Case Law Update
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Supreme Court of Florida

Davis v. State, SC18-7 (Oct. 25, 2018)

Davis was convicted of first-degree murder, kidnapping and sexual battery. He received the death sentence for the murder and his convictions and sentences became final in 2015. In 2015, he filed a Rule 3.851 motion. The motion was still pending in January 2017, when Davis' counsel advised the trial court that Davis "'wished to waive all of his penalty phase claims,' including his claim to *Hurst* relief." The court appointed experts to determine Davis' competency and ultimately conducted an extensive colloquy of Davis regarding the desired waiver. At that time, since the jury recommendation of death in this case had been by a vote of 7-5, Davis was advised of the likelihood of obtaining a new penalty phase based on Hurst.

The colloquy of Davis confirmed his "intent to proceed with dismissing the pending proceedings." However, "Davis made clear that he intended to retain counsel in order to bring future claims, namely those related to his execution – claims challenging the method of execution or claims regarding whether he could constitutionally be executed." In view of Davis' desire to retain counsel for those future claims, the trial court granted Davis' request and dismissed his "pending" motions.

In most postconviction waiver cases, the defendant seeks to waive both proceedings and counsel. Davis' case was unusual as he desired counsel for certain future claims. The State, on appeal, argued that the trial court should not have allowed counsel to remain on the case. The Supreme Court disagreed.

First, the Court found that Davis' waiver was valid based on the colloquy. Second, the Court found that the trial court "properly allowed Davis to waive the instant proceedings while maintaining counsel."

In Re: Standard Jury Instructions in Criminal Cases – Report 2018-02, SC18-513 (Oct. 25, 2018)

The Supreme Court authorized for publication and use amendments to existing instructions: "2.1(d) (Insanity – Psychotropic Medication); 3.5(c) (Accessory After the Fact); and 14.1 (Theft)," and new instructions: "21.17 (Compounding a Felony) and 29.5 ([Disorderly Conduct] [Breach of the Peace])."

In instruction 2.1(d), the word "insanity" is deleted, as that instruction does not address insanity; it is "given when a defendant's ability to proceed to trial is dependent on the use of psychotropic medication." A paragraph has also been added to inform the jurors not to allow the defendant's condition or any apparent side effects to affect their deliberations.

Instruction 3.5(c) was renumbered to 21.18. A "new paragraph addresses considerations that the court may need to take into account if the felony alleged is child abuse, neglect of a child, aggravated child abuse, aggravated manslaughter of a child under 18 years of age, or murder of a child 18 under 18 years of age."

The amendment to the theft instruction adds "within the definition of 'dwelling' that an enclosure around a curtilage need not be continuous as it may have an ungated opening for entering and exiting." A definition of "motor vehicle" was also added. And, a comment was added, "stating that a special instruction will be required if the defendant found lost or abandoned property and failed to report the description and location to a law enforcement officer, or unlawfully appropriated the lost or abandoned property."

Instruction 21.17 sets forth the elements of compounding a felony, under section 843.14, Florida Statutes (2018).

In Re: Amendments to the Florida Rules of Civil Procedure, et al., SC17-882 (Oct. 25, 2018)

The Rules of Criminal Procedure, among other rules of procedure, have been significantly amended, primarily as to the time to respond to documents served by e-mail. Rule 3.070 had provided an additional three days "to be added to the deadline when a party had the right or was required to do some act or take some proceedings within a prescribed period after the service of a notice or other document on the party by mail or e-mail." This has been deleted to make the criminal rules of procedure consistent with amendments to the Rules of Judicial Administration and

other rules of procedure. Rule 2.514 of the Rules of Judicial Administration now governs, and an additional period of days after service by e-mail is no longer in effect. Service by e-mail is treated the same as pleadings which were hand-delivered. The time for responding runs from the date of service of the e-mail, with no additional days added on.

Amendments to the appellate rules of procedure include provisions directed towards criminal appeals. The time in which a defendant may cross-appeal has been extended from 10 to 15 days of "service of the state's notice or service of an order on a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2)." The State's time for filing a notice of cross-appeal has likewise been extended from 10 to 15 days.

In appeals from summary denials of postconviction motions without evidentiary hearings, if the appellate court requests a response, the appellant's time for a reply has been extended from 20 to 30 days after service of the response.

Time deadlines for briefs in death penalty appeals under Rule 9.142 have been amended. The state's answer brief is due 50 days from the date of service of the defendant's brief; the defendant's reply brief has been extended from 30 to 40 days after the service of the state's brief.

Eleventh Circuit Court of Appeals

United States v. Carthen, 16-17653, 16-17753 (Oct. 25, 2018)

Codefendants Carthen and Groce were convicted of multiple counts of federal robbery and firearm offenses. Their appeals challenged the sufficiency of evidence, the admission and exclusion of "evidence relating to the testimony of the alleged coconspirator," and the constitutionality of their 57-year mandatory sentences. The Eleventh Circuit affirmed the convictions and sentences.

The evidence was sufficient as to Carthen's participation in the conspiracy to commit robbery. "Mr. and Mrs. Parker were able to identify Mr. Carthen and testified that he acted strangely when they encountered him shortly after the robbery. According to their testimony, Mr. Carthen implausibly claimed to have watched the robbery from a nearby house. An expert witness testified she was able to ascertain with a high degree of confidence Mr. Carthen's DNA on the pair of gloves and the hoodie recovered near the scene of the robbery. Mr. Martin explained in detail Mr.

Carthen's involvement in Mr. Groce's armed robbery scheme and identified Mr. Carthen on security footage from the robbery."

Mr. Martin's testimony about statements from Carthen and Groce was properly admitted under the coconspirator exception to hearsay. Under Rule 801(d)(2)(E), statements are admissible if the government "prove[s] by a preponderance of the evidence that: (1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the statement was made during the course and in furtherance of the conspiracy." "When determining whether these elements have been satisfied, 'the district court may rely on information provided by the coconspirator's proffered statement as well as independent external evidence.'" "Here, the evidence confirming Mr. Martin's testimony about the conspiracy involving Mr. Carthen included the pattern of the robberies, the hoodie with Carthen's DNA that was visible on the gas stations' security footage, and the identification of the two witnesses placing Carthen near the last robbery soon after it occurred."

The district court excluded evidence proffered by Groce to impeach Martin. The evidence tried to show that Martin previously lied under oath. On cross-examination, counsel sought to ask if Martin ever perjured himself or lied under oath before. If Martin denied that, the defense would have called two witnesses to rebut that denial. The district court permitted the perjury question, but excluded the proffered rebuttal witnesses under Rule of Evidence 608(b). There was no abuse of discretion. Rule 608(b) prohibits the use of specific instances of a witness's conduct in order to attack the witness's character for truthfulness.

The challenge to the mandatory minimum sentence was rejected. "Defendants convicted of brandishing a firearm in furtherance of a crime of violence under s. 924(c) are subject to . . . a minimum sentence of twenty-five years in prison" for every conviction after the first. Each of the defendants here was convicted of three counts under s. 924(c). The defendants' argument that the 25-year minimum could not apply when the three convictions all arose out of the same incident was rejected based on prior precedent from the Eleventh Circuit.

United States v. Jones, 17-12240 (Oct. 25, 2018)

The Court held that a second-degree murder conviction from Florida was a "'violent felony' within the meaning of the elements clause of the Armed Career Criminal Act (ACCA)."

The Court looked to the statutory definition of second-degree murder; not to the facts of the case. Jones argued that a second-degree murder could be committed under Florida law without the use of physical force, such as killing by poisoning a victim. That argument was previously rejected by the Court in Hylor v. United States, 896 F. 3d 1219 (11th Cir. 2018), which held that poisoning qualified as physical force and thus rendered first-degree murder under Florida law a violent felony under the elements clause of the ACCA. There was no relevant distinction between first- and second-degree murder under Florida law for purposes of analysis under the elements clause of the ACCA.

United States v. Hernandez, 17-15666 (Oct. 26, 2018)

Hernandez was convicted of felony conspiracy to possess with intent to distribute 500 grams or more of methamphetamine and one kilogram or more of heroin under 21 U.S.C. s. 846. He was sentenced to 240 months, the mandatory minimum under 21 U.S.C. s. 841(b)(1)(A). The mandatory minimum was based on the existence of a prior conviction for a drug-related felony.

When the existence of the prior conviction is in dispute, the court must conduct a section 851 hearing "to determine whether the defendant has a previous conviction, thus making him eligible for the sentencing enhancement." Hernandez argued that the district court erred by not applying the Federal Rules of Evidence at the section 851 hearing. Hernandez objected to: the admission of a certified judgment of a the prior cocaine possession conviction because it was a photocopy, not the original; booking photographs, based on the lack of proper authentication; testimony from a probation officer identifying the person in the photos as Hernandez although she was alleged not to be competent to give such testimony.

The Eleventh Circuit held, for the first time, joining the Eighth Circuit, "that the Federal Rules of Evidence do not apply at s. 851 hearings because they are miscellaneous proceedings akin to sentencing hearings." The decision of whether to apply the Rules of Evidence is left to the discretion of the district court. In lieu of the Rules of Evidence, the district court may apply the "sufficient indicia of reliability" standard. The evidence noted above satisfied that standard.

"In this case, the district court improperly employed the preponderance of the evidence standard" as opposed to the proof-beyond-a reasonable-doubt standard at the section 851 hearing. Absent objection, the Eleventh Circuit reviewed this for plain error. As there was sufficient evidence, including the evidence challenged above, to find beyond a reasonable doubt that the prior drug-related conviction

existed, "it was not reasonably probable that the outcome of the proceedings would have changed even if the district court had applied the correct standard."

Second District Court of Appeal

Crews v. State, 2D16-484 (Oct. 24, 2018)

The State, on appeal, conceded a sentence of 30 years in prison as a violent career criminal for grand theft was improper because grand theft is not a "primary felony" offense eligible for VCC sentencing under section 775.084(1)(d)(3), Florida Statutes (2013). However, the Second District affirmed that sentence, without prejudice, because the defendant did not preserve the sentencing issue by either objecting at sentencing or filing a motion during the pendency of the direct appeal under Rule 3.800(b). The defendant will be able to raise the issue at the conclusion of the direct appeal through a Rule 3.800(a) motion to correct illegal sentence in the trial court, or through an appellate court petition alleging ineffective assistance of appellate counsel for failing to raise the issue through a Rule 3.800(b) motion.

D.T. V. State, 2D17-1549 (Oct. 24, 2018)

D.T. was found to have committed multiple delinquent acts, including theft of a motor vehicle, theft of a firearm in the vehicle, and theft of other property that was in the vehicle. The dispositions for the thefts of the firearm and other property were reversed, because the "theft of the vehicle and of the contents of that vehicle is one act of taking."

Teltschik v. State, 2D17-1810 (Oct. 24, 2018)

A conviction for third-degree grand theft was reversed because the State failed to prove the value of the stolen items, which had to be more than $300 but less than $5,000.

The stolen items were tools and maintenance equipment from a golf resort. The grounds superintendent testified and gave the purchase price for some items but did not testify about depreciation. For others, he testified about use and current condition, but did not testify about purchase price or depreciation. As to a few items, he testified about "probable" replacement costs.

"While common sense would allow a reasonable juror to conclude beyond a reasonable doubt that the several thousands of dollars in tools and equipment

described by Mr. White was worth at least $300, the supreme court has been clear that common sense has no role in proving value in these circumstances."

Perez v. State, 2D17-2331 (Oct. 26, 2018)

Perez appealed convictions for several counts of video voyeurism. The Second District reversed because the trial court erred by denying in part Perez's motion to suppress "evidence seized subsequent to a warrantless search of the hard drive of his personal laptop computer." The search yielded secret recordings of his adult stepdaughter "in her bedroom while she was in various states of undress."

The adult stepdaughter inadvertently discovered that a television in the family's living room displayed a live video feed from her bedroom. She told her mother, who, in turn, sought her husband's consent to access his laptop. He did not consent, but she searched the laptop anyway and discovered the videos of her daughter. She contacted police and when they arrived, they observed small pinhole cameras hidden in the daughter's bedroom; the cameras were hardwired to a digital video recorder stored under the living room television.

The detective then contacted an assistant state attorney as to how to proceed, and the detective testified that the attorney, who was highly experienced, said "'to go ahead and work on the consent of [Ms. Perez] to conduct the examination of the computer.' The detective testified that at the time he called the intake attorney, he was 'prepared and ready to start typing out the search warrant.'"

The trial court denied suppression. The court found Ms. Perez's consent was invalid as the laptop was not hers. However, the court found that the videos were admissible under the inevitable discovery doctrine.

Pursuant to the Florida Supreme Court's decision in Rodriguez v. State, 187 So. 3d 841 (Fla. 2015), the Second District disagreed and reversed. The Supreme Court held, in Rodriguez, "that the inevitable discovery doctrine requires the prosecution to make a showing that law enforcement was in active pursuit of a search warrant." Although the detective was ready to start typing the application for a search warrant, that process had not begun, as it was abandoned when he pursued consent from the wife. The Court rejected the State's argument that the act of the detective in calling the state attorney's office as to whether to secure a warrant or obtain the wife's consent constituted active pursuit of a warrant.

Third District Court of Appeal

Brown v. State, 3D16-1787 (Oct. 24, 2018)

The trial court revoked Brown's juvenile sanctions and sentenced him to 25 years in prison. The Third District reversed and remanded for new proceedings "because, in revoking Brown's juvenile sanctions, the trial court: (i) made findings outside of the scope of the charging document, thereby depriving Brown of a proper notice of the basis for revoking his juvenile sanctions; and (ii) relied exclusively upon inadmissible hearsay."

Section 985.565(4)(c), Florida Statutes (2016), provides "if a child 'proves not to be suitable' for juvenile sanctions previously imposed by the court (a commitment program, juvenile probation program or treatment program supervised by DJJ), then DJJ can provide the court 'with a written report outlining the basis for its objections to the juvenile sanction' (i.e., the charging document) and schedule a disposition hearing before the court. [citation omitted]. After conducting the disposition hearing, the court, if it finds that the child is not suitable for the previously imposed juvenile sanctions, may revoke the previous adjudication and impose any lawful sentence."

Under the statute, a juvenile is rendered not suitable for juvenile sanctions: "(i) when a child commits a new violation of law while under juvenile sanction; (ii) when a child commits any other violation of the conditions of juvenile sanction; or (iii) when the child's actions are otherwise determined by the court to demonstrate a failure of juvenile sanction."

DJJ asserted in a charging document that Brown had committed a new violation of law. That was the only basis for revocation asserted. The trial court, however, based on argument from the State, viewed the disposition hearing as being "far broader." "The trial court decoupled the disposition hearing from the charging document, considered the entire panoply of evidence probative to the question of whether juvenile sanctions were appropriate for Brown in light of Brown's unprofitable experience under DJJ supervision. Thus the trial court focused not on the actual charges in the DJJ affidavit, but rather, on Brown's history of conduct while under DJJ supervision." The evidence at the disposition hearing should have been limited to whether the new violation of law was committed, as alleged in the charging document.

On remand, DJJ was authorized to amend the charging document if it chose to do so.

M.G. v. State, 3D17-1556 (Oct. 24, 2018)

"M.G., a human trafficking victim, appeals from an order denying a petition to expunge her criminal history record, filed pursuant to section 943.0583, Florida Statutes (2017) ('the Human Trafficking Victim Expunction Statute'). We affirm, because, while the statute generally permits the trial court to exercise its discretion in ordering the expunction of the criminal history records of human trafficking victims, the trial court correctly determined that the plain language of the statute excludes expunction of criminal history records related to the offense of kidnapping."

While living under the control of a human trafficker, M.G. was arrested and charged with offenses, including kidnapping, sex trafficking, and deriving support from the proceeds of prostitution. M.G. entered into a negotiated plea agreement, under which she pled guilty to sex trafficking and prostitution charges, but the state nolle prossed the kidnapping. M.G. cooperated with the State and agreed to testify against the alleged human trafficker. After serving her sentence, she sought to expunge all criminal history records. After a hearing, the court granted the petition as to all records except those related to the kidnapping charge.

The human trafficking expunction act includes the following sentence: "However, this section does not apply to any offense listed in s. 775.084(1)(b)1." Section 775.084(1)(b)1 is the habitual violent felony offender statute, and, one of the offenses listed as a qualifying predicate in that provision is kidnapping. M.G. argued that the sentence in the human trafficking statute, that the section does not apply to any offense listed in 775.084(1)(b)1, is effective only if the person petitioning for expunction was convicted of the enumerated offense. The Third District disagreed.

Fourth District Court of Appeal

Dorcely v. State, 4D17-1272 (Oct. 24, 2018) (on rehearing)

The Court withdrew its prior opinion of September 12, 2018 and substituted the new opinion for it.

The trial court found Dorcely was unsuitable for juvenile sanctions, revoked the juvenile sanction, and resentenced him as an adult. Dorcely argued "that the trial court lacked authority to revoke his juvenile sanction because the DJJ only found him unsuitable for the juvenile sanction of probation," and did not conclude "that he was unsuitable for *all* juvenile sanctions." The Fourth District disagreed. The Court quoted statutory provisions where the legislature used the indefinite article "a" "before the list of juvenile programs," thus indicating "that unsuitability proceedings must be commenced by the DJJ if a child is deemed unsuitable for *any* (not all) of the enumerated juvenile programs."

Wallace v. State, 4D17-1511 (Oct. 24, 2018)

Wallace appealed his convictions and sentences for aggravated battery and trespass in a structure. He argued that the court erred in not sentencing him as a youthful offender. The Fourth District disagreed.

Wallace argued "that the trial court failed to give proper consideration to the request for a youthful offender sentence and, rather than exercising its discretion, followed a 'general policy of not imposing a youthful offender sentence when the offender discharged a gun and caused physical injury." No "predetermined policy" was announced in this case. Rather, "the trial court alluded to a *general* policy, and announced that it would not immediately pronounce a sentence because 'I need to think about this just a little bit longer and decide how I want to sentence.'"

Bent v. State, 4D17-3885 (Oct. 24, 2018)

The Court addressed the following question: "May an officer, based on information provided by store employees, handcuff an appellant on suspicion of shoplifting although the shoplifting did not occur in the officer's presence?" The Court answered in the affirmative: "Because the legislature enacted section 812.015(30(a), Florida Statutes, which provides that law enforcement may detain based on probable cause developed from a store employee's report of suspected shoplifting, we answer in the affirmative."

The statutory provision quoted above provides an exception "to the general rule that an officer normally may effect a warrantless arrest only for a misdemeanor that occurs in his or her presence."

In this case, Bent "was observed and detained by a store employee who, based on his training in loss prevention, believed she might be shoplifting. Based on the

dispatch call and information provided to the officer by the store employees when he arrived on the scene, the officer developed probable cause. . . . The officer could have reasonably concluded that the loss prevention employee was reliable in his conclusion that appellant had attempted to steal merchandise from the store. Therefore, the officer could handcuff appellant for the purpose of attempting to effect a recovery of the merchandise."

Dixon v. State, 4D18-575 (Oct. 24, 2018)

Dixon appealed an order of the trial court denying his motion for review of sentence under section 921.1402, Florida Statutes (2016).

In 2016, Dixon, who had been a juvenile when he committed a first-degree murder, received a resentencing hearing under section 921.1401, Florida Statutes. The court held an evidentiary hearing and entered a written order sentencing Dixon to 28 years in prison. The order individually addressed each of the 10 sentencing factors enumerated in section 921.1401(2).

Two years later, Dixon filed a motion for review of sentence under section 921.1402, Florida Statutes. The trial court conducted the review hearing and, after hearing argument of counsel, orally denied the motion. The oral order did not expressly refer to either section 921.1402 or the factors enumerated in 921.1402. While the judge orally noted that the defendant was trying to better himself and now had a low risk of reoffending and had made significant positive strides, the judge stated that "at this point, I do not believe a modification of your sentence is appropriate." A written order was then entered, referring to and reiterating the prior oral findings and further incorporated by reference the analysis and reasoning from the 2016 resentencing hearing.

Dixon argued on appeal that the trial court erred by relying on the analysis and factors from section 921.1401 and the 2016 resentencing, rather than the factors set forth in section 921.1402 for a review hearing.

Dixon's argument was not preserved by either objection or motion under Rule 3.800(b) prior to briefing on direct appeal. The Fourth District did not see any fundamental error. "Nothing in the record suggests that the trial court was confused or that the court did not consider the section 921.1402 factors. On the contrary, the court's oral pronouncement alluded to some of the section 921.1402 factors." The written order did so as well.

The Fourth District's conclusion noted that it would have been better if the trial court had referenced section 921.1402 and addressed each of the enumerated factors individually. However, section 921.1402(7) does not require such detail in the written order.

G.A.Q.L. v. State, 4D18-1811 (Oct. 24, 20180

G.A.Q.L., a minor, was speeding when he crashed. One passenger died in the crash. The minor's blood-alcohol content was .086 when tested at the hospital. Police obtained a search warrant for the vehicle and located two iPhones, one of which allegedly belonged to the minor. The officers then obtained a warrant to search the phone for "data, photographs, assigned numbers, content, applications, text messages, and other information." In order to obtain that information, the State needed "both the passcode to access the phone and the iTunes password to update it." The State moved to compel the minor to provide those passwords, and the minor argued that compelled disclosure violated his Fifth Amendment rights. The trial court "determined that the act of producing the passcode and password was not testimonial" and granted the State's motion. The minor filed a certiorari petition and the Fourth District agreed with the minor and quashed the trial court's order.

"Here, the state seeks the phone passcode not because it wants the passcode itself, but because it wants to know what communications lie beyond the passcode wall. If the minor were to reveal this passcode, he would be engaging in a testimonial act utilizing the 'contents of his mind' and demonstrating as a factual matter that he knows how to access the phone. . . . As such, the compelled production of the phone passcode or the iTunes password here would be testimonial and covered by the Fifth Amendment."

The Court next addressed the "foregone conclusion exception," noting that it might apply in some circumstances, but did not apply in this case. Under this exception, production does not violate the Fifth Amendment "if the state can show with reasonable particularity that, at the time it sought to compel the act of production, it already knew of the materials sought, thereby making any testimonial aspect a foregone conclusion. . . . As it pertains to electronic files, this doctrine requires that the state demonstrate with reasonable particularity 'that (1) the file exists in some specified location, (2) the file is possessed by the target of the subpoena, and (3) the file is authentic."

The foregone conclusion exception relates to the data locked behind the passcode wall, not the password itself. The State's arguments in the trial and

appellate courts were treating the passcode as the target of the foregone conclusion. "Here, the state's subpoena fails to identify any specific file locations or even name particular files that it seeks from the encrypted, passcode-protected phone. Instead, it generally seeks essentially all communications, data, and images on the locked iPhone. The only possible indication that the state might be seeking anything more specific was the prosecutor's statement at the hearing that the surviving passenger had been communicating with the minor via Snapchat and text message on the day of the accident and after the accident, a fact that the trial court briefly mentioned in its order but did not appear to rely on in reaching its conclusion." That "stand-alone statement is not enough to meet the 'reasonable particularity' requirement of the foregone conclusion exception." The State was inferring that Snapchat and text files were located on the phone; rather, the State "must identify what evidence lies beyond the passcode with reasonable particularity."

Toole v. State, 4D17-2115 (Oct. 24, 2018)

Although the Fourth District affirmed a restitution order where the appellant argued that the State failed to prove the value of the stolen items, the Court wrote this opinion "to capture the attention of the Criminal Law Section of the Florida Bar, with the hope that it will analyze the existing convoluted scheme for restitution in Florida and make recommendations to the appropriate parties to bring lucidity to the process."

The Court's opinion found that case law on restitution "has confusingly devolved to permit a *laissez-faire* approach in order to compensate victims." The Court first observed the general rule that focuses on and defines fair market value. This was then contrasted with language in a Florida Supreme Court opinion stating that "such a rigid standard of proof is not required for purposes of restitution." The Court concluded that "Florida courts have accepted evidence amounting to less than proof of each of the four fair market value factors."

One judge dissented, observing that "while the law on restitution may be somewhat confusing, it always requires proof of the fair market value of items lost."

Fifth District Court of Appeal

Department of Children and Families v. Tanner, 5D18-2898 (Oct. 26, 2018)

Tanner was found incompetent to stand trial. The court further found that Tanner met the criteria for involuntary commitment and ordered him committed to

DCF. DCF sought certiorari review, arguing that "there was no evidence that Tanner's incompetency was the result of a mental illness." The Fifth District agreed and ordered Tanner released from DCF's custody.

One of the requirements for involuntary commitment under section 916.13, Florida Statutes, is that the "defendant must have a mental illness that renders him substantially likely to cause serious bodily harm to himself or others."