Case Law Update
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Eleventh Circuit Court of Appeals

Delva v. United States, 16-12947 (April 29, 2019)

Two defendants appealed multiple convictions arising out of identity theft and tax fraud operations.

A motion to suppress evidence seized from an automobile under the automobile exception to the requirement of a warrant was properly denied. "For a warrantless search of an automobile to be constitutional, '(1) the automobile must be readily mobile, and (2) there must be probable cause to believe that it contains contraband or evidence of a crime.'" Probable cause in this context means "'there is a fair probability that contraband or evidence of a crime will be found in the vehicle' under the totality of the circumstances."

Agents received a tip that the defendants were conducting identity theft and tax fraud operations out of a townhouse. The tipster was provided with a recording device and went to the townhouse and provided the agents with photographs of large numbers of credit cards, laptops, a money counter and a firearm. The tipster then advised the agents of the defendants' plan to relocate the operation shortly. The agents observed one of the defendants remove three shoeboxes and a backpack from the townhouse and load them into a Mercedes. Prior photos from the townhouse had shown the credit cards in a shoebox. Agents looked into a window of the Mercedes and observed what appeared to be credit or debit cards in a box with a lid ajar. Under these facts, probable cause was found to exist.

The Court made the alternative finding that the evidence would have been discovered under the inevitable discovery doctrine. The agents not only obtained a warrant later that same day, but were already actively pursuing the warrant.

The Court also addressed several sufficiency of evidence claims. The evidence was sufficient as to conspiracy to possess unauthorized access devices. The undercover investigation placed Kenny Delva at the townhouse, with Bechir Delva and Francois, a cooperating source. A video "depicted Kenny right alongside

laptops, documents listing PII, debit cards, a money counter, and a rifle – all out in the open. At one point, Kenny was holding a laptop power cord and papers. As observed earlier, the fraudulent tax returns were filed using computers and the papers containing PII had hundreds of names of real people with their dates of birth and Social Security numbers." Kenny Delva also made incriminating statements that are set forth in the opinion. The same evidence was deemed sufficient as to the charge of possession of unauthorized access devices, as it demonstrated an awareness of and ability to "control the PII and debit cards that were being used in the identity theft and tax fraud scheme. For instance, the video recording placed Kenny in the townhouse surrounded by the identity theft and tax fraud evidence and showed him talking about purchasing 'plastic,' among other things."

There was no abuse of discretion in permitting a detective "to testify as an expert" regarding "the terminology and jargon used" in identity theft and tax fraud cases. The Court found that the detective had substantial experience in such investigations and that many "involved criminals using coded terminology." And, his "testimony assisted the jury in understanding how the slang terms used by Bechir and Kenny related to the terminology used in this stolen identity refund fraud. For example, in his post-Miranda interview, Bechir admitted to finding the 'fos' online and using it to file fraudulent tax returns. Detective Sealy competently testified that, in South Florida, 'fos' is a common slang term used in 'stolen identity refund fraud' and means personal identifying information or PII, such as an individual's name, date of birth, and Social Security number."

United States v. Hano, 18-10510 (April 30, 2019)

Hano and codefendant Arrastia-Cardoso appealed convictions of Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. The Court addressed two first-impression questions: "(1) whether a five-year statute of limitations for a defendant implicated by DNA testing, 18 U.S.C. s. 3297, permits indictment within five years of that testing regardless of whether the limitation period otherwise applicable to the offense has already expired; and (2) whether the Confrontation Clause of the Sixth Amendment, *see Bruton v. United States*, 391 U.S. 123 (1968), or the Due Process Clause of the Fifth Amendment prohibits use of the nontestimonial statements of a nontestifying criminal defendant against his codefendant in a joint trial."

The offenses Hano was charged with were typically subject to the five-year limitation period for noncapital crimes, 18 U.S.C. s. 3232(a). However, s. 3297 provides that "[i]n a case in which DNA testing implicates an identified person in

the commission of a felony, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period."

The offenses in this case occurred in 2009; the indictment was returned in March 2016. The district court found that it was within the applicable five-year period of the DNA exception because "DNA testing did not implicate [Hano] in the charged crimes until June 26, 2015, which left the government with five years to indict Hano after that date." Hano argued that the DNA exception was inapplicable because an application note to section 3297 provides: "The amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section if the applicable limitation period has not yet expired." Hano argued that the "has not yet expired" language meant "at the time the defendant is implicated by DNA testing," and that the exception "only extends a non-yet-elapsed limitation period." The government argued, and the Eleventh Circuit agreed, that the quoted language referred to the standard limitation period not yet having expired at the time of enactment of the DNA exception, and was not related to the time at which the DNA evidence was discovered.

Hano made incriminating statements to Borrego Izquierdo. Hano did not testify at the trial. The codefendant, Arrastia-Cardoso, argued that the admission of Hano's statements to Izquierdo violated Arrastia-Cardoso's Confrontation Clause rights under Bruton and Crawford v. Washington. The Eleventh Circuit, for the first time in a published opinion, joined other circuits in concluding that Bruton applied only to testimonial statements. The statements made by Hano to Izquierdo, however, "were plainly nontestimonial. . . . When Hano spoke with Borrego Izquierdo, no future prosecution was on the horizon. Hano was not presently under investigation and had no reason to believe that his statements to Borrego Izquierdo would ever be used in court. Borrego Izquierdo likewise had no ground to suspect that he would ever testify against Hano. What transpired between them was a friendly and informal exchange in which Hano happened to reveal evidence that would ultimately be critical to the government's case when Borrego Izquierdo decided to come forward years after the robbery."

The Eleventh Circuit rejected an alternative request to "adopt a rule that would extend the rule of *Bruton* to nontestimonial statements on procedural-due-process grounds." Such a rule would provide a more expansive right than that secured by the Confrontation Clause, "reducing the Confrontation Clause to surplusage."

Evidence of Hano's subsequent flight by boat to Cuba from Texas in 2010 was properly admitted as evidence of flight. The Court rejected an argument that this transformed the case from one of robbery and conspiracy into a case "about immigration." The evidence was not unduly prejudicial. The government did not argue in the trial court that "Hano was illegally present in the United States," and the jury was not invited to find guilt "on the basis of immigration status."

Nance v. Warden, Georgia Diagnostic Prison, 17-15361 (April 30, 2019)

The Eleventh Circuit affirmed the denial of a federal habeas corpus petition challenging a death sentence.

Nance did not argue that counsel were ineffective for failing to investigate and develop more mitigating evidence, the typical ineffective assistance claim in penalty phase proceedings. Rather, he argued that counsel were "ineffective in how they *used or failed to use* all that they learned in their extensive investigation. More specifically, his present attorneys fault counsel for deciding not to present more of the mitigating circumstance evidence, especially more expert witnesses, than they did." Without providing extensive details as to who was called and who was not, the Eleventh Circuit observed the high burdens that a petitioner has in establishing such a claim, which is "virtually unchallengeable." Defense counsel called 23 witnesses, whose testimonies covered a wide array of areas of mitigation.

Nance also challenged the state trial court's requirement that he wear "a stun belt under his clothes during the resentencing trial without holding a new evidentiary hearing to determine whether the restraint was necessary." The Court addressed this in terms of the federal habeas standards – whether the state court decision was contrary to or an unreasonable application of clearly established federal law, as construed by the United States Supreme Court. Nance relied on cases involving "visible" security restraints, and the rationale of those decisions did not extend to restraints that were not visible. And, an Eleventh Circuit decision, United States v. Durham, 287 F. 3d 1297, 1306 (11th Cir. 2002), holding that the decision to use a stun belt "must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints," was not applicable, as federal habeas challenges to state court convictions are focused on clearly established federal law as determined by the Supreme Court. Circuit precedent does not constitute clearly established federal law as determined by the Supreme Court, and can not form the basis for federal habeas relief under AEDPA.

United States v. Spence, 17-14976 (May 2, 2019)

Spence was convicted on child pornography charges on the basis of videos on his cell phone. The phone and its videos were discovered when he arrived at the airport from Jamaica, and he told agents that he received the two videos while he was in Jamaica; that he showed one to show school children there to encourage them to report molestation; and that he sent the videos to women with children while he was in Jamaica. On appeal, he argued that the "distribution of the videos while he was in Jamaica should not have affected his Guidelines calculation," as the use of that conduct for sentencing purposes would violate "the principle that legislation of Congress should apply only within the United States unless a contrary intent appears." The "narrow issue in this appeal is whether the presumption against the extraterritorial application of congressional legislation should be extended to apply also to preclude a sentencing judge from considering extraterritorial conduct which would otherwise be properly considered as relevant conduct."

The Eleventh Circuit agreed with decisions from the Seventh and Tenth Circuits which held "that the presumption against the extraterritorial application of congressional legislation does not apply in the sentencing context of a court's consideration of relevant conduct that occurred outside the United States." The offenses for which Spence was convicted – transportation and possession of child pornography, did occur in the United States. That the Jamaican conduct occurred outside the United States and was being considered as to the gravity of the United States offenses, "does not mean that he was sentenced for that extraterritorial conduct." There was no language in the Sentencing Guidelines limiting consideration of relevant conduct to that occurring in the United States. And, 18 U.S.C. s. 3661 provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

It was acknowledged that two Second Circuit decisions could be viewed as "being in some tension with our holding."

First District Court of Appeal

Pasicolan v. State, 1D14-2634 (May 2, 2019)

On remand from the Florida Supreme Court, the First District applied the Supreme Court's recent decision in Lee v. State, 258 So. 3d 1297 (Fla. 2018), and

vacated convictions for unlawful use of a two-way communications device and use of computer services to solicit a minor, as they constituted double jeopardy violations. The defendant had also been convicted of traveling to meet a minor and transmission of material harmful to minors. In Lee, the Supreme Court held that for double jeopardy purposes, the reviewing court should consider only the charging document to determine whether the multiple convictions were based on the same conduct. The First District's prior opinion had looked to the evidence as well.

Coffey v. State, 1D15-1299 (May 2, 2019)

On remand from the Supreme Court, as in Pasicolan, above, the First District applied the principles of Lee v. State, 258 So. 3d 1297 (Fla. 2018), and reversed convictions for unlawful use of a two-way communications device, and use of a computer to facilitate or solicit a parent to consent to the sexual conduct of a child. Based on the allegations in the charging document, those two offenses were subsumed within the charge of traveling to meet a minor to engage in sexual conduct with consent by a parent.

Drakus v. State, 1D17-4457 (May 2, 2019)

The First District reversed the denial of a Rule 3.850 motion (with an evidentiary hearing). The trial court's order failed to make any factual findings or conclusions, either orally or in writing. As a result, the appellate court could not determine the sufficiency of the evidence regarding the absence of prejudice for a claim of ineffective assistance of counsel.

Wright v. State, 1D18-268 (May 2, 2019)

The denial of a Rule 3.801 motion seeking credit for time spent in jail while awaiting re-sentencing was reversed as the allegations in the motion were sufficient. "Criminal defendants are entitled to credit for time spent in county jail awaiting re-sentencing."

Jackson v. State, 1D18-373 (May 2, 2019)

Jackson appealed convictions for first-degree murder, armed burglary and attempted armed robbery. The First District affirmed and addressed two issues.

The charges arose from a single criminal episode with three different victims. Jackson and an unidentified individual forced their way into a trailer and attempted

to rob to occupants at gunpoint. A neighbor intervened and was repeatedly shot and killed.

The jury submitted a question: "Does the verdict count number just pertain to the individual stated on each charge? Example: if he fired a gun but not at the person listed on the count number, does it still affect other verdict counts?" The State urged the court to reread the instructions on the 10-20-Life statute; defense counsel argued that the court should instruct the jurors to rely on their memories. The court reread the 10-20-life instructions and added additional language, telling the jury to consider all instructions, not just one section, and to read them together. The instructions included language which highlighted the element of 10-20-Life that the discharge of a firearm by the defendant, if found beyond a reasonable doubt, to have caused death or great bodily harm to "any" person should result in a finding of guilt "with discharge of a firearm" causing death or great bodily harm.

The First District found that the trial court had the discretion to answer the jury's question or reread or refer to prior instructions. When the jury is reinstructed, "the repeated instructions should be complete on the subject involved" as partial instructions may give undue emphasis to the reinstruction as opposed to omitted portions. The trial court's response in this case was found to have been within its discretion, "by rereading only those portions of the instructions that answered the jury's specific question. . . . Moreover, by repeatedly reminding the jury that it needed to pay attention to all of the instructions and not focus on any one particular instruction, the court satisfactorily addressed any concern that rereading only the portion of the instructions would unduly emphasize that portion over the remainder of the instructions."

As to the consecutive mandatory minimum sentences the trial court imposed, the First District affirmed. Although this was a single criminal episode, there were multiple victims and the trial court had discretion to impose concurrent or consecutive mandatory minimum sentences. The Court acknowledged case law from the Fifth District which barred consecutive mandatory minimum sentences where only one victim as shot, even though there were multiple victims. Those cases were distinguished "because they involved the single discharge of a firearm whereas this case involved multiple discharges of a firearm, resulting in multiple fatal injuries to one of the victims. To the extent these cases could be construed for the proposition that consecutive sentencing is not permissible where only a single victim is shot regardless of the number of gunshots or injuries to the victim, they cannot be reconciled with the Florida Supreme Court's subsequent decision in *Williams*, which held that consecutive mandatory minimum sentences for four counts of aggravated

assault with a firearm were permissible where a defendant pointed a gun at four victims and then fired multiple shots into the air. 186 S. 3d at 989. Notably, none of the victims actually were shot at or injured."

Carr v. State, 1D18-401 (May 2, 2019)

Carr was found guilty of organized fraud. She owned a company that serviced large homeowners' associations and defrauded the HOAs, taking hundreds of thousands of dollars.

There was no error in denying a requested "good-faith jury instruction," based on the defendant's alleged "good faith belief that [she] had the right to possess" the property in question. Carr argued that "there was evidence that she relied in good faith on an accountant's advice – specifically, that she could remove profits and other monies from her company's account." However, the "fraud alleged and proven took place *before* Carr removed the money from her company's account. And Carr's defense as to how other people's money wound up in her company's account was that someone else put it there."

Furthermore, Carr was convicted of organized fraud, not the lesser included offense of theft. "Good faith can be a defense to theft, . . . but the jury found Carr guilty of organized fraud, which means the jury necessarily found Carr engaged in a course of conduct with the '(a) intent to defraud, or (b) intent to obtain property by false or fraudulent pretenses.' . . . Therefore, the good-faith defense at to theft would have made no difference."

Nor was there an error in "giving a willful-blindness instruction," which told the jury that "'[i]n some cases, the issue to be determined is whether the defendant had knowledge of a certain fact. Florida Law recognizes a concept known as willful blindness, which is sometimes referred to as "deliberate avoidance of positive knowledge."' The court further instructed that someone 'who engages in willful blindness is deemed to have knowledge of that fact.'"

Organized fraud required proof of more than knowledge – i.e., actual intent to defraud. "But Carr makes no argument as to why the willful-blindness instruction would not have been applicable to the lesser-included offense of theft – an offense that includes a knowledge element but no element of fraudulent intent."

Thomason v. State, 1D17-2828 (April 29, 2019)

The First District affirmed a conviction for first-degree felony murder. A motion to suppress statements was properly denied. Pre-Miranda statements were non-custodial and did not require warnings. The Court evaluated multiple factors when reaching this conclusion. The defendant agreed to go to the Sheriff's Investigative Department for questioning and voluntarily accepted a ride with the investigator. It was after hours, and the CID door, which Thomason voluntarily walker through, was locked; however, the door could be opened by pressing a button inside the room. Thomason was repeatedly told that he was free to leave and could end questioning. He was able to use his cellphone freely. While the investigators spoke of a need to talk to Thomason, "they characterized it as needing to find out what happened to the child, so the doctors could provide the correct medical care." While the significance of this line of questioning, focusing on "need," was subject to differing interpretations, the trial court's ruling was viewed with deference on appeal. The investigators "kept pressing the appellant to tell the truth to help the child." "While this line of questioning is suggestive of the appellant's guilt, it was not so confrontational as to outright accuse the appellant of harming the child to the extent of causing brain damage." Thomason was never handcuffed. When he stated that he could not continue the interview, the questioning stopped and he was driven home by the investigator.

Toward the end of that interview, Thomason said: "If I'm being accused of something, I'd rather have a lawyer present with me . . . if you're going to ask me anything else." As a result of this alleged request for counsel, Thomason argued that a second interview, a day later, at the jail, should have been suppressed. This was deemed to be an equivocal request for counsel. As Thomason was not in custody at that time, Miranda warnings were not required and questioning could have continued at the first interview, notwithstanding any request for a lawyer. Thus, when questioning resumed the next day, the investigator "was not reinitiating prohibited questioning because the appellant had not had his *Miranda* rights violated the day before."

The trial court did not err in denying a motion for mistrial based on a statement that the defendant "killed the child while under the influence of drugs." The reference to a drug test during the interview was very brief; the case was not about drug use; and it was "unlikely that the statement had much effect on the jury's verdict." While the statement might implicate the appellant's character, "the trial did not turn on the appellant's character." It as about the medical evidence of the child's injuries.

Dawson v. State, 1D17-2985 (April 29, 2019)

The Court affirmed a conviction for the failure of a sexual predator to properly register residence after release from custody.

Dawson argued that he did attempt to register and entered the lobby of the sheriff's office twice. While the Sheriff's Office had video surveillance of that lobby, it was not required to be maintained. Dawson requested a special jury instruction saying that the Sheriff's Office video "is only maintained for 30 days and any video that existed was not preserved in order to view in this case." There was no abuse of discretion in denying the requested instruction. Although it supported the defense and there was evidence to support the instruction, standard instructions given in the case were deemed sufficient. Additionally, "the proposed instruction was s statement of stipulated fact rather than one of law."

Alsubaie v. State, 1D17-3517 (April 29, 2019)

In a Rule 3.850 motion, the defendant argued that counsel was "ineffective in failing to advise him of the deportation consequences of his no contest plea. Because Appellant has shown a reasonable probability that he would have rejected the plea and proceeded to trial had he been adequately informed of the plea's deportation consequences, we reverse."

The defendant was charged with cocaine possession, marijuana possession, and driving without a valid license and entered a plea of no contest. During the plea colloquy, he was advised that it was possible that he "could be deported." The trial court withheld adjudication on the felony cocaine possession count and sentenced the defendant to 36 months' probation; The defendant was adjudicated guilty on the two misdemeanor counts and received concurrent terms of probation for six months on each. He subsequently received a Notice to Appear at the Department of Homeland Security because his convictions for drug possession made him removable. His Rule 3.850 motion alleged that counsel failed to advise him of the immigration consequences of his plea. An evidentiary hearing was held on the motion, and the defendant testified to the same effect, adding that he was not advised to consult an immigration attorney. He added that had he known that the plea would have subjected him to mandatory removal, he would have proceeded to trial. Trial counsel did not testify at the hearing.

On appeal, the State acknowledged that the evidence demonstrated deficient performance of counsel. As to prejudice, which the State contested, the appellate court observed that the defendant scored 17.4 points on the CPC scoresheet. Therefore, he "likely risked no more than a year in county jail if found guilty by a jury." Given the 'limited additional consequence of a potential jury verdict of guilt, and even a slight possibility of an acquittal, we hold that there was a reasonable probability that he would have risked proceeding at trial to avoid mandatory deportation."

Farmer v. State, 1D18-331 (April 29, 2019)

In an appeal from the denial of a Rule 3.800(a) motion, the First District rejected Farmer's argument that the Court should extend the United States Supreme Court's decisions in Graham v. Florida and Miller v. Alabama "to provide that his sentence for his participation in a murder, which he committed when he was an adult, is illegal." The Court rejected the argument. The Court accepted the age of 18 as a bright line.

Ellison v. State, 1D18-1629 (April 29, 2019)

Appellate counsel from a direct appeal was ineffective for failing to file a Rule 3.800(b) motion to preserve a sentencing error. The scoresheet "improperly included an 'adult-on-minor sex offense' multiplier," doubling the sentencing points. That multiplier applies only to offenses enumerated ins section 921.0024(1)(b), Florida Statutes, and the offense for which Ellison was convicted, unlawful sexual activity under section 794.05, was not such an enumerated offense.

Second District Court of Appeal

Mesen v. State, 2D16-4971 (May 3, 2019)

Mesen appealed a conviction for lewd or lascivious exhibition in the presence of an elderly or disabled person. The victim was a woman in a wheelchair. The Second District reversed because "the State failed to introduce sufficient evidence to prove that he exposed his genitals to the victim because there was no testimony that his genitals were visible." Witnesses testified that they "saw Mr. Mesen's pants unzipped and the victim's arm extending into his pants, moving back and forth, but they could not see the victim's hand. His pants were not pulled down; they may have been unbuttoned but were definitely unzipped. Neither witness saw his genitals."

The State argued "that the 'victim was exposed to Mesen's genitals via her hand, which was placed in his genital area beneath his outer clothing.' The fact that the victim had her hand in the defendant's pants is merely incidental to what is proscribed by the statute, which criminalizes actions taken by the defendant, not the inducement of an action taken by the victim. The evidence supports only one action alleged to have been taken by the defendant: unzipping his fly within reach of a victim who is disabled or elderly, so as to place his genitals within reach of her touch without making them visible."

Sanchez v. State, 2D17-258 (May 3, 2019)

The Second District reversed convictions for unlawful use of a two-way communications device and first-degree misdemeanor criminal mischief, finding the evidence to be insufficient.

The offense of unlawful use of a two-way communications device requires proof that the device was used to further or facilitate a felony; not merely the possession of such a device during the commission of a felony. There was no evidence that the device in this case was used to further or facilitate a felony. The State presented evidence "that a set of walkie-talkies was found in the spare tire compartment of the Mustang after the Old Polk City Road store burglary. But the State presented no evidence to establish that either Sanchez or any of his codefendants used the walkie-talkies to commit or facilitate the burglary of that store."

The criminal mischief charge related to damage to the emergency exit door of a burglarized store. There was evidence of criminal mischief, but it was insufficient to demonstrate that the value was greater than $200. The evidence at trial was limited to the store manager's 'guess' that the replacement of the door would be between $1500 and $2000," and that "the door had not been replaced because it was usable and worked fine in its slightly damaged condition."

State v. Jean, 2D18-2281 (May 3, 2019)

The Second District granted a petition for writ of certiorari as to a trial court order directing the State to disclose the identity of a confidential informant. The trial court failed to conduct "the in-camera hearing the law requires."

Manley v. State, 2D16-2272 (May 1, 2019)

As in prior decisions, the Second District held that the 2017 statutory amendment to the stand your ground burden of proof applied retroactively. The Court directed that the lower court conduct a new hearing on remand. The Court also certified conflict on the question of retroactive application of the statutory amendment with decisions of the Third and Fourth Districts.

McAlkich v. State, 2D16-4675 (May 1, 2019)

Battery on a law enforcement officer is neither a qualifying nor an enumerated offense under the PRR statute, and its erroneous imposition renders the sentence illegal.

Third District Court of Appeal

Garcia v. State, 3D15-2815 (May 1, 2019)

The Third District reversed a conviction for second-degree murder. The "State presented purely circumstantial evidence that Ms. Macriello was deceased and that she died through the criminal agency of Mr. Garcia."

Evidence was presented of the disappearance of Ms. Macriello as of June 3, 2013. One week later, her landlord heard her car being parked in her spot in their apartment complex, but he did not see who was driving. Shortly later that day, a taxi picked up Garcia and another woman, not Macriello, several blocks away from the apartment. Documentary evidence showed transfers from Ms. Macriello's bank account after her disappearance; all of the transfers were to the benefit of Garcia. This included some ATM withdrawals, documented by surveillance video. Garcia deposited large checks from Macriello to himself between June 5th and 10th.

Cellphone records as to phone numbers belonging to Garcia and Macriello showed frequent calls between their two phone between June 3, 2013 and June 7th, when Macriello's phone was shut off. During the same period, "numerous calls between Mr. Garcia's cellphone and Ms. Macriello's cellphone 'pinged' off the same cellular antenna, within the same sector, indicating that the cellphones were within close proximity to each other at the time of the calls."

Ms. Macriello's car was found, smelling of cleaning agents, "and was thoroughly clean inside." The driver's seat had been adjusted to accommodate

someone taller than Macriello. Luminol reacted to a fluid in the trunk and to fluid on the front passenger floorboard, but results for the two areas "came back negative for blood."

In interviews, Garcia said that he met Macriello on a dating website and had a relationship with her, and that he last saw her between July 4th and August 2013. He denied taking money from her bank accounts. In statements to his wife, Garcia stated that Macriello had given him two $20,000 checks because she owed him money.

Macriello's body was never found. There was no crime scene evidence, no murder weapon, no eyewitness, no confession; nothing to establish that she "died by a criminal act committed by Mr. Garcia."

The Court also found the evidence insufficient as to grand theft. This focused on the two $20,000 checks; online transfers totaling $4,700 and two $500 ATM withdrawals. As to the checks, the State's theory was that Garcia coerced Macriello into writing them, but presented no evidence to support the coercion theory. A forensic examiner opined that the checks were probably written by Macriello. That expert also examined a handwritten promissory note "purportedly evidence that Ms. Macriello owed $20,000 to Mr. Garcia," and identified Macriello as the writer of the note. The examiner could not determine whether the note was written freely or under duress.

As to the online transfers, there was no evidence of the IP address for the online transactions request. Nor was there evidence that Garcia had any access to Macriello's laptop or her username and password for access to the bank account online.

Byron v . State, 3D17-1267 (May 1, 2019)

In a post-conviction motion, Byron argued that trial counsel was ineffective for failing to request competency evaluations. During the course of the post-conviction proceedings, which resulted in an evidentiary hearing at which Byron was the only witness, the court appointed experts to determine Byron's competency and, although there was disagreement between the experts, in December 2016, Byron was found competent. The evidentiary hearing was held in April 2917, and a hospital evaluation, shortly prior to the hearing, found Byron to be competent.

At the hearing, defense counsel expressed concerns and sought to have the court question Byron, but Byron ignored the court's questions. When Byron eventually addressed the court, after initially stating that he had not taken a deal (when he had), he eventually testified coherently.

On appeal, Byron argued that the court erred in not holding a further competency hearing at the April 2017 evidentiary hearing. Byron, on appeal, did not establish the "existence of a 'bona fide question as to the defendant's competency.'" The court's own observations and interactions with Byron during the evidentiary hearing, coupled with the prior evaluations and findings of malingering or exaggeration, undermined Byron's claim that a further evaluation was needed.

State v. Rincon, 3D18-1282 (May 1, 2019)

The trial court erred in dismissing an affidavit of violation of probation. After hearing relevant information regarding the defendant's status, the State's plea offer, the potential sentence for a violation, and other information, the trial court "sua sponte and over the State's objection," dismissed the affidavit of violation and terminated Rincon's probation "unsuccessfully."

Rincon qualified as a violent felony offender of special concern and the trial court was required to follow section 948.06(8), Florida Statutes. This precluded a dismissal "without holding a recorded violation-of-probation hearing at which both the state and the offender are represented." And, after the evidentiary hearing, "the trial court must make a series of *written findings* as to whether the offender poses a danger to the community." The trial court failed to comply with those requirements.

Gyden v. State, 3D18-2230 (May 1, 2019)

The trial court dismissed an amended Rule 3.850 motion because a petition alleging ineffective assistance of appellate counsel was then pending in the Third District. The trial court's belief that it lacked jurisdiction to the pending petition in the appellate court was incorrect.

Fourth District Court of Appeal

Radice v. State, 4D17-1373 (May 1, 2019)

The trial court did not apply the wrong standard when it denied a motion for new trial under Rule 3.600(a)(2), which challenges a verdict as being contrary to the

weight of the evidence. The judge stated that "'[w]e gave it to the nice people of the jury. That is who made the decision.' But that was not the entirety of the court's statement. The court continued: '[T]o say that the decision, the jury's decision, is contrary to the evidence in this case, I don't think that is accurate.'"

The State cross-appealed a downward departure sentence. The trial court departed for the reason that the offense was committed in an unsophisticated manner, and was an isolated incident for which the defendant has shown remorse. The record did not establish an isolated incident. Radice testified that he could not quantify the number of fights he had been in on Fort Lauderdale Beach. Additionally, he had two prior felony convictions and two misdemeanors.

Thomas v. State, 4D18-306 (May 1, 2019)

Thomas argued that the trial court committed fundamental error when it accepted his plea without determining that competency had been restored. The Fourth District disagreed.

A 2009 letter from a forensic outpatient center to a judge in a different case referenced a finding of incompetency in a then-pending 2007 juvenile case which was unrelated to the instant case. The court was unaware of these documents before accepting the plea in the instant case.

While incompetency is presumed to remain until there is an adjudication of restoration, a court does not err in failing to conduct an inquiry absent evidence of incompetency. The judge in this case had no reason to question competency and the alleged adjudication of incompetence in the earlier case did not alter that. It was incumbent upon the defense to alert the judge in the instant case of the incompetence adjudication from the unrelated case.

Soltis v. State, 4D18-598 (May 1, 2019)

Soltis waived his right to a Nelson inquiry regarding competency of counsel. After moving to dismiss court-appointed counsel, "he took no steps to bring his motion to the court's attention despite having the opportunity to do so. Then, at his change of plea hearing, Appellant expressed his satisfaction with the same court-appointed counsel."

Johnson v. State, 4D19-826 (May 1, 2019)

A habeas petition challenging pretrial detention was denied. Johnson argued that "a first appearance judge's ruling declining to revoke bond in pending cases bound the trial court." The denial was based on the Fourth District's finding that "absent circumstances not present here, the ultimate authority tor evoke an existing bond lies with the court having trial jurisdiction."

Johnson posted bond on two 2018 felony cases and was released. He was then arrested on a 2019 case for drug and firearm possession charges. After hearing the defendant's record and charges, the first appearance judge on the 2019 case denied the State's request for revocation of bond in the 2018 cases. The State then moved for revocation in the 2018 cases by the judge assigned to those cases. The judge granted that request over the defense argument that the State was required to show good cause and changed circumstances for a modification of the ruling by the first appearance judge.

"When a defendant violates pretrial release conditions, the statutes and rules of criminal procedure vest the judge having trial jurisdiction with the ultimate authority to revoke an existing bond and order commitment. The first appearance judge's ruling did not bind the trial court or preclude it from exercising its authority to order pretrial detention under the statute."

Fifth District Court of Appeal

Malave v. State, 5D17-3225 (May 3, 2019)

The Fifth District reversed two convictions for sex offenses, finding prejudicial error in the admission of "the victim's statement to the Child Protection Team Investigator." The State sought admission under the hearsay exception for statements of a disabled adult under certain circumstances, section 90.803(24), Florida Statutes.

The evidence in question was "testimonial" under Crawford v. Washington, 541 U.S. 36 (2004), and should have been excluded "unless the declarant is unavailable to testify and the defendant had a previous opportunity to cross-examine the declarant." Here, although the victim was deemed unavailable to testify, there was no prior opportunity to depose her.

Wilcox v. State, 5D18-1636 (May 3, 2019)

Convictions for robbery and battery on a person over 65 were reversed because the court erred "in failing to allow [the defendant's] private counsel to represent him at trial."

The trial began with court-appointed counsel on February 19, 2018. After jury selection and swearing of the jury that day, the trial was recessed until February 22nd. On February 21st, private counsel was retained by the defendant's family and a notice of appearance was filed along with a motion for continuance of the trial. The court denied both the motion for continuance and substitution of counsel.

The trial court did need to consider the fact that the jury had already been sworn and balance the legitimate interests of effective administration with the right to counsel of one's choice. The court's concern as to a continuance was the advanced ages of the victims – over 80. However, private counsel represented that even if the continuance was denied, counsel was prepared to proceed with the trial as scheduled. Absent a showing of bad faith on the part of the defendant in seeking discharge of court-appointed counsel, it was improper to deny the substitution.

Lathan v. State, 5D18-1979 (May 3, 2019)

Lathan filed a petition alleging that appellate counsel was ineffective for failing "to argue that the trial court committed fundamental error by not instructing the jury on the necessarily lesser included offense of attempted manslaughter by act." He was convicted of attempted second-degree murder with a firearm. The Fifth District denied the petition, but certified several questions of great public importance to the Florida Supreme Court.

The mandate on direct appeal was issued in June 2013. Six months earlier, the Florida Supreme Court opinion in Walton v. State, 208 So. 3d 60 (Fla. 2016), held that attempted manslaughter by act was a necessarily lesser included offense of attempted second-degree murder and that the trial court had not discretion but to instruct the jury" on the lesser.

The original charge in the case was attempted first-degree murder. At the charge conference, the State requested the lesser of attempted second-degree murder. Defense counsel then represented that he had no requests for any other lesser offense instructions. The Fifth District concluded that Lathan, through his trial counsel, "voluntarily waived his right to have the jury instructed on the lesser included

offense of manslaughter by act." "We have no reason to believe that trial counsel was unaware of the remaining available category one lesser included instructions for attempted first-degree murder, nor has Lathan suggested that his trial counsel acted outside the scope of his authority when advising the court that Lathan did not seek any further lesser included offense instructions."

The Fifth District then certified the following questions:

> I.IN LIGHT OF *WALTON V. STATE*, 208 SO. 3D 60 (FLA. 2016), AND *ROBERTS V. STATE*, 242 SO. 3D 296 (FLA. 2018), MAY A DEFENDANT IN A NONCAPITAL CASE STILL WAIVE CATEGORY ONE LESSER INCLUDED OFFENSE JURY INSTRUCTIONS UNDER *JONES V. STATE*, 484 SO. 2D 577 (FLA. 1986)?
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> II. IF SO, MUST DEFENSE COUNSEL ANNOUNCE AN EXPRESS WAIVER ON THE RECORD ON THE CATEGORY ONE INSTRUCTION, OR IS COUNSEL'S AFFIRMATIVE DECLINATION TO THE TRIAL COURT'S INQUIRY OF WHETHER ANY LESSER INCLUDED OFFENSE INSTRUCTIONS ARE BEING REQUESTED SUFFICIENT TO WAIVE THE GIVING OF CATEGORY ONE LESSER INCLUDED OFFENSE INSTRUCTIONS?
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> III. WHEN THE EVIDENCE AT TRIAL READILY SUPPORTS THE JURY'S VERDICT OF GUILT FOR ATTEMPTED SECOND-DEGREE MURDER WITH A FIREARM AND NO ERROR WAS MADE IN THE INSTRUCTIONS REGARDING THAT OFFENSE, IS THE TRIAL COURT'S DECISION NOT TO GIVE THE ATTEMPTED MANSLAUGHTER BY ACT LESSER INCLUDED OFFENSE INSTRUCTION FUNDAMENTAL ERROR WHEN DEFENSE COUNSEL AFFIRMATIVELY RESPONDS TO THE TRIAL COURT THAT COUNSEL IS REQUESTING NO LESSER INCLUDED OFFENSE INSTRUCTIONS?

IV. DID THE COURT'S DECISION IN *DEAN V. STATE*, 230 SO. 3D 420 (FLA. 2017), ABROGATE THE JURY PARDON DOCTRINE OR, AT THE VERY LEAST, DOES ITNOW REQUIRE THE APPLICATION OF THE HARMLESS ERROR ANALYSIS WHEN A CATEGORY ONE LESSER INCLUDED OFFENSE JURYINSTRUCTION, ONE STEMP REMOVED FROM THE CONVICTED OFFENSE, IS NOT GIVEN?

Osborne v. State, 5D18-3997 (May 3, 2019)

Osborne filed motions to modify probation, asking the trial court to modify conditions requiring that he live with his father and wear an ankle monitor. The trial court denied the motions without an evidentiary hearing. Osborne filed a certiorari petition in the Fifth District, which denied the petition and held that there was no departure from the essential requirements of law, as "nothing in chapter 948 requires a court to hold an evidentiary hearing upon receipt of a motion seeking modification of previously imposed conditions."

Bent v. State, 5D19-1060 (May 1, 2019)

A habeas corpus petition was granted and the Fifth District ordered a new hearing to determine reasonable bail.

Bent was charged with second-degree felony murder and attempted first-degree murder. At the first bond hearing, the investigating officer testified as to two identifications of Bent – one reliable, one not reliable. During a subsequent deposition, the witness who allegedly provided the reliable identification testified that the officer "pressured her into selecting Petitioner from the photo lineup." Based on that deposition testimony, Bent sought a modification of the bond.

The second motion for bond was denied without explanation. Afterwards, the State filed a notice indicating that a second officer, present during the photo lineup, confirmed the deponent's testimony regarding coercion. A third motion for bond was filed and the judge advised the parties, through a judicial assistant, that the court would not entertain another bond hearing.

The Fifth District held that the deposition and its subsequent corroboration by another officer sufficed to entitle Bent to a hearing on the motion for modification.