provision of this section, no adjudication of guilt shall be withheld for a third degree felony offense if the defendant has two or more prior withholdings of adjudication for a felony that did not arise from the same transaction as the current felony offense.”

The Second District found that there was sufficient evidence of two prior withholdings. Braine challenged that finding, arguing that the statutory provision does not apply when the two prior withholdings arose from the same case. “Under his interpretation, all withholdings granted in one sentencing proceeding would constitute a single withhold.” The Second District disagreed, as that “ignore[d] the plain

meaning of the statute. The legislature created a ‘same transaction’ exception for a current felony offense that arose from the same transaction as a prior felony offense. The only transactional relationship relevant under section 775.08435(1) is the relationship between the current felony offense and a prior felony offense, not, as Mr. Braine contends, the relationship between two prior offenses.”

[Fernandez v. State](#), 2D17-5100 (Sept. 14, 2018)

A rule 3.801 motion seeking 116 days additional credit for jail time served in county jail prior to sentencing was premature. Under Rule 3.801, that rule may be used to correct a “final sentence.” As the motion in this case was filed during the pendency of an appeal from the judgment and sentence, the motion was premature, as the sentence was not yet final. The Second District reversed the denial of the motion with directions to the trial court to strike the motion.

Furthermore, since the motion was filed during the direct appeal, while Fernandez was represented by counsel, the motion should have been treated as a Rule 3.800(b) motion, challenging the sentence; but, there too, the motion was unauthorized, because Fernandez was represented by appellate counsel and was not authorized to file pro se motions at the time.

Third District Court of Appeal

[Pickett v. State](#), 3D16-2871 (Sept. 12, 2018)

Pickett appealed convictions for attempted second-degree murder, witness tampering and criminal mischief. The Third District affirmed the first two, but reversed the criminal mischief conviction due to insufficient evidence.

Pickett challenged the admissibility of evidence of the defendant having committed an armed robbery of Andrea Smith, five hours before the shooting. In addition to the above-noted charges, Pickett had been charged with, and acquitted of, the attempted murder of Andrea Smith. There was no abuse of discretion in the admission of this evidence as it “helped explain the entire context out of which the charged offenses arose and provided an intelligent account of the events leading to the charged offenses.” The Court further explained:

The evidence explained why the defendant was at the house, the broken relationship between the defendant and Andrea, the defendant’s obsessive behavior towards

Andrea, why he over-reacted when he saw Robert (another male who he did not know) at Andrea's house, and why Andrea felt intimidated when the defendant repeatedly called her from jail to ask her to drop the charges.

At trial, the State relied on a cell phone found at the scene and asserted that it was Andrea's phone; it was later determined that the phone was the defendant's. The defendant claimed "that this evidence was material because it was used to bolster the credibility of Andrea – a key witness." The Third District applied the principles of Giglio v. United States, 405 U.S. 150 (1972), and concluded that "nothing in the record suggests that either Andrea, or the State, *knowingly* presented false testimony." "Andrea's belief that the phone depicted in the photograph was her cell phone was reasonable as the defendant had taken her cell phone from her earlier that day; he appeared at her bedroom window and held up a cell phone which she was led to believe was her cell phone, and the defendant motioned for her to come outside to retrieve it; and the defendant told Andrea's grandmother that he was at the house to return Andrea's cell phone to her."

Additionally, the mistaken identification of the phone was not "material." Whether the dropped phone was Andrea's or the defendant's "neither proves nor disproves the earlier robbery of Andrea's phone." Andrea's "belief" was relevant in this case, as it looked like the defendant was using her phone to lure her outside.

The defendant challenged the sufficiency of evidence as to witness tampering. The evidence established "that the defendant attempted to obtain Andrea's sympathy in order to convince her to sign a non-prosecution affidavit." "Whether a statement or other communication constitutes a true threat that has the probable consequence of causing reasonable apprehension in the hearer is a question of fact for the jury." Here, "it was not unreasonable for Andrea to feel intimidated and be apprehensive. The defendant called Andrea repeatedly, even using subterfuge to get her to answer her phone, in his attempt to convince her to come to court and drop the charges. Although Andrea agreed to meet him, she was so concerned that she contacted the police and advised them about the phone call, after which the defendant was apprehended and arrested." Additionally, the defendant placed jail-house calls to Andrea, and, after she asked him to leave her alone, he started making three-way calls to conceal where the calls were originating from. A transcript of one of those calls was included in the opinion, and it was the basis for Andrea feeling the defendant was trying to bribe her, by suggesting his mother would give her whatever she wanted.

The criminal mischief was reversed because there was no evidence that the defendant intended to shoot at a neighbor's property. The charge of criminal mischief requires proof of intent to damage the property of another; that intent is not established when the defendant's true intention was to harm the person of another. The defendant shot at and attempted to kill Andrea's cousin, Robert Smith. The shots were not directed at the neighbor's property.

[Rua-Torbizco v. State](#), 3D17-2675 (Sept. 12, 2018)

Based on the 10-20-Life statute, section 775.087(2), and then-controlling Third District precedent, the trial court, based on the jury's finding of actual possession of a firearm, imposed consecutive mandatory minimum sentences for armed burglary and three aggravated assaults. The Florida Supreme Court, in [Williams v. State](#), 186 So. 3d 989 (Fla. 2016), subsequently held that mandatory minimums were impermissible "if the offenses arose from the same criminal episode and a firearm was merely possessed but not discharged."

In this case, Rua-Torbizco's prior appellate counsel was ineffective for not raising this issue on appeal to keep it alive pending the Florida Supreme Court's disposition of [Williams](#). The sentences were vacated for resentencing in light of [Williams](#).

[Williams v. State](#), 3D18-175, 3D18-176 (Sept. 12, 2018)

Keith Williams and Kenneth Williams filed Rule 3.850 motions in two separate cases, alleging newly discovered evidence, in the form of an affidavit from a co-defendant who admitted his own involvement, but denied the involvement of either of the Williamses. The State responded, contending that there was "evidence independent of the testimony of [the third co-defendant] to prove that Defendant was responsible for the crime charged." The State's response in the trial court did not include any record attachments to support that argument and the trial court's order denying the motion was an "unelaborated order," with no attachments.

The defendants had both entered pleas and sought to withdraw them based on newly discovered evidence. On appeal, the Third District rejected the State's argument that the affidavit in support of the Rule 3.850 motions was 'inherently incredible.' The Court further rejected the argument, raised for the first time, that with due diligence, the newly discovered evidence could have been ascertained within the original two-year limitations period for a Rule 3.850 motion. These arguments were both rejected because they were not raised in the lower court and

were not articulated as the basis for the trial court's summary denial. Given the limited record that the Third District had, it could not evaluate those arguments.

The trial court's order was reversed and remanded with directions to hold an evidentiary hearing.

#### Fourth District Court of Appeal

##### Williams v. State, 4D17-407 (Sept. 12, 2018)

A \$1000 fine that the trial court had imposed, under the belief that it was mandatory, was reversed, because section 316.1935(2), Florida Statutes, does not include a mandatory fine.

##### Jeanbart v. State, 4D18-689 (Sept. 12, 2018)

The Fourth District ordered a new direct appeal based upon a finding that prior appellate counsel from a direct appeal was ineffective for having failed to raise two issues.

Jeanbart was convicted of two counts of attempted first-degree murder and other offenses. At trial, his defense was that the shootings were the independent actions of an individual he was with, and he had no prior knowledge that such actions were going to occur. He was representing himself at trial. During closing argument, he asserted that a witness made certain statements related to the defense of knowledge and intent. The prosecutor objected that the defendant was arguing facts not in evidence and the court sustained the objection. The appellate court observed that the defendant was basing his argument on the words of a witness.

The second issue related to the admissibility of a gun with the defendant's DNA, discovered hours after the shooting, where the gun was not used in the charged crime itself.

##### Dorcely v. State, 4D17-1272 (Sept. 12, 2018)

The defendant was originally sentenced to juvenile probation. He received notice at that time that the court could revoke the probation and sentence him to adult sanctions if he proved unsuitable for juvenile sanctions. DJJ subsequently filed a written report asserting such unsuitability based upon the defendant's anti-social behaviors and disregard for authority figures. He received an evidentiary hearing

and the trial court imposed adult sanctions. The Fourth District affirmed the new sentence on appeal.

Contrary to the defendant's argument, the affidavit and evidence of unsuitability for juvenile sanctions did not have to allege and demonstrate unsuitability for all juvenile sanctions; the statutory language required only proof of unsuitability after the filing of the report by DJJ stating that the defendant is unsuitable for any (not all) of the enumerated juvenile sanctions.

Chamberlain v. State, 4D15-4048 (Sept. 12, 2018)

The Fourth District affirmed a conviction for first-degree murder and addressed one issue based on a discovery violation. The trial court determined "that the defendant was not prejudiced by the State's failure to reveal fingerprint testing prior to trial and in concluding that no *Richardson* violation occurred when the State conducted further DNA testing during trial." The Fourth District found, contrary to the trial court, that each of these constituted a discovery violation, but agreed with the trial court's determination that there was no prejudice.

As to the fingerprint evidence, it had not been disclosed. When it was, after the start of the trial and opening arguments, the trial court granted a one-month recess for its review and further discovery. In opening arguments, defense counsel had told the jury that there was forensic evidence of fingerprints on the victim's vehicle and that there would be questions about that. The defense's theory was not impeded by the fingerprint evidence; the Court said that they were not "useable," and the evidence of the lack of the defendant's fingerprints would benefit the defendant.

The DNA evidence was produced mid-trial. The State obtained it after hearing defense counsel's opening argument. The Court reviewed defense counsel's opening argument and found that defense counsel had not presented any argument that would cause a problem based upon the new DNA evidence. Once again, if anything, the Fourth District found that the new evidence actually helped the defendant. It actually supported the theory advanced by the defense in opening argument.

Henry v. State, 4D17-303 (Sept. 12, 2018)

Henry appealed convictions for second-degree murder and other offenses. The Fourth District affirmed and addressed claims regarding statements made by the prosecutor.



The killing occurred either during a drug deal or a drug rip off. The prosecutor's theme in the closing argument was a comparison to the betrayal of Caesar. Henry argued on appeal that the comments portrayed him as an evil human being, who harbored an indifference to life and were disparaging. Most of the comments at issue were not the subject of objections; others were the subject of only general objections that may not have been sufficient. Henry argued that since some of the comments had been objected to, the Court could look at them cumulatively.

The most objectionable comment was on cross-examination of the defendant, when the prosecutor asked: "Do you just have a complete indifference to human life?" However, that comment, whether standing alone or in conjunction with others, did not rise to the level of fundamental error.

In other comments, the prosecutor characterized the defendant as a violent criminal, a murderer, an armed robber, a burglar, and someone the jury should not like. While those comments, "in the abstract, could be viewed as 'step too far' statements," when they were viewed in the context of the State's effort to "establish that Appellant was a willing participant in the burglary and robbery, by gunpoint, of the victim, and in light of the State's evidence supporting its charges, these characterizations of Appellant and his actions did not cross the line, either separately or cumulatively, into the realm of fundamental error."

#### Fifth District Court of Appeal

[Rogers v. State](#), 5D17-2795 (Sept. 14, 2018)

The trial court erred by failing to conduct a competency hearing and entering a written order determining competency.

The trial court granted defense counsel's motion to appoint an expert to determine competency. The expert then opined that the defendant was competent. Defense counsel disagreed and requested a second evaluation. The record was silent as to any subsequent proceedings and the case proceeded to trial, where the defendant was convicted.

On remand, the trial court was authorized to conduct, if possible, a nunc pro tunc hearing and to make findings based on it. If the defendant is found incompetent or the court can not make a determination as to the defendant's competency at the time preceding his trial, it shall vacate the judgment and sentence.

[Hart v. State](#), 5D17-3438 (Sept. 14, 2018)

Where oral pronouncements of probation revocation conflict with the written order, the oral pronouncements control.