Case Law Update
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Supreme Court of Florida

State v. Peraza, SC17-1978 (Dec. 13, 2018)

The Supreme Court resolved a conflict between district court of appeal decisions on the question of whether a law enforcement officer can rely on the provisions of Florida's Stand Your Ground immunity statute if the officer, while making a lawful arrest, uses deadly force which he or she reasonably believes to be necessary to prevent imminent death or great bodily harm to himself or herself or to another or to prevent the imminent commission of a forcible felony. The Supreme Court held that a law enforcement officer may rely on the provisions of the Stand Your Ground law. The officers are not limited to the provisions of section 776.05, Florida Statutes, which is not a part of the Stand Your Ground law, and which involves the justifiable use of force when making a lawful arrest. The officers, like any other person, may seek immunity in a pretrial hearing.

State v. Lewars, SC17-1002 (Dec. 13, 2018)

The Supreme Court addressed a certified conflict regarding a provision of the prison releasee reoffender act. Section 775.082(9)(a)1, Florida Statutes (2012), requires that the defendant, "within three years preceding his or her commission of a qualifying offense, to have been 'released from a state correctional facility operated by the Department of Corrections or a private vendor.'"

Two district courts of appeal had concluded that the quoted statutory language applied "when a defendant is released from a county jail after serving a sentence entirely in the county jail where the sentence would have required transfer to a Florida prison but for the accumulation of jail credit." The Second District, however, disagreed with that conclusion.

The Supreme Court agreed with the Second District and held "that release from a county jail under the circumstances of this case does not satisfy the language of section 775.082(9)(a)1."

The district courts of appeal had disagreed as to whether an individual was released from a DOC facility "when the defendant is physically released from a county jail after having been committed to the legal custody of the Department of Corrections but not physically taken to a facility operated by the Department of Corrections." The Supreme Court analyzed the language in the statutory provision and basically held that "state correctional facility" means "state correctional facility" and a "county jail" is not a "state correctional facility."

McCloud v. State, SC17-2011 (Dec. 20, 2018)

The Supreme Court addressed a certified conflict regarding the proper interpretation of the witness tampering statute, section 914.22, Florida Statutes.

The question was whether "section 914.22(1)(e), Florida Statutes, requires the State to demonstrate that a witness attempted to contact law enforcement to prove its case in chief on witness tampering." The Supreme Court held that the statute does not require the State to prove that a witness attempted to contact law enforcement as an element of the offense.

The relevant language of the statute is:

> (1) A person who knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, or offers pecuniary benefit or gain to another person, with intent to cause or induce any person to:
>
> . . .
>
> (e) Hinder, delay, or prevent the communication to a law enforcement officer or judge of information relating to the commission or possible commission of an offense. . . .

"Nothing in the plain language of section 914.22(1)(e) indicates that the elements of witness tampering include a witness's attempt to contact law enforcement, either during or after the commission of the offense."

Brown v. State, SC18-323 (Dec. 20, 2018)

Section 775.082(10), Florida Statutes, provides that if the Criminal Punishment Code scoresheet totals 22 points or fewer, the court must impose a nonstate prison sanction unless the court makes written findings that a nonstate prison sanction could present a danger to the public. Because that provision "requires the court, not the jury, to find the fact of dangerousness to the public that is necessary to increase the statutory maximum nonstate prison sanction, we hold that subsection (10) violates the Sixth Amendment to the United States Constitution. . . ."

The Court's decision applied the principles of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004). "In order for a court to impose any sentence above a nonstate prison sanction when section 775.082(10) applies, a jury must make the dangerousness finding."

Shelly v. State, SC16-1195 (Dec. 13, 2018)

Shelly argued that custodial interrogation improperly continued after he unequivocally invoked his right to counsel.

The Court's opinion sets forth a lengthy interrogation of Shelly verbatim. Shelly had been confronted by detectives telling him that the two friends he claimed to be with at the time of the murders did not support his assertion. Shelly then continued to insist that the detectives call his mother to corroborate his alibi. At one point in the questioning, Shelly stated: ""Y'all better watch the First 48. I ain't done it. I ain't do it. When the man say he ain't do it let 'em talk to his lawyer, y'all got to let 'em go man." The Supreme Curt concluded that this passage "was not unambiguous. A reasonable police officer under the circumstances would not reasonably understand that Shelly was invoking his *Miranda* rights because Shelly simply mentioned the word 'lawyer' within the roader context of discussing a television program." Thus, at this point, the detectives "were not required to cease questioning."

Subsequently, Shelly did invoke his *Miranda* rights and questioning ceased. A detective informed Shelly that he was going to be moved to another room shortly. Shelly then asked the detective to call his mother. "We conclude that Shelly reinitiated communication with detective Consalo by asking him to call his mother, who Shelly asserted was an alibi witness."

Shelly later unequivocally invoked his right to silence. When the detective told him that he knew his rights and inquired if he wanted to talk "a little bit longer," Shelly responded, "No." The detective continued to say that he would remain and talk to him, and after asking, if that was okay," Shelly stated, "Okay, no more talk." Shelly added a few more negatives, as to talking, and the detective continued with statements to the effect of "if you want to talk I will be more than happy and I'm gonna shoot straight with you. . . ." After a few more statements going back and forth, when the detective again asked if he wanted to talk, Shelly responded, "I'll talk to you." The detective then stated that Shelly was reinitiating contact with the officers, and Shelly said "I'll talk to you." Immediately after, he said, "I don't want to talk man," and told the detective to lock him up.

Reviewing this exchange, the Supreme Court stated: "From this exchange we can see that Detective Consalo wholly ignored Shelly's invocations of his rights and immediately proceeded to attempt to coax him into continuing with the interrogation. Detective Consalo failed to cease interrogating Shelly after Shelly unequivocally invoked his right to silence." Subsequent statements by the detective were found to constitute interrogation – statements that he knew Shelly's family; promised to tell Shelly what Shelly's mother said; telling Shelly his mother was losing another son; and referencing the difference between a life sentence and getting a needle put in your arm. Thus, the continued interrogation at this point violated Shelly's Miranda rights and Shelly's statements from this point on were suppressed.

As his Miranda rights were violated, the Court could not "hold that his subsequent waiver was voluntary." That subsequent waiver "was the product of Detective Consalo's coercively persistent and repeated efforts to wear down Shelly's resistance and induce Shelly to continue the interrogation and eventually confess."

King v. State, SC17-1486 (Dec. 20, 2018)

The trial court granted a Rule 3.851 motion, remanding for a new penalty phase based on Hurst v. State, 202 So. 3d 40 (Fla. 2016), and denied the motion as to all guilt phase claims. King appealed that denial and the Supreme Court addressed multiple claims of ineffective assistance of trial counsel.

As to the alleged failure of counsel to object to numerous statements in King's interrogation video, trial counsel worked extensively on a redaction of that video, and did object to several of the remaining statements at issue. As to others, the Court found that "it was not improper for the jury to hear [the detective's] statements that elicited a reaction from King during the interrogations, especially because they gave

proper context to the entirety of the interrogation, which elicited several incriminating and inconsistent statements by King."

Counsel was not ineffective for failing to make hearsay objections. Some of the matters at issue were minor. Others, such as the content of cell phone records, did not constitute improper hearsay, as "phone company call lists are not out-of-court statements by a declarant."

The failure to object to the introduction of and repeated references to a bloody shirt found in the defendant's residence was not ineffective assistance. At an evidentiary hearing, defense counsel testified that it was a smoke screen. And, defense counsel used it as part of an argument that the "police ran a careless investigation."

Counsel was not ineffective for failing to present a DNA expert to rebut the State's expert. Counsel had consulted an expert prior to trial, and that expert stated that he would not provide much assistance to the defense's case. And, as King had admitted to being in the victim's home prior to the murder, defense counsel was advised by an expert that additional DNA testing could be "problematic." Counsel made a reasonable strategic decision.

The failure to call a shoeprint expert did not constitute ineffective assistance. Counsel deemed it unnecessary because none of the prints at the scene matched any of King's shoes. It was also possible that presenting such testimony might have opened the door to evidence about King's implication in a robbery of a nearby home a month earlier.

The failure to obtain a latent fingerprint expert was not ineffective assistance. The expert King presented at the postconviction evidentiary hearing agreed with the results of 12 print lifts from the victim's home. The disagreement as to one, which the defense expert said did have comparison value, where the Sheriff's Office had determined it had "no value," was meaningless, as the defense expert did not match this print to anyone and said it could have belonged to anyone.

The failure to object to a detective's cell phone testimony was not ineffective assistance; nor was the failure to present a cell phone testimony expert. The Florida Supreme Court has previously held that testimony from a detective "regarding the content of cell phone records and comparing cellular tower site maps to phone records was not expert testimony." "Here, Detective Cayenne testified that the cell phone records showed that King was not at home during the approximate time of the

murder, which was contrary to King's statements to the police." And, while the defense expert at the postconviction hearing "concluded that King could have been at home when he placed the 5:24 a.m. phone call the day of the murder," the Court found that King failed "to show how a cell phone expert's testimony would have elicited anything different than what [trial counsel] was able to show through his cross-examination of Detective Cayenne. . . ."

Counsel was not ineffective for failing to object to several factual statements made by the prosecutor in closing argument where those statements were "inferences that were reasonably drawn from the evidence."

Allen v. State, SC17-1623 (Dec. 20, 2018)

The Supreme Court affirmed the denial of a Rule 3.851 motion. Allen had been convicted of both the first-degree murder and kidnapping of the victim. The Supreme Court addressed multiple claims of ineffective assistance of trial counsel, a Giglio claim, and a Hurst claim.

Counsel was not ineffective for failing to object to comments by the prosecutor during the guilt phase. The prosecutor misstated that to prove felony murder, the State needed to prove only that the victim died during the kidnapping, not how she died. While the State's theory of the case was based on strangulation, there was also evidence of cocaine use, and the defense was arguing that death could have been the result of cocaine intoxication. The Court found that the defense failed to establish prejudice, "considering the totality of the correct descriptions of the elements of felony murder available to the jury."

The prosecutor also stated that Allen was strangling the victim "so tightly that it would even cause petechia." The medical examiner had stated that "really tight" strangulation would not cause petechia – small blood vessels that break in the eye. Again, prejudice was not established: "The evidence presented at trial showed that Wright was tortured, bound, and strangled by Allen. Whether petechia occurred from the strangulation of Wright does not weaken the evidence made available to the jury."

The prosecutor stated that it takes 3-4 minutes to die of strangulation. The medical examiner stated 4-6 minutes, but later qualified the testimony to saying that the belt had been around the victim's neck for three minutes and she stopped moving after three minutes. The prosecutor's statement was not "wholly inconsistent with the evidence presented at trial," "because "'four' is a correct amount of time." Allen

further failed to demonstrate that but for the misstatement, the jurors would have found him not guilty.

Counsel was not ineffective for failing to investigate and present additional mitigation evidence. At the postconviction evidentiary hearing, Allen adduced evidence of a traumatic background and mental health issues, including PTSD and sexual and physical abuse. An expert for the State testified at the same hearing that he did not believe any significant mitigation was omitted from the penalty phase; he also disputed the PTSD testimony. The Supreme Court did not address whether counsel was deficient for not obtaining this evidence, but found that Allen did not demonstrate prejudice in light of the mitigation evidence that was presented at trial.

One of the State's witnesses, who was present during the murder, had provided pretrial statements which asserted that Allen poured caustic substances on the victim's face. The same witness had previously said that he could not remember which substances those were, but that it was a lot. On direct examination, the State elicited that it was bleach, rubbing alcohol, hair spray and nail polish remover. On recross-examination, defense counsel elicited that bleach, polish remover and ammonia were poured in the victim's face and eyes and down her mouth. Allen argued that counsel was ineffective for eliciting this as it was more specific and damaging that the prior, more generic testimony. The Supreme Court found that counsel's tactics were reasonable, as counsel was eliciting inconsistencies and impeaching the witness. Alternatively, based on other evidence of tying, binding, beating, torturing and strangling the victim, Allen could not demonstrate prejudice.

The Court addressed multiple claims of failures to object or move for mistrial as to instances of prosecutorial misconduct during the penalty phase. During cross examination of a defense expert, the prosecutor stated that Allen was involved in drugs and had previously served time in prison. During cross-examination of another witness, the prosecutor stated that Allen was convicted several times for selling drugs. The Court found that prejudice was not established, as these comments "were isolated, and did not approach the same level of impropriety as comments in other cases where this Court has granted relief."

Next, the prosecutor violated a pretrial order by asking an expert two questions about Allen's future dangerousness – as a future threat to prison guards. This comment was the subject of argument on direct appeal, where the unobjected-to comment was found not to constitute fundamental error, and Allen "therefore cannot demonstrate that the questions were prejudicial under *Strickland*."

Other unobjected-to comments for which the Court found no prejudice, without addressing deficiency of counsel, included: asking an expert if "he saw Allen display signs of remorse following the murder"; the prosecutor "describing the crime scene with an imaginary script and invit[ing] the jurors to place themselves in the position of the victim"; the prosecutor stating that "'in certain cases' 'the law calls for' a death penalty recommendation"; characterizing the defense expert's testimony as saying that because he was a paid expert he would not change his opinion when confronted with new facts; referring to the pouring of liquids or water on the victim's face as water boarding torture; misstating information about a PET scan, MRIs and CAT scans; emphasizing that the defendant's mother, who was a witness, was the mother of several children who had been imprisoned; alleged misstatements of the defense expert's testimony, and alleged bolstering of the prosecutor's characterization of that testimony by advising the juror that the prosecutor "wrote down" what the expert said while testifying. Last an argument of defense counsel's cumulative errors here failed, because "each subclaim, addressed individually, is without merit, [and] the claim of cumulative error also necessarily fails."

Counsel was not ineffective for asking Allen's aunt, during the penalty phase, if he grew up around drugs and violence. Counsel made this inquiry to show the environment in which Allen grew up, emphasizing the negative atmosphere of the defendant's cultural upbringing and its impact on her.

Counsel was not ineffective, as to both the guilt and penalty phases, for failing to call a forensics expert. The weaknesses of the State's expert, as developed by a defense expert at the postconviction hearing, were the same as those elicited by defense counsel, at trial, on cross-examination of the State's expert.

The failure to impeach a witness who was present at the murder and testified for the State was not ineffective. The statements at issue were not wholly inconsistent with the witness's trial testimony, and counsel did cross-examine that same witness about many inconsistencies in the witness's testimony. For the same reasons that did not establish a deficiency on the part of counsel, prejudice could not be established.

One of the jurors expressed positive sentiments toward the death penalty. However, she was flexible and would listen to all evidence, both aggravation and mitigation, including mental health evidence, and further said that there were circumstances where she would not recommend the death penalty. As she assured

the court that she would be fair and follow the law, counsel was not ineffective for failing to challenge the juror, whether for cause or peremptorily.

A Giglio claim was procedurally barred as it should have been raised on direct appeal "where the facts supporting the claim were available." The Court went on to find that there was, in fact, a Giglio violation, as the state elicited answers regarding the defendant's prior drug convictions that were false and failed to correct them. However, there was "no reasonable possibility that the fact that the jurors heard that Allen had multiple prior drug convictions – as opposed to just one prior drug conviction – would have had an impact on their vote in the face of the evidence detailing the horrific events during wright's kidnapping that resulted in her murder."

The Hurst claim was denied because it was harmless. The jury's recommendation of death was unanimous. The jurors knew that they had to determine whether sufficient aggravators existed and whether they outweighed mitigation. And, the jurors did find the defendant guilty of kidnapping, which was used by the court to support the aggravator of murder during the course of a kidnapping. In addition to the HAC aggravator, which was supported by the evidence, and weighed heavily, "the disturbing facts of this case further support the conclusion that the *Hurst* error is harmless. Wright was bound and beaten, unable to leave Allen's home," and Wright "was strangled even as she screamed for mercy." "She died a terror-filled and painful death."

Two justices dissented, based on the failure to investigate and present further mitigation evidence.

Gosciminski v. State, SC17-1928 (Dec. 20, 2018)

Gosciminski appealed the denial of a motion for postconviction DNA testing under Rule 3.853. He had previously been convicted of armed robbery, burglary with an assault or battery, and first-degree murder, and sentenced to death.

He sought the testing of more than 40 pieces of evidence and as "the basis for testing, Gosciminski argued that there is more sensitive testing available today that may be able to develop a DNA profile if each item is sent through the amplification and electrophoresis stages." The State "contended that the evidence had either been previously tested or contaminated."

The trial court incorporated by reference the State's written closing argument and granted the motion in part and denied it in part. The motion was granted as to

six exhibits. Gosciminski argued that the trial court "did not make independent findings under rule 3.853." The Supreme Court "has previously found that a court did not err in adopting the State's closing memorandum. *See Pietri v. State,* 885 So. 2d 245, 270 (Fla. 2004)."

Most of the items referenced in the 3.853 motion had previously been tested, but the testing stopped after the second stage of testing and did not proceed further, because the lab indicated that there was "a quantitation value of 'none.'" "[I]t did not meet the minimum threshold required by the Indian River Crime Laboratory (IRCL) in order to proceed to the amplification and electrophoresis stages." It was not enough to allege that advancements in testing might result in DNA profiles being discovered. Under the rule, "the evidence must have never been tested previously or tested with results that were inconclusive." The items for which testing was granted were items that had never been tested. And, the State acquiesced to the testing of five additional items "presumably because under current testing standards enough DNA was present at the quantification stage to move forward to the amplification and electrophoresis stages." These five items were "the only ones that could possibly contain relevant DNA evidence," and they "would be the only ones eligible for DNA testing."

Gosciminski also argued that the order "fails to protect his due process rights because it does not list any procedures concerning the transportation, handling, and consumption of evidence." The order had directed the State to "provide the court a written plan agreed upon by the parties, and coordinated with any affected agency, for release and submission of evidence to FDLE." This issue was "not ripe for review," as the proposal had not yet even been "written by the State, let alone approved by the parties and the trial court."

Last, an argument that the denial of the motion "violated his substantive and procedural due process rights" was without merit, as "a state prisoner had no substantive due process right to postconviction access to the State's evidence so that he could apply new DNA testing technology that might prove his innocence." And, procedural due process was provided, as Gosciminski "was provided notice and an opportunity to be heard."

Rivera v. State, SC17-1991 (Dec. 20, 2018)

Rivera appealed the denial of a Rule 3.851 motion.

Any error in the failure to hold a case management conference pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993)," was harmless. And, a motion to exceed the page limitation was properly denied. Rule 3.851(e)(2) provides a 25-page limit for a successive motion. Rivera sought leave for a 29-page motion, based upon, in part, the alleged complexities of a Hurst claim. The State objected to the request, as Hurst was inapplicable, because the conviction and sentence were final well before Ring v. Arizona, 536 U.S. 584 (2002), and, the request for the 29-page motion was also predicated upon the "use of smaller font size on twenty of those pages."

Huff's requirement for a case management hearing applies to "initial death penalty postconviction motions." This was a successive motion. And, any error was harmless, as the motion was based entirely on Hurst, which was inapplicable, as Hurst did not apply retroactively to death sentences that were final prior to Ring.

Rivera attempted to circumvent the holdings as to retroactivity of Hurst by arguing that "the substantive aggravators were present in the statute since its creation, thus warranting full retroactive application of Hurst." This was viewed as no more than reargument of the prior Florida Supreme Court decisions on retroactivity.

The Court also rejected an effort to relitigate a previously denied claim of newly discovered DNA evidence. Rivera argued that there was an "increased likelihood that Rivera would receive a lower sentence on retrial in the post-*Hurst* landscape."

First District Court of Appeal

Whisby v. State, 1D16-3949 (Dec. 18, 2018)

In a prosecution for multiple counts of armed kidnapping with the intent to commit sexual battery, sexual battery and other offenses, the First District affirmed and found that collateral-crime evidence was admissible.

In the case under appeal, the defendant kidnapped the victim at gunpoint, forced her intoh is car, drove her to various locations, and then forced her to perform oral sex and intercourse. He then led police on a high-speed chase until he abandoned his car and forced the victim to hide under a shed with him.

In the prior crime, a sexual battery committed less than 24 hours earlier, Whisby kidnapped the victim at gunpoint, forced her into a car he previously stole, drove to a nearby park and forced her to have intercourse.

The First District found that the offenses with the two victims had sufficient similarity. They were in close proximity in time, and "in almost identical fashion." In addition to the above-noted facts, both incidents "concluded with Whisby using a tissue or napkin to either clean them or himself." He used the same vehicle and gun.

In addition to being admissible under section 90.404(2)(a), Florida Statutes, the Court found that the testimony was independently admissible under McLean v. State, 934 So. 2d 148 (Fla. 2006), which applied section 90.404(2)(b), which pertains to collateral acts of child molestation, based upon a balancing of relevant facts including the similarity of the act; closeness in time; frequency of prior acts; and presence or lack of intervening circumstances. The appellate court could rely on the alternative statutory provision, even though it was not asserted or ruled upon with findings by the trial court below, because the court conducted an evidentiary hearing on the collateral offense evidence and the analysis under the two statutory provisions was essentially the same.

Wilson v. State, 1D17-809 (Dec. 18, 2018)

The First District reversed convictions for burglary of a dwelling with an assault and armed robbery. The trial court abused it discretion by allowing an expert witness to testify for the State.

Wilson presented an alibi defense after filing a notice of intent to rely on alibi evidence. The State did not disclose the witness as an expert, but argued that the defense knew of the expert, had deposed the expert prior to trial, "and was in possession of the phone records to be referenced by the expert." The defense asserted that the witness had been deposed "solely on the use of cell phone records to locate Appellant for his arrest and not for the purpose of determining his location when the robbery occurred."

The trial court concluded that there was no discovery violation. The First District concluded that the witness should have been listed as a rebuttal witness after the defense filed the notice of intent to rely on an alibi. Applying the prejudice component of analysis for a discovery violation, the Court found that "there exists a reasonable probability Appellant would have altered his trial presentation or strategy had the State disclosed its intent to utilize expert testimony in rebuttal prior to the

defense resting its case. In fact, Appellant had previously retained an expert who concluded the cell phone records were inconclusive, which would have contradicted the testimony of the State's expert. Appellant chose not to call this witness, based, at least in part, on his belief the State would not be calling an expert witness in rebuttal. Allowing the State to proceed with presenting expert testimony amounted to trial by ambush."

King v. State, 1D17-929 (Dec. 18, 2018)

In Hatten v. State, 203 So. 3d 142, 146 (Fla. 2016), the Supreme Court held that any sentence in excess of the minimum mandatory under the 10-20-Life statute must be supported by additional statutory authority. In King, an appeal from the denial of a Rule 3.800(a) motion to correct illegal sentence, the First District held, inter alia, that the Supreme Court's decision in Hatten did not apply retroactively to a previously final conviction and sentence.

Williams v. Florida Commission on Offender Review, 1D18-0179 (Dec. 18, 2018)

Williams was convicted of first-degree murder, and other offenses. The Commission "aggravated Petitioner's presumptive parole release date for his separate conviction of shooting into occupied vehicle and for use of a firearm." "However, use of a firearm is included in the definition of the offense of shooting into occupied vehicle, and the Commission's rules do not permit additional aggravation for factors included in the definition of other convictions already used as aggravating elements."

Hall v. State, 1D18-1446 (Dec. 18, 2018)

Hall appealed a conviction for felony child abuse "for whipping his 11-year old son with a belt." The failure to instruct the jury on the affirmative defense of parental discipline did not constitute fundamental error.

The failure to instruct on an affirmative defense, when not requested, constitutes fundamental error "only when the defendant is deprived of a fair trial." This happens only if the "omitted instruction '[1] divests the defendant of his or her "sole, or . . . primary, defense strategy" *and* [2] that defense is supported by evidence adduced at trial that could not be characterized as "weak."'"

While this was the sole defense in the case, it was an extremely weak defense. There "was no evidence that the child committed any misbehavior that would

arguably justify discipline. Rather, the undisputed evidence showed that the child was given a whipping for trying to prevent Appellant from hitting his mother in the car. The parental-discipline affirmative defense affords no protection to Appellant under these circumstances."

Mayers v. State, 1D18-2926 (Dec. 17, 2018)

Mayers filed a petition for writ of prohibition, based on Stand Your Ground immunity, to seek the dismissal of charges of second-degree murder and attempted first-degree murder.

The trial court, after an evidentiary hearing, found that the evidence of self-defense was inconclusive, and that under the version of the statute prior to the amendment placing the burden on the State, the defendant was not entitled to immunity. That court alternatively found that if the burden had been on the State, the State failed to meet its statutory burden.

The First District has concluded that the statutory amendment on the burden of proof applies retroactively, and, as Mayers was entitled to its benefit, the prohibition petition was granted and discharge was ordered. Conflict with decisions of the Third and Fourth Districts was certified to the Supreme Court.

Second District Court of Appeal

Turner v. State, 2D16-3474 (Dec. 19, 2018)

While the Florida Supreme Court held, in Norvil v. State, 191 So. 3d 406, 410 (Fla. 2016), that "a trial court may not consider a subsequent arrest without conviction during sentencing for the primary offense," the Second District, under the facts of this case, held that "the trial court may consider the facts underlying the new law violations in assessing whether to revoke community control and to tailor an appropriate sentence upon revocation."

Turner, after serving 18 years in prison, was on community control for second-degree murder. An affidavit of violation of community control alleged an arrest for burglary with an assault or battery, resisting officers without violence, drug-related offenses. At the revocation hearing, Turner admitted to each of the alleged new law violations, and the State's later presented evidence "about the aggravated nature of the new law violations." The defense presented a psychologist who had diagnosed

Turner with PTSD, bipolar disorder, panic disorder, and stimulant use disorder as to the use of amphetamine.

Turner argued "that the trial court erred in sentencing him based upon its consideration of the pending new law violations," relying on Norvil. Turner argued that "because he admitted to the violations, 'there was no evidentiary hearing held to prove the new law violations by "the greater weight of the evidence."'" "He argues that he did not admit guilt as to any of the new pending charges; rather, he only admitted a new law violation as he was only arrested for those new charges."

The Second District distinguished Norvil. There, "following the defendant's entry of an open guilty plea to armed burglary of a dwelling, he allegedly burglarized a vehicle. [citation omitted]. In imposing sentence on the armed burglary offense, the trial court improperly considered the vehicle burglary. [c.o.]. But, as Mr. Turner must recognize, Norvil and all of the other cases upon which he relies involved the trial court's improper sentencing considerations following a trial or a guilty plea on the main offense; they did not implicate a controlee's conduct during a term of 'intensive, supervised custody.'"

"A trial court's decision to revoke community control is informed properly by a complete understanding of the controlee's behavior while serving community control. In our view, the arrest stemming from a new law violation is incidental to the conduct precipitating the arrest. Thus, the trial court's consideration of such conduct, in the context of a community control violation hearing, is proper."

The sentence in this case was imposed under the 1998 Criminal Punishment Code's scoresheet, which includes points for each community sanction violation. "Because the scoresheet's inclusion of Mr. Turner's community sanction points was mandated by statute, it was necessarily proper for the trial court to consider Mr. Turner's new law violations."

Third District Court of Appeal

Chiong-Cortes v. State, 3D17-1794 (Dec. 19, 2018)

The sentence was reversed and remanded for resentencing before a different judge, based on the judge's improper consideration of remorse at sentencing: "I'll tell you, Mr. Chiong-Cortes, I've heard a lot of excuses from you and I have seen the pattern of criminal conduct for close to 30 years. And the one thing I haven't heard is any remorse, just excuses." And: "And that is really the biggest concern."

Although the defense argued extensively as to mitigation, "the trial court did not expressly limit his comments regarding Appellant's lack of remorse to its rejection of the request for mitigation."

Elias v. State, 3D18-1804 (Dec. 20, 2018)

When denying a motion for post-trial release pending direct appeal of a conviction and sentence, the trial court must enter a "written order setting forth the factual basis on which the court reached its decision and the reasons for its denial."

Fourth District Court of Appeal

Johnson v. State, 4D15-4452, 4D15-4519, 4D15-4539 (Dec. 19, 2018) (on motions for clarification and certification of conflict)

The Fourth District granted the State's motions for clarification and certification, withdrew its prior opinion, and issued the current opinion. The defendant appealed convictions and sentences for two probation violations which were based on new charges filed in the third case, for which he was tried and convicted at a jury trial.

The jury trial case was based on the failure of the trial court to follow the requirements of Melbourne v. State, 679 So. 2d 759 (Fla. 1996), regarding a peremptory challenge by the State. "The ultimate question we answer in this case is whether the *Melbourne* procedure is *always* a three-step process, or a three-step process *if requested*. We determine that the *Melbourne* procedure is indeed always a three-step process."

After an objection to a peremptory challenge by the State, the court found that it was race-neutral. The defense did not make any further objection or argument at that time. At the conclusion of jury selection, the defense stated that the panel was not acceptable, in part because of the denial of the prior Melbourne objection to the juror at issue here.

In Spencer v. State, 238 So. 3d 708 (Fla. 2018), the Supreme Court reviewed a decision of the Second District in which that Court had held that the third step of Melbourne, determining whether the race-neutral reason is genuine, was required "if requested." The Supreme Court issued a plurality opinion in Spencer, agreeing with the Second District that strict adherence to Melbourne procedures was not required.

However, the Supreme Court rejected the Second District's conclusion regarding preservation. The final step of Melbourne was not discretionary. The trial court had complied with the requirements of Melbourne in Spencer "'when he requested a response from defense counsel immediately after the State provided its purported race-neutral reason and before the trial court ruled on the genuineness of the reason.''

Thus, the Fourth District, in Johnson, concluded "that at a minimum, *Melbourne* imposes a duty on trial courts at Step 3 to request a response to the proffered explanation from the opponent of a peremptory challenge once Step 2 has been completed."

Based on the foregoing conclusions and analysis, the Court in Johnson's case "simply cannot assume that a genuineness inquiry was actually conducted in order to defer to the trial court." The State argued that compliance with Melbourne could be found because the trial court, when finding the State's reason to be race-neutral, also noted that the defense had exercised both peremptory and cause challenges on black members of the venire. The Court disagreed. In this case, "the trial court prematurely curtailed the procedure."

The Court certified conflict with contrary decisions of the Second, Third and Fifth Districts. Brown v. State, 204 So. 3d 546 (Fla. 5th DCA 2016); Ivy v. State, 196 So. 3d 394 (Fla. 2d DCA 2016); and Hanna v. State, 194 So. 3d 424 (Fla. 3d DCA 2016).

One judge dissented with a written opinion.

Rosario v. State, 4D16-3360 (Dec. 19, 2018)

Provisions for 10-year mandatory minimums as part of the sentences for two conspiracy counts were stricken where it was not clear from the record that they were a part of the negotiated plea.

Owens v. State, 4D17-3504 (Dec. 19, 2018)

Owens appealed a conviction for fleeing or attempting to elude an officer. The Fourth District reversed for a new trial based on the prosecutor's closing argument.

The prosecutor was discussing the actions of Owens in speeding, and stated: "That's not what a reasonable person does and that's what the standard is, what would a reasonable person in that circumstance do?" Defense counsel objected on the basis of a misstatement of the law. The Fourth District agreed. "The reasonable person standard is the incorrect standard in determining reckless driving, knowledge and fleeing. Although the State may utilize different tools to infer knowledge, the prosecutor expressly told the jury that the applicable standard was a reasonable person standard, which is a misstatement of law."

The error was not harmless. The only issue in the case was the element of fleeing that "the defendant knowing he had been directed to stop by a duly authorized law enforcement officer, willfully fled in a vehicle in an attempt to elude a law enforcement officer." The misstatement went to "whether defendant *knew* that he was being directed to stop."

One judge dissented.

State v. Estime, 4D18-101 (Dec. 18, 2018)

The State appealed an order dismissing an information based on the expiration of the statute of limitations, and the Fourth District reversed.

The defendant was charged with two counts of sexual battery on a mentally defective person, under section 794.011(4)(a) and (e)5., based on events that occurred in 2004. In April 2004, the victim provided a statement of the incidents to the police, and the police obtained her medical and school records, showing an IQ of 40-55. After reporting the crime, the victim had an abortion, and law enforcement obtained a sample of the fetus for DNA testing. The police could not locate the defendant, whose name had been provided to the police by the victim, and obtained a warrant for his DNA and issued a BOLO.

In August 2004, a psychologist evaluated the victim and found "that she was severely mentally challenged, with abilities comparable to a four-year-old child." Findings were made as to poor memory, minimal verbal skills, inabilities to respond to questions or focus, and high levels of confusion. The victim was unable to consent to sexual activity. The State then no-actioned the case pending receipt of the defendant's DNA and testing.

U.S. Customs advised law enforcement that the defendant returned to Florida in 2017. The DNA search warrant was executed and results showed a 99.9997%

probability of paternity. The defendant was arrested in July 2017 for the two counts of sexual battery.

The offenses were first-degree felonies, with four-year limitations periods, from the dates of the offenses. At issue here was the statutory extender of section 775.15(16)(a)3., Florida Statutes (2006), which provides that for sexual battery prosecutions, the prosecution may be commenced "at any time after the date on which the identity of the accused is established . . . through the analysis of . . . DNA evidence." The question was whether the accused's identity was established by the DNA when he had already been named as the offender in 2004 by the victim.

The Court found that the statutory language was applicable to this case. "If the legislature had intended the statute to apply only to cases where the defendant's identity was completely unknown, it could have used the word 'discover,' which would have limited the statute's application. However, it did not." Additionally, the victim's questionable competency to testify and her mental condition were such that "the defendant's identity was not 'proven' during the initial investigation."

The Court's opinion also includes a footnote explaining that the 2006 legislative amendment adding the extender based on DNA evidence applied retroactively to offenses committed prior to its effective date.

Fifth District Court of Appeal

Bozada v. State, 5D18-2504 (Dec. 21, 2018)

The trial court summarily denied a Rule 3.850 motion alleging ineffective assistance of counsel "for failing to investigate and present the testimony of a potentially exculpatory witness, Sarah A." The trial court did not attach records from the trial court file to conclusively refute the claim, and it was therefore remanded for further proceedings, as it stated a facially sufficient claim, if true.

The defendant was charged with multiple counts of lewd or lascivious molestation and capital sexual battery. Three girls testified at trial as to what the defendant did to them. Ms. A also testified as to what the girls told her about the incidents. On cross-examination, defense counsel elicited that Ms. A visited Bozada in jail, but did not pursue that further. Bozada alleged in his motion that she "visited him in jail a few months prior to trial, and told him that the girls had come to her and said they made up the allegations of misconduct because they were upset with Appellant for disciplining them." He claimed this conversation with Ms. A. was

recorded and counsel failed to investigate and develop that. The State's case was based entirely on what the girls said, as there was no physical evidence.

On remand, the trial court must either attach documents that refute the allegations about the jail conversation or otherwise conduct an evidentiary hearing on the issue.

Smith v. State, 5D18-3095 (Dec. 21, 2018)

The Fifth District reversed the summary denial of a Rule 3.850 motion alleging newly discovered evidence and remanded it for an evidentiary hearing.

Smith was convicted of robbery, and there were two victims, Sharpe and Lofton. At trial, Lofton's identification of Smith was unequivocal. The other victim, Sharpe, provided an identification with a degree of uncertainty. After the conviction, Sharpe provided an affidavit stating that Lofton admitted to Sharpe that Lofton gave false identification testimony at trial.