Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Rothenberg, 17-12349 (May 8, 2019)

Rothenberg pled guilty to possession of child pornography and appealed a restitution order of $142,600 "in restitution to nine victims depicted in the images of child pornography that he possessed." "This case involves the question of how to calculate the amount of restitution a possessor of child pornography, like the defendant Rothenberg, must pay to a victim whose childhood sexual abuse appears in the pornographic images he possessed but did not create or distribute."

Rothenberg's primary argument was that the restitution order "failed to calculate and then disaggregate the victim's losses caused by the initial abuser, distributors, and other possessors from those caused by Rothenberg himself."

By way of example, one of the victims requested restitution in the sum of $10,000. This was based on an evaluation by a forensic pediatrician, who found that the victim suffered from posttraumatic stress disorder, depression and other mental health problems and that future medical care as a result of these conditions would exceed $660,000. The victim also incurred $5,000 in attorney's fees in connection with the case. Four other defendants had been ordered to pay restitution to "victims in the same series of images as" this victim, and the awards for those ranged from $1,000 to $9,000. Another victim sought restitution of $25,000, based largely on anticipated future psychiatric care costs in the range of $265,000 to $303,000. This victim noted that the requested sum was less than $1% of total losses and that 327 other defendants had been ordered to pay restitution. Another victim's loss calculations included estimated net loss wages over her lifetime of more than $800,000, in addition to attorney's fees of more than $90,000 that had been incurred.

The district court's analytical framework was based on the decision in Paroline v. United States, 572 U.S. 434 92014), which "governed how the restitution awards should be made, established a proximate cause requirement, and set forth a variety of factors for district courts to consider in determining the proper amount of restitution." Paroline included a "proximate cause requirement" for a defendant to pay "in an amount that comports with the defendant's relative role in the causal

process that underlies the victim's general losses." 18 U.S.C. s. 2259(b)(1) similarly includes a proximate cause requirement. For purposes of appellate review, the Eleventh Circuit first found that the Court "should consider whether, in light of the Paroline factors, the district court arrived at a restitution amount that lies within the general range of reasonable restitution awards dictated by the facts of the case," giving "due deference to the district court's determination that the Paroline factors, on the whole, justify the restitution amount awarded and should not vacate an award unless left with the definite and firm conviction that the district court committed a clear error of judgment in setting the award amount." And, as long as the district court "acknowledges that it has considered the Paroline factors and the defendant's arguments regarding restitution, we will not vacate a restitution award solely on the basis that the district court did not address each factor explicitly."

Rothenberg argued that the district court must first disaggregate 'the portion of the victim's losses caused by the original abuse," and second, disaggregate "the losses caused by the defendant from those caused by other possessors or distributors." The Eleventh Circuit, after an extensive discussion of cases from other Circuit Courts, rejected that argument and concluded "that a district court is not required to determine, calculate, or disaggregate the specific amount of loss caused by the original abuser-creator or distributor of child pornography before it can decide the amount of the victim's losses caused by the later defendant who possesses and views the images." The manner by which the district court calculates the "amount that comports with the defendant's relative role" is "largely left up to the district court, so long as the number is a 'reasonable and circumscribed award' that is 'suited to the relative size' of the defendant's causal role in the entire chain of events that caused the victim's loss."

Thus, "even if a victim's total loss estimate includes losses caused both by the original abuser-creator, the distributors, and other possessors, the district court need only indicate in some manner that it has considered that the instant defendant is a possessor, and not the initial abuser or a distributor, and has assigned restitution based solely on the defendant possessor's particular conduct and relative role n causing those losses."

Applying those standards, the Eleventh Circuit concluded that the district court did consider Rothenberg's "relative role as the proximate cause." The Court further found that there was no requirement that the district court "dive into the facts of every past order and position their restitution findings in relation to those of other courts." Nor is the district court "required to say why it did not follow or disagreed with restitution orders as to the same victim imposed by other courts." The number

of past criminal defendants and their restitution amounts as to the same victim are just one of many factors for the district court to consider, without having to make mathematical calculations.

The Eleventh Circuit also addressed sufficiency of evidence arguments regarding restitution as to individual victims. A requirement from prior Eleventh Circuit case law, that the government "show that a child pornography victim was aware of, and specifically harmed by, a particular defendant possessor's conduct" was found to have been abrogated by the Supreme Court's decision in Paroline.

As to one victim, an award of $42,600 was reversed and remanded for further proceedings. At the time of the restitution hearing, the victim "was still in the process of obtaining expert reports documenting her total losses." And, there was no "reasonable estimate of what those total losses might be." Counsel arguing for that victim had merely asserted that a proposed statute would "set a minimum restitution award of $25,000 for possession of child pornography," and that a statute creating a civil cause of action for victims of child pornography set liquidated damages in the amount of $150,000. This was not in compliance with the framework established by Paroline.

First District Court of Appeal

Wanless v. State, 1D17-448 (May 6, 2019)

Wanless appealed convictions for five counts of aggravated assault. He first argued that the trial court should have excluded the State's expert testimony about his sanity. He argued that section 916.115(1)(a), Florida Statutes "precludes expert testimony from anyone who is not a psychiatrist, licensed psychologist, or physician." The Court disagreed. That statute pertains to the qualifications of experts the court appoints to evaluate sanity. "Although experts appointed pursuant to section 916.115 sometimes testify at trial . . . the parties may also introduce '[o]ther evidence regarding the defendant's insanity or mental condition,' so long as it is otherwise admissible."

He also argued that his consecutive sentences under the 10-20-Life statute "were illegal because his convictions stemmed from a single criminal act." The convictions arouse out of an episode "during which Wanless threatened his father and law enforcement officers." One count pertained to the assault on the father with a knife; the other four were for assaults on three deputies and the father with a gun. Wanless fired one gunshot, but had multiple victims.

The First District's opinion includes extensive analysis of decisions under the 10-20-Life statute, and ultimately concludes that while multiple gunshots could constitute separate acts to support consecutive sentences, "in Wanless's case, with just one shot, there are no distinct acts to effect the bifurcation. There were multiple victims, but each was victimized by the same act, the same assault, the same single gunshot." The consecutive mandatory minimum sentences were therefore reversed.

One judge dissented as to the 10-20-Life decision.

Gloston v. State, 1D17-2756 (May 6, 2019)

Gloston appealed convictions for kidnapping and attempted sexual battery. He argued that the evidence was insufficient as to kidnapping "because the asportation of the attempted victim was incidental and inherent to the crime of attempted sexual battery." The First District disagreed and affirmed. The Court discussed and applied the elements of Faison v. State, 426 So. 2d 963), for determining whether the movement or confinement was sufficient to establish the offense of kidnapping.

Gloston "forcefully moved J.S. off the elliptical machine" in a gym, and then "proceeded to struggle with J.W. in an attempt to drag her out of the hotel gym, into the hallway, and toward the pull deck. . . . These acts are neither slight, inconsequential, nor incidental to Gloston's intent of sexually battering J.W."

The asportation "was not inherent to an attempted sexual battery. Gloston chose not to sexually batter J.W. in the hotel gym." The asportation was "part of his intent to forcibly move J.W. in order to facilitate a sexual battery."

The third and final relevant factor was that "Gloston's actions were significant and independent of an attempted sexual battery and were done to lower the risk of detection." Gloston argued that the fact that he "chose to pull down J.W.'s shorts in the hallway shows that the asportation was simply a part of his attempted sexual battery because the hallway was a public area and he could have been easily discovered. But Gloston only began his attempt to sexually batter J.W.in the hallway after she told him that she 'gave up.' Before that point, Gloston was forcibly moving J.W. towards the pool deck. Furthermore, the State elicited testimony that the pool deck was dark. Thus, it is entirely reasonable to conclude that Gloston was moving J.W. to the pool deck since the dimly lit area decreased the risk of detection.

Daniel v. State, 1D19-0516 (May 6, 2019)

Daniel was convicted of multiple offenses arising out of a high-speed car chase through a residential neighborhood, during which he was pursued by police for running a stop sign. The convictions included vehicular homicide and fleeing or eluding. The driver of a vehicle was killed; passengers were injured; and individuals in a yard where Daniel's car came to rest were injured. Jury instructions for fleeing or eluding omitted "serious bodily injury" as an element of the offense. Fleeing or eluding, under section 316.1935(3)(b) is a first-degree felony when it causes the death or serious bodily injury of another person.

Daniel argued that the "single homicide rule" precluded dual convictions for vehicular homicide and fleeing or eluding. The First District agreed, citing Crusaw v. State, 195 So. 3d 422 (Fla. 1st DCA 2016) and McCullough v. State, 230 So. 3d 586 (Fla. 2d DCA 2017). The remedy was to vacate the conviction for first-degree fleeing or eluding and remand for entry of a judgment for the lesser included offense of second-degree fleeing or eluding, which does not include the element of causing death.

One judge concurred in result only, emphasizing the significance of the Supreme Court's recent decision of Lee v. State, 258 So. 3d 1297 (Fla. 2018), which prohibits the court from considering the evidence, jury instructions, verdict form, or anything other than the charging document, to determine whether multiple punishments were erroneously imposed for the same act. The concurring opinion then analyzed the language under which the two counts were charged and based its conclusion solely on that. The concurring opinion would have certified to the Supreme Court the question of whether Lee applies to "all same-conduct multiple-punishment claims, or only to the soliciting and traveling claims indicated in that decision."

Segura v. State, 1D18-520 (May 6, 2019)

After a murder trial ended in a hung jury and mistrial, Segura filed a certiorari petition, challenging the exclusion of evidence that another man confessed, because the same evidentiary issue would arise at the next trial. The First District concluded that it lacked jurisdiction to issue a writ of certiorari because the petitioner could not demonstrate that he would otherwise suffer irreparable harm.

If the evidence is excluded again at the second trial and Segura is convicted, the issue can be raised on direct appeal. And, neither "pretrial detention nor the

possibility of another mistrial constitutes the type of irreparable harm necessary to support certiorari jurisdiction."

Dooly v. State, 1D18-2455 (May 6, 2019)

A trial court lacks jurisdiction to revoke probation and resentence a defendant where the defendant had already served the statutory maximum time on probation before the filing of the probation violation affidavit.

Brown v. State, 1D18-3623 (May 6, 2019)

The summary denial of a Rule 3.850 alleging ineffective assistance of counsel for failing to seek suppression of evidence and for failing to challenge the sufficiency of the information was reversed for further proceedings because the attachment of the plea colloquy, in which the defendant generally expressed satisfaction with counsel and agreement as to actions taken and not taken, was insufficient to conclusively refute the claims. As to the suppression issues, the plea colloquy did not demonstrate that the defendant had been made aware of the suppression issues prior to entering his guilty plea.

Second District Court of Appeal

Thomas v. State, 2D17-417 (May 10, 2019)

Thomas appealed convictions for possession of a controlled substance and possession of drug paraphernalia. All of the convictions were reversed because "the evidence was legally insufficient to establish that Thomas constructively possessed the illegal drugs and drug paraphernalia." The Court summarized the relevant evidence:

> Here, the undisputed evidence demonstrates illegal drugs were discovered in a location that was accessible to many individuals who either resided in the home or who had access to the home. Thomas's mother testified that she resided in the house with her six children, all of whom had access to the house and each of the four bedrooms within the house. She further testified that her nieces and her sons' girlfriends also had access to the house. While the State offered evidence that Thomas occupied the bedroom containing the illegal drugs, the evidence also

> established that women's clothing and "possibly" shoes were discovered in the bedroom. Under such circumstances, it is settled that we many not infer Thomas's knowledge of the contraband's presence and ability to exercise dominion and control over it.

The State had tried to tie Thomas to the bedroom where the drugs were found by a prescription pill bottle with his name on it, found on top of the dresser where the drugs were found; shoe boxes for men's shoes matching Thomas's shoe size, which were found in the same room; and several items that contained Thomas's picture, as well as photos of Thomas with a woman.

Rubio v. State, 2D18-2253 (May 10, 2019)

The Second District reversed the denial of a trial court habeas corpus petition, assessing its viability in terms of both Rule 3.850 and Rule 3.800(a).

The petition raised sentencing scoresheet issues. The trial court treated the habeas petition as a Rule 3.850 motion and concluded that it was filed beyond the two-year time limit. As the motion contained claims related to scoresheet issues, it could have been treated as a Rule 3.800(a) motion, and such motions have no time limits. However, under Rule 3.800(a), a sentencing scoresheet claim is subject to harmless error analysis under the "could have been imposed standard."

Under Rule 3.850, however, if the motion were timely filed, the same scoresheet issue would have been subject to a different harmless error analysis – the "would have been imposed" standard. The Second District therefore looked at the lower court's time bar as to Rule 3.850 and found that it was in error.

First, the two years for the Rule 3.850 motion did not commence with the date of the mandate from a prior postconviction proceeding. At the time of that mandate, August 13, 2013, the trial court had vacated a prior conviction, but had not rendered an amended judgment and sentence. Thus, at the time of that mandate, the defendant lacked any appealable order. Next, the trial court relied on October 15, 2013, the date on which the State announced a nolle prosse as to one pending charge. This, however, did not constitute an appealable judgment and sentence. Indeed, as of the time of this appeal, an amended judgment and sentence following the granting of postconviction relief had not yet been issued, and the two year period for filing a Rule 3.850 motion had not even begun to run.

State v. Bellamy, 2D17-806 (May 8, 2019)

The State appealed a trial court's sentencing order which was a downward departure based on the finding that the defendant "required specialized treatment for a mental disorder that is unrelated to substance abuse or addiction and for a physical disability, and Mr. Bellamy is amenable to treatment." The Court reversed due to insufficient evidence to support those findings.

There was no testimony to support the existence of a mental disorder. Bellamy had never been diagnosed with mental health issues and never testified as to any treatment for a mental illness. Although his daughter testified that he was diagnosed for the physical disability of mesothelioma, that was based on "what her father told her." Bellamy's only testimony regarding it was that when he was in jail, "one doctor told me I had that disease, and that's all I know." There was additional, vague testimony regarding an eye examination, gout, arthritis, difficulty hearing, and skin problems, but no medical records or expert testimony were presented.

Quijano v. State, 2D17-2541 (May 8, 2019)

The defendant appealed an order revoking sex offender probation. Although the State and trial court relied on an uncharged violation of condition 21 for possessing pornographic material, which requires a relationship to the pattern of deviant behavior that led to the original sex offender probation, rather that condition 33, which prohibits the possession of any pornographic material, the error was deemed harmless.

The alleged violation of condition 21 necessarily included an alleged violation of condition 33, the possession of any pornographic material.

Forbes v. State, 2D18-952 (May 8, 2019)

Forbes appealed the denial of a Rule 3.850 motion following an evidentiary hearing. During the course of an evidentiary hearing on a first rule 3.850 motion, Forbes learned for the first time "that her counsel failed to convey a purported probationary sentence offered by the State." The motion which led to that discovery resulted in an appeal and an affirmance. About nine months after the evidentiary hearing where Forbes learned of the failure to convey, Forbes filed a second Rule 3.850 motion, based on newly discovered evidence, regarding the failure to convey that plea offer. The trial court granted an evidentiary hearing and denied the motion, which order was appealed.

The second motion was deemed timely because of the allegation that the failure to convey the offer was first learned during the prior evidentiary hearing in November 2014, nine months prior to the filing of the motion containing the claim of newly discovered evidence. And, a claim of newly discovered evidence may be an exception to the bar against successive 3.850 motions.

At the evidentiary hearing on the second motion, defense trial counsel testified about a discussion of a "potential probationary plea offer" with the prosecutor. However, "the State never offered such a deal because the parties could not agree on the amount of restitution." As the testimonies of defense counsel and prosecutor were inconsistent, the trial court was able to credit the prosecutor's denial of the existence of any such plea offer and the motion was properly denied after the evidentiary hearing.

Third District Court of Appeal

Odom v. State, 3D17-1330 (May 8, 2019)

A prosecutor's "passing reference to 'jail calls' in closing argument" was the subject of the denial of a motion for mistrial. The motion for mistrial was properly denied, within the trial court's discretion, where it related to a "single word amidst ten pages of closing argument," and the reference "was not 'so prejudicial as to vitiate the entire trial.'" The 16-minute jail call was admitted into evidence, but was not identified at that time as a jail call.

State v. Gottfried, 3D19-699 (May 8, 2019)

A certiorari petition filed by the State was dismissed due to a lack of jurisdiction. The Court's opinion sets forth the general principles regarding certiorari jurisdiction, but does not set forth the issue raised in the State's petition. The Court notes that costs of further litigation, and the time, trouble and expense of an unnecessary trial are not considered irreparable harm for the purpose of establishing the existence of certiorari jurisdiction.

Link v. State, 3D19-759 (May 8, 2019)

A mandamus petition seeking to compel the trial court to hold a stand-your-ground immunity hearing was granted, and the trial court was ordered to hold the hearing within 45 days.

A colloquy between the court and counsel indicated that the judge was deferring the hearing based on the court's understanding that a relevant case was pending in the Florida Supreme Court and that the State was entitled to obtain a ruling in that case before proceeding with the trial court hearing. The defendant had been seeking the hearing since May, 2018.

When a district court of appeal issues a decision, as had the Third District on the significant legal question – i.e., Love v. State, 247 So. 3d 609 (Fla. 3d DCA 2018), addressing the retroactive application of the 2017 statute amending the burden of proof – that decision is binding within that district, as well as elsewhere in the state when no other district court has issued a contrary opinion. The trial court was incorrect when it stated that "once the Supreme Court 'accepts jurisdiction that [district court's] decision isn't really quite binding.' Until the decision of this Court . . . is overruled or otherwise affected by a decision of the Florida Supreme Court, this Court's decision is binding on the trial courts within the Third District."

Fourth District Court of Appeal

Kemp v. State, 4D15-3472 (May 8, 2019)

On Kemp's second amended motion for rehearing, the Court withdrew its prior opinion and issued the current one.

Kemp appealed convictions for five counts of vehicular manslaughter. The issue on appeal was whether he operated "a motor vehicle . . . in a reckless manner likely to cause the death of, or great bodily harm to, another." There was a factual dispute as to whether he was in control of the car at the time of the crash.

The State "relied on expert opinion testimony that appellant had applied the brakes before the crash. The expert's braking opinion was based solely on his visual observation of crush damage to the victim's car." The Fourth District reversed with directions to the trial court to conduct a Frye hearing as to the admissibility of this opinion testimony.

The car accident occurred on I-95, near an exit which had curvature that, according to the lead investigatory, would require the driver to maneuver the vehicle to make the curve. Kemp's car sped down the exit ramp, into the perpendicular intersection at the end of the ramp, impacting the other vehicle at about 128 miles per hour, according to an expert for the State. Kemp, when paramedics arrived, was

awake, but mostly in and out of consciousness. One issue was whether he lost consciousness before the crash. Kemp testified that he fainted at the wheel and did not have control over the car at the time of the collision.

One issue pertained to the admissibility of an officer's testimony under Daubert, which was applicable at the time of the trial. The officer "testified that the crush damage to the Lexus went downward in 'an arc-type fashion,' which indicated that the front end of appellant's car was dipping as it was colliding with the Lexus. If a car is dipping, Dooley explained, this indicates 'that there is some type of braking or driver input.'" By the time of the Fourth District's current decision, the legislature's adoption of the Daubert standard was no longer operative, as the Florida Supreme Court held that it was an unconstitutional statute. Thus, the trial court did not apply the Frye test at the time of the trial.

Frye applies to new or novel science. While accident reconstruction itself is not new or novel, it does not follow that "every method purported to reconstruct some aspect of driving is based upon generally accepted underlying scientific principles and methodology." Due to the importance of the testimony on the issue described above, the Fourth District reversed and remanded for the Frye hearing.

On remand, if the trial court finds that the testimony satisfied the Frye test, it can reinstate the convictions and sentences. If the State fails to satisfy its burden under Frye, the trial court must grant a new trial.

Little v. State, 4D17-2611 (May 8, 2019)

The trial court failed to hold a competency hearing after appointing an expert to determine competency. The Court applied its recent decision in Machin v. State, 2019 WL 1549376 (Fla. 4th DCA April 10, 2019), and temporarily relinquished jurisdiction to the trial court to determine, nunc pro tunc, if possible, Little's competency. Depending upon the trial court's conclusion as to competency, the trial court will then proceed with one of the paths outlined in Machin.

Puzio v. State, 4D17-3034 (May 8, 2019)

Puzio appealed from resentencing for two counts of first-degree murder and one count of armed carjacking committed while he was a juvenile.

The Fourth District reversed because on the first-degree murder counts no jury found beyond a reasonable doubt that Puzio "actually killed, intended to kill, or

attempted to kill the victims." The trial proceeded on alternative theories of premeditated murder and felony murder and there were two perpetrators in addition to the defendant.

During the penalty phase of the original trial, which was in the 1990's, the jury considered various mitigating factors and found that Puzio "was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor." The verdict did not specify whether the jurors were finding premeditation or felony murder. The trial court conducted its resentencing hearing in 2017. The court imposed 60-year sentences for each count of first-degree murder, with entitlement to judicial review after 25 years.

By relying on section 775.082(1)(b)1., for the resentencing, the court was required to make a finding of actual killing, intent to kill, or attempt to kill. The lack of such a jury finding on the verdict form resulted in an omission that could not be deemed harmless. While the State pointed to evidence to support such a finding, the record did not demonstrate "beyond a reasonable doubt that a rational jury would have found the defendant killed, intended to kill, or attempted to kill the victim." There was conflicting evidence as to who the shooter was.

White v. State, 4D17-3500 (May 8, 2019)

In 2017, White, who was convicted of first-degree murder for a homicide committed while a juvenile, was resentenced to life in prison with judicial review after 25 years.

The Fourth District reversed due to the failure of the trial court to obtain a PSI. A PSI is required under Rule 3.701(a) for a first-time felony offender or juvenile offender where the court has discretion as to sentencing and probation is not ordered. Under the current juvenile sentencing statutes, section 775.082(1)(b)1, which the trial court ultimately relied on, provided discretion within the range of 40 years up to life. The failure to obtain the PSI was properly preserved through a Rule 3.800(b) motion pending the appeal from the resentencing.

The Court also addressed and rejected White's argument that section 921.1401 violates the Sixth Amendment "by allowing the trial court, rather than a jury, to make the finding as to whether life imprisonment is an appropriate sentence for a juvenile offender under the relevant sentencing factors." The Fourth District agreed with prior decisions of the First and Third Districts, which found that the

statute "does not alter the statutory maximum or minimum that may be imposed on a juvenile offender; nor does it make the imposition of a life sentence contingent on any particular finding of fact." The statutory factors referenced in section 921.1401 "are not elements that enhance the prescribed penalty, but rather 'are merely sentencing factors which the trial judge may take into consideration when exercising his discretion to impose a sentence within the range prescribed by statute and ensure proportionality.'"

Palomino v. State, 4D18-197 (May 8, 2019)

In a direct appeal of a conviction for aggravated battery and two violations of a domestic violence injunction following a jury trial, the State conceded that the defendant was entitled to a new trial where one full day of the trial transcript was missing, as the court reporter's files did not have it, and it could not be reconstructed.

Fifth District Court of Appeal

Johns v. State, 5D18-1877 (May 10, 2019)

The summary denial of one claim of ineffective assistance of counsel – for failing to argue "that the trial court improperly considered impermissible matters – his 'psychopathy' and that he might 'be a budding psychopath' when there was no evidence to support the trial court's observations," was reversed for further proceedings. The trial court did not attach records to its written order to conclusively refute the claim.

McKenzie v. State, 5D18-2206 (May 10, 2019)

The Fifth District reversed an order designating the defendant as a sexual predator, because the trial court lacked jurisdiction to do so. The order was entered after the defendant completed his prison sentence. The trial court relied upon Cuevas v. State, 31 So. 3d 290 (Fla. 3d DCA 2010), with which the Fifth District now disagreed and certified conflict. The Court's decision was based upon statutory construction of section 775.21(5)(c).

Adams v. State, 5D18-2424 (May 10, 2019)

The summary denial of a motion for the return of property was reversed for further proceedings.

The Fifth District discussed differences between two statutory provisions. Section 705.105 applies where law enforcement seized property intended for use in a criminal or quasi-criminal proceeding. A summary denial under this provision requires the trial court to attach portions of the record showing that the property was seized pursuant to a lawful investigation or held as evidence.

Section 95.11(3)(i) applies when the property was not seized as evidence or pursuant to a lawful investigation, "such as where a defendant's property is held for safekeeping upon arrest." The trial court, under this provision, need not attach portions of the record to its order.

Neither the record before the Fifth District nor the trial court's order demonstrated which provision applied. The case was therefore remanded for further proceedings, to determine which statute applies, and then to act appropriately, if further action is required, under the relevant statute.

Lancaster v. State of Florida, Department of Corrections and Florida Commission on Offender Review, 5D18-2871 (May 10, 2019) (on motion for rehearing)

The Fifth District granted certiorari review from an order denying a trial court habeas petition. Lancaster had been on parole and tested positive for cocaine and THC. He claimed the drugs were for relief of pain resulting from chemotherapy treatment. A hearing officer recommended reinstatement of parole; the Florida Commission on Offender Review disagreed and revoked parole. Several years later, Lancaster filed the habeas petition to compel the restoration of the original conditions of parole due to the failure of the FCOR to make statutory findings that the violation was willful and substantial.

The record did not demonstrate what was found to be willful and substantial and the case was remanded to the circuit court for consideration of the claim.

Although the habeas petition was filed several years after FCOR's revocation and the Fifth District was sympathetic to the argument that the issue was not raised in a timely manner, FCOR did not raise that defense in the trial court and there is no time limit to the filing of a habeas petition challenging a finding of a parole violation. Timeliness may be raised in the trial court as an affirmative defense of laches.