Case Law Update
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Prepared by
Richard L. Polin

Supreme Court of the United States

Gamble v. United States, 17-646 (June 17, 2019)

The Supreme Court refused to overrule the "dual sovereignty" doctrine which permits a state to "prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute." It also permits the federal government to prosecute for the same conduct after a state court prosecution.

In this case, Gamble was convicted in an Alabama state court for possessing a firearm as a felon, and was then charged in federal court for being a felon in possession. Gamble's argument for overruling the dual sovereignty doctrine asserted that "it departs from the founding-era understanding of the right enshrined by the Double Jeopardy Clause." The Court disagreed, finding that "the Clause's text, other historical evidence, and 170 years of precedent" pointed the other way.

In addition to extensive analysis of the history of the Double Jeopardy Clause and the Court's prior decisions, the Court addressed and rejected the argument of two dissenting opinions (Ginsburg, J. and Gorsuch, J.), that the majority erred by "treating the Federal and State Governments as two separate sovereigns when in fact sovereignty belongs to the people." The majority accepted that the Constitution "rests on the principle that the people are sovereign, but that does not mean that they have conferred all the attributes of sovereignty on a single government. Instead, the people, by adopting the Constitution, '"split the atom of sovereignty."'"

The majority also rejected the argument of the dissents "that because the division of federal and state power was meant to promote liberty, it cannot support a rule that exposes Gamble to a second sentence." To this, the majority responded that our "federal system advances individual liberty in many ways. Among other things, it limits the powers of the Federal Government and protects certain basic liberties from infringement. But because the powers of the Federal Government and the States often overlap, allowing both to regulate often results in two layers of regulation." Examples included taxation and regulations of gambling and the sale

of alcohol. The dual sovereignty doctrine therefore did not represent a "desecration" of federalism.

Turning to early common law principles, the Court viewed English cases as "a muddle," and treatises offered "spotty support" for Gamble.

Gundy v. United States, 17-6086 (June 20, 2019)

The Sex Offender Registration and Notification Act, 24 U.S.C. s. 20913(d), in addition to requiring those convicted of a wide range of enumerated sex offenses to register prior to the completion of a sentence being served, also delegates to the Attorney General the authority to issue a rule specifying "the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders. . . ."

In this case, Gundy argued that the "nondelegation doctrine bars Congress from transferring its legislative power to another branch of the Government." The Court disagreed. A "delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." The delegation in SORNA satisfied the requirements for a permissible delegation. "The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative – and, more specifically, transitional – in nature. . . . And they arose, more technically, from the gap between an initial registration requirement hinged on imprisonment and a set of pre-Act offenders long since released. . . . Even for those limited matters, the Act informed the Attorney General that he did not have forever to work things out. By stating its demand for a 'comprehensive' registration system and by defining the 'sex offenders' required to register to include pre-Act offenders, Congress conveyed that the Attorney General had only temporary authority." "Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional – dependent as Congress is on the need to give discretion to executive officials to implement its programs."

Rehaif v. United States, 17-9560 (June 21, 2019)

18 U.S.C. s. 922(g) makes it unlawful for certain individuals to possess firearms. The prohibition includes "felons and aliens who are 'illegally or unlawfully in the United States,'" and it adds that "anyone who 'knowingly violates' the first provision shall be fined or imprisoned for up to 10 years."

The issue in this case, upon review of a decision of the Eleventh Circuit Court of Appeals, was whether the term "knowingly" meant "that the Government must prove that a defendant knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felony, an alien unlawfully in this country, or the like)." The Court held "that the word 'knowingly' applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it."

In this case, Rehaif entered the United States on a "nonimmigrant student visa to attend university. After he received poor grades, the university dismissed him and told him that his "'immigration status"' would be terminated unless he transferred to a different university or left the country." When the government learned that he was engaged in target practice at a firing range, he was prosecuted. At trial, the court rejected his argument that the jury had to be instructed that he knew he was in the country illegally. The Eleventh Circuit affirmed the conviction based on its conclusion that the law did not require a defendant to know his own status." The Supreme Court reversed.

The Supreme Court applied "the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text." The Court saw no reason to apply the term "knowingly" to just one of the two elements of the statute. By applying the word "knowingly" to the defendant's status, the "purpose of scienter" was advanced, "for it helps to separate wrongful from innocent acts." Addressing prior decisions in which the Court declined to find a scienter requirement in criminal statutes, the Court noted that those cases involved "statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties."

The Court did not address the government's alternative argument that any error in the jury instructions was harmless and left that for the lower courts on remand.

Flowers v. Mississippi, 17-9572 (June 21, 2019)

The proceeding arose out of Flowers' sixth jury trial for murder, resulting in a death sentence. Prior trials resulted in reversals or mistrials, some based on prosecutorial misconduct, some based on the discriminatory use of peremptory

challenges. The current certiorari petition raised a Batson claim and the Supreme Court granted the petition.

In the prior trials, with information available as to four of the five, the prosecution had used 41 out of 42 peremptory challenges on black prospective jurors. In this, the sixth trial, five out of six challenges were used against black prospective jurors, and one black juror was seated.

The Supreme Court granted relief based upon a combination of the following reasons, specifying that it was not saying that any one of the reasons would have mandated relief:

> Four critical facts, taken together, require reversal. *First*, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck – a statistic that the State acknowledged at oral argument in this court. Tr. of Oral Arg. 32. *Second*, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. *Third* at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. *Fourth*, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.

As part of the Court's analysis under Batson, it notes the following factors as relevant to the trial court's evaluation of whether racial discrimination occurred:

> Statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
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> Evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;

> Side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
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> A prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
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> Relevant history of the State's peremptory strikes in past cases; or
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> Other relevant circumstances that bear upon the issue of racial discrimination.

As to the disparate questioning of black and white prospective jurors, the Court noted that the "State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions." The Court rejected the State's argument that this discrepancy was attributable to "differences in the jurors' characteristics." This case originates from a small community, a town of about 5,000. And, as one example, the Court noted that the State asked one black prospective juror "18 follow-up questions about her relationships with Flowers' family and with witnesses in the case." As to one white juror whom the State accepted, although there were group questions, there was not a single follow-up question even though the juror knew several members of Flowers' family.

As to the disparate treatment of two members of the venire, the Court noted that one black prospective juror, Carolyn Wright, said she was strongly in favor of the death penalty and had a family member who was a prison security guard. The State explained its striking of her as being due to her knowledge of several defense witnesses, and her employment at the Wal-Mart where Flowers' father also worked. White prospective jurors were not stricken, even though they knew many individuals involved in the case. There was no evidence that Wright and Flowers' father worked together or were close; there were no individual follow-up questions about the extent of any relationship between them.

Additionally, an assertion by the State that Wright worked with one of Flowers' sisters was inaccurate and the trial court judge had noted that, as well. The Supreme Court noted several other incorrect statements made by the prosecution when justifying other strikes of black prospective jurors.

Eleventh Circuit Court of Appeals

Whatley v. Warden, Georgia Diagnostic and Classification Center, 13-12034 (June 20, 2019)

The Eleventh Circuit reviewed a federal habeas corpus proceeding in a death penalty case. The district court granted relief, finding that counsel was ineffective for failing to investigate and present mitigating evidence. The district court denied relief on a claim that counsel was ineffective for "failing to object when [Whatley] testified before the jury during the penalty phase in shackles." Both parties appealed. The Court reversed on the government's appeal and denied relief on Whatley's claim regarding shackling. The state court granted an evidentiary hearing.

The Court's opinion, analyzing the state courts' treatment of various pieces of evidence advanced by Whatley, is routinely couched in terms of the highly deferential principles that apply to federal habeas review of state court convictions and sentences.

Affidavits from experts presented by Whatley included "statements of others." While that was not forbidden hearsay with respect to a state court sentencing proceeding, the state court had focused on the lack of reliability of those matters as to which experts relied on facts from third parties. Much of the dispute went to trial counsel's argument that Whatley came from a "good family," and the post-conviction proceedings advanced evidence to the contrary.

Evidence that a great-uncle raped Whatley's mother would have conflicted with the mitigation strategy in which counsel "painted a positive picture of his great-aunt and great-uncle, the couple who took him in, raised him, and gave him an ideal childhood."

Whatley claimed that counsel should have presented evidence showing he was subjected to "brutal treatment" in prison, to show why he never returned to a subsequent halfway house. The state court rejected this based upon a credibility assessment, observing that it would not have significantly swayed the jury.

1988 reports showing abuse by Whatley's mother would have cut against mitigation, as they included statements that he lacked remorse for his crimes and believed he could get away with anything.

Whatley's reliance on evidence from friends and jail guards about his remorse as mitigation were found by the state court to have little likely effect on the jury because they would have opened the door to the State explaining Whatley's "emotional reaction to learning that the victim had died as being a concern for his own punishment rather than true remorse for his actions."

A claim based on the failure of counsel to provide a defense expert with the 1988 reports was inconsequential because the doctor testified that the reports would not have changed her expert opinions if she had seen them prior to trial.

The federal district court, when granting relief, found that counsel performed deficiently, but the district court "never asked whether the Supreme Court of Georgia's decision [as to prejudice] was reasonable." The district court had refused to grant deference because it disagreed with the Georgia Supreme Court's factual findings regarding the jury's likely perceptions of the evidence being relief upon in post-conviction proceedings.

The Georgia Supreme Court's conclusions had been based substantially on credibility or reliability determinations that are presumed correct. The Eleventh Circuit then performed the analysis itself as to whether the Georgia Supreme Court was entitled to deference. When "a reviewing court weighs all of the evidence, it reconstructs a hypothetical retrial." The Georgia Supreme Court did not "walk through every step of a hypothetical retrial. But it didn't have to. Indeed, we are not limited to the reasons the Court gave and instead focused on its 'ultimate conclusion,' . . . here, that Petitioner was not prejudiced by Trial Counsel's deficient performance." Engaging in that analysis, the Eleventh Circuit found that Whatley had not overcome the presumption of correctness that applied to Georgia's findings of fact.

The Eleventh Circuit observed that the various affidavits presented by Whatley would have presented the great-aunt and great-uncle in a bad light and, if presented at sentencing would have had little probative value. Whatley would also likely have taken the stand and testified as to these matters, and the Court noted how that would have opened the door to impeachment on cross-examination, "gutting his credibility." Opinions of Whatley's experts would have been refuted by the State's expert. For these and similar reasons, Whatley "did not overcome with clear and convincing evidence the presumption of correctness that applies to the Supreme Court of Georgia's findings of fact."

As to the shackling issue, during the penalty phase, the prosecution noted it. Defense counsel did not object and said, "Well, he's convicted now." On direct appeal, the Georgia Supreme Court treated it as invited error, which the Eleventh Circuit viewed as a procedurally defaulted claim. As the substantive shackling claim was procedurally barred, Whatley tried to assert it in federal habeas proceedings as a claim of ineffective assistance of trial counsel, for failing to object. In Georgia, a presumption of prejudice from shackling would have existed if the substantive claim had been asserted on direct appeal; but the state court refused to apply that presumption because it was presented in collateral review proceedings and as a claim of ineffective assistance of counsel. Whatley was asking the Eleventh Circuit to find that the presumption of prejudice did apply to the claim of ineffective assistance. The Court disagreed. Whatley's argument was viewed as asking the Eleventh Circuit to consider what would have happened if trial counsel had objected, and to then further assume that the trial court would have erred by overruling the objection without a hearing or by conducting a hearing and then making an erroneous conclusion after the hearing. The Court would not apply a presumption of prejudice from a procedurally defaulted claim, as that would eliminate the distinction between collateral review and direct review.

Thus, Whatley had to demonstrate actual prejudice and he failed in that effort. The jury had heard that he had a violent criminal history, and "the shackles were trivial in light of the evidence before the jury."

One judge dissented as to the shackling issue and would have granted a new sentencing hearing on its basis.

First District Court of Appeal

Lowery v. State, 1D17-3716 (June 20, 2019)

Lowery appealed a conviction for first-degree felony murder; the underlying felony was aggravated child abuse. The First District affirmed and addressed multiple issues.

"The State's theory of the case was that appellant ran a daycare facility in her home and that a perfectly healthy 15-month-old child died of a head injury caused by appellant while the baby was in her care." Medical experts testified that the death was due to blunt force trauma to the brain, "possibly in combination with a violent shaking." The injuries were not consistent with an accidental fall. There was evidence that the child was "not symptomatic when he was dropped off at appellant's

house that morning," and showed no symptoms until he vomited and had a seizure three hours later, when Lowery called 911. There was also Williams rule evidence "that appellant frequently treated the child in a rough manner" which the medical examiner opined could have led to the death.

The defense hypothesis that the child suffered from pre-existing medical conditions that could have caused the death was refuted by experts for the State. The opinion provides detailed facts.

Lowery also challenged the admission of Williams rule evidence that Lowery "would punish the child by picking him up by his feet and plopping him onto the couch." In addition to a lack of preservation of many of Lowery's arguments, they were found to be without merit. "[I]ntent was a material fact in issue because she was the only adult with the child when he fell ill, and she suggested his injuries were caused either accidentally when his brother hit him in the head with a block, or by an underlying medical conviction, or both." Even though the prior incidents "may not have risen to the level of aggravated child abuse, they are strikingly similar to if not the very cause of death here." The medical examiner testified that "picking the child up by his feet, swinging him out, and plopping him down, hitting his head – would have caused a 'blunt impact' to his head, which was the cause of death."

The trial court did err in instructing the jury on aggravated child abuse by malicious punishment where that alternative means of committing the offense was not charged in the indictment. Aggravated child abuse can be committed in three distinct manners. The indictment in this case charged only two of the three: 1) by committing an aggravated battery; and 2) by knowingly or willfully abusing the child and in doing so causing great bodily harm, permanent disability or permanent disfigurement. The error, however, was harmless. Although a person can commit malicious punishment without committing an aggravated battery, there "was no evidence here of a punishment that was not also a battery." "Based on the jury's finding that the actions of appellant caused the death of the child, coupled with the only facts that were proven and argued to the jury that any punishment involved an illegal touching resulting in great bodily harm, it can be determined with certainty that appellant was not at risk for being found guilty of an uncharged crime."

Lowery also challenged the giving of the lesser included offense instruction on manslaughter by culpable negligence. The First District concluded that it was a category 1 necessarily lesser included offense of first-degree felony murder and that the trial court therefore had no discretion about giving it, even if not supported by any evidence. Regardless, there was evidence to support it, as the "jury could have

found that appellant's habit of picking the child up by his feet and plopping him on the couch showed reckless indifference for the child's safety."

Last, Lowery argued that the trial court erred by limiting closing argument to 1 ½ hours given the complexity of the case. The court originally granted 1 ½ hours but shortened it to one hour. The judge said the reason for shortening the argument was that counsel was talking about the same thing over and over again. At the end of the one hour, the court granted defense counsel's request for an additional 10 minutes. The trial court did not abuse its discretion.

Pollard v. State, 1D18-4572 (June 20, 2019)

In a prohibition proceeding, the Court addressed the question of the extent to which "the Fifth Amendment right against self-incrimination protect[s] a suspect in a criminal case from the compelled disclosure of a password to an electronic communications divide in the state's possession." The Court concluded "that the proper legal inquiry on the facts presented is whether the state is seeking to compel a suspect to provide a password that would allow access to information the state knows is on the suspect's cellphone and has described with reasonable particularity."

After Pollard's arrest for armed robbery, the State obtained a search warrant and seized an iPhone from his car and moved to compel him to disclose the passcode "so that it could access broad categories of encrypted information on the cellphone." The affidavit in support of the warrant referred generally to time ranges for call/text/communication history; content of communications between certain dates; pictures of narcotics, money and firearms; written information about drug and robbery offenses between specified dates. "The affidavit did not state the existence or content of any specific text, picture, call or other particular information," and only alleged that it was reasonable to believe that the defendant and a codefendant had communicated via cell phone leading up to the robbery for preparations.

The Court's opinion includes an extensive survey of different approaches of state and federal courts on the issue related to compulsion of passwords, and notes distinctions based on whether the defendant has or has not "given up his testimonial privilege in the password itself." There was no evidence in the instant case that Pollard had given up his privilege in the password – such as by using it in the presence of law enforcement officers.

In this case, the Court agreed with the Fourth District "that unless the state can describe with reasonable particularity the information it seeks to access on a

specific cellphone, an attempt to seek all communications, data and images 'amount[s] to a mere fishing expedition.'" The State's "generalized requests for multiple categories of communications, pictures, and social media activity fit the description of a net cast far too broadly. The only category of information that potentially meets the reasonable particularity standard is the investigating officer's affidavit, which avers only that 'it is reasonable to believe' that a co-defendant had 'communicated with Pollard via cell phone' leading up to and on the day the robbery occurred. The basis for this belief is that because the co-defendant had sent text messages to another person involved in the robbery, it would be reasonable to believe that the co-defendant must have communicated with Pollard in a similar manner as well, even though no specific communication is identified or alleged." The "evidentiary record is too thin to conclude that the foregoing conclusion exception applies. At best, the officer believed that text messages likely existed on Pollard's phone because most criminal enterprises of this type operate via coordinated electronic communications that would leave a discoverable digital trail, but this generalized belief falls short of the reasonable particularity standard."

One judge dissented. The dissent accepted that under the Fifth Amendment the passcode was testimonial in nature, but concluded that compulsion is not barred where the "state already knows of the testimonial aspect of the communication." "Before the trial court, the state proved – and Pollard conceded – that the phone belonged to Pollard, that he had control over it, and that he knew the passcode to unlock it. Thus, the facts making this communication implicitly 'testimonial' are not in dispute, but are a foregone conclusion."

Morales v. State, 1D18-3996 (June 20, 2019)

Morales appealed the denial of a motion to suppress based on a warrantless search which opened and reviewed "an image file that had been flagged by a private party as matching known child pornography." The First District affirmed because Morales "failed to demonstrate that he had a reasonable expectation of privacy when he uploaded child pornography to an anonymous online chat room." The Court alternative concluded that the motion was "properly denied under the private search doctrine."

As to the lack of a reasonable expectation of privacy due to Morales having uploaded the image file to an anonymous chatroom, the Court stated that there was "nothing in the record indicating the number of participants in the chat room, whether Appellant had exclusive control to admit people into the chat room, or whether ChatStep monitored the chat room for illegal activity as part of its service

agreement." The characterization of the chat room as "private" did not, in and of itself, establish a reasonable expectation of privacy. "Appellant presented no evidence that the uploaded file was password-protected, or that he took any affirmative steps to restrict access to the file." It was Morales' burden to establish a reasonable expectation of privacy.

As to the "private search" doctrine, the Court found no Fourth Amendment violation "because (1) whatever expectation of privacy Appellant might have had in the hash value of the file was frustrated by Chatstep's private search, which matched the hash value of the file to known child pornography; (2) the visual review of the file was not a significant expansion of ChatStep's private search because it merely confirmed the hash value match already had established with almost virtual certainty; and (3) there was no indication that the agent had searched any of Appellant's files not flagged as child pornography."

ChatStep, the host of the anonymous chatroom, was a private company which retained PhotoDNA, another private company (run by Microsoft), to compare hash values of files with hash values of known images of child pornography. Upon receipt of a match from PhotoDNA, ChatStep sent the image to the National Center for Missing and Exploited Children, which then forwarded it to the Florida Department of Law Enforcement. No one at ChatStep, PhotoDNA or NCMEC opened or viewed the file.

Second District Court of Appeal

Richardson v. State, 2D17-3814 (June 21, 2019)

The Second District reversed the summary denial of one claim of a Rule 3.850 motion for further proceedings.

Richardson argued that his dual convictions for soliciting a child and traveling to meet a child for a sexual act constituted a double jeopardy violation. The trial court denied the claim, looking at all of the evidence to determine whether there was a single criminal episode and, if so, whether there were discrete acts.

After the trial court ruled, the Florida Supreme Court opinion in Lee v. State, 258 So. 3d 1297 (Fla. 2018), was issued and held that the determination should be made only on the basis of the charging document, not the entire evidentiary record.

Babic v. State, 2D18-1682 (June 21, 2019)

The Second District reversed the summary denial of a Rule 3.850 motion in a prior appeal, with leave to file an amended motion within 60 days. The amended motion was not filed. When Babic learned that his counsel did not file an amended motion, he sought a belated appeal, requesting further opportunity to file the amended motion. His counsel filed an affidavit stating that he did not review the Second District's prior order with Babic and did not file the amended motion. The State did not object to granting further time for filing an amended motion. The Second District granted the request.

Lawrence v. State, 2D17-4071 (June 19, 2019)

Lawrence appealed convictions for manslaughter and firing a gun into a motor vehicle. The Second District reversed and remanded for a new trial because the trial court erred in permitting two State witnesses testify that Lawrence "had confessed his guilt to a fellow inmate." This testimony was inadmissible hearsay.

The State intended to call Edwards, an inmate, to testify that Lawrence confessed to him. After Edwards recanted and testified that he did not recall telling a detective and investigator about the confession, the State had the detective and investigator testify as to what Edwards told them about Lawrence's confession.

The Court rejected the State's argument that this was not hearsay because it fell under the identification exception to the hearsay rule. That section applies only when "'the declarant was an eyewitness or a victim who identified the alleged perpetrator soon after the crime or soon after coming into contact with him or her.'" Edwards was not present at the shooting and did not speak to Lawrence until months later.

The Court also rejected the State's argument that the testimony was not offered to prove the truth of the matter asserted in the out-of-court statement by Edwards. The State called Edwards, knowing that he had recanted, and he stated that he did not recall talking to investigators. He did not say anything harmful to the State's case. The State, in opening argument, had already referred to the statements as substantive evidence. The State's "true aim was to circumvent the hearsay rules."

Contreras v. State, 2D17-4989 (June 19, 2019)

The Second District found that two of several grounds for revocation of probation was not supported by sufficient evidence. The order of probation required Contreras to "live and remain at liberty without violating any law." The affidavit of violation alleged that this was violated by the commission of five new criminal offenses in California. No proof of this was offered by the State. Contreras testified at his hearing "that he was arrested and 'pleaded' to the charges." This "does not constitute substantial evidence that he committed the new law violations." This was no more than evidence of having been arrested, not convicted.

The trial court also found that Contreras failed to pay costs of supervision. That violation was not established by sufficient evidence because the trial court did not inquire as to ability to pay and make findings of willfulness. The only testimony was that Contreras was employed and was in arrears.

The case was remanded for the trial court to determine if the remaining violations still warrant revocation. The appellate court could not determine from the record whether the trial court would have revoked on the basis of the remaining violation.

Third District Court of Appeal

Gonzalez v. State, 3D19-479 (June 21, 2019)

The Third District reversed a conviction for third-degree grand theft and reduced it to second-degree misdemeanor petit theft because the State failed to prove that the value of the stolen property exceeded $300.

The stolen item was a Louis Vuitton Neverfull purse, which was less than a year old, and contained an iPhone 6, Gucci Wallet and keys. The victim testified that the original purchase price of the purse was $1,500 and the wallet $700. The victim was permitted to testify, over objection by the defense, that she looked on eBay and found that the cost of a replacement purse would be about $1,000 "retail value," and the wallet, about $400.

The State improperly relied on the victim's testimony about the eBay searches, as it was hearsay: it was intended to prove the truth of the matter asserted, the actual worth or market value of the items. While a property owner may testify as to personal knowledge of the fair market value, this did not constitute such

personal knowledge. Absent the hearsay testimony, the remaining testimony was solely the original purchase prices for the two items, and that was insufficient.

The Court also rejected the State's argument that the fair market value exceeded the required $300 because it was "'so obvious as to defy contradiction.'" While there were prior district court of appeal decisions supporting such a rationale, it was rejected by the Supreme Court of Florida in Marrero v. State, 71 So. 3d 881 (Fla. 2011).

Reyes v. State, 3D18-0164 (June 19, 2019)

Reyes appealed convictions for aggravated animal cruelty. He was arrested when he was found "sitting behind the wheel of a truck near a farm" and three dead sheep were loaded into the back of the truck he was sitting in. He argued that the convictions should be reduced to misdemeanor animal cruelty because there was no evidence that the sheep were killed in a cruel or unnecessarily painful manner. The Third District disagreed with that argument and affirmed.

Section 828.12(2), Florida Statutes (2018), requires proof of either a cruel death or unnecessary pain or suffering. There was sufficient evidence as to both. The sheep had "one to two three-inch stab wounds around their belly areas." They were still warm to the touch when the first officer arrived and a "knife with fresh blood on it was found in Reyes' vehicle." All the sheep had "puncture and slice wounds to the chest area," and "the blood pattern on the sheep indicated that they had been dragged to the vehicle."

Fourth District Court of Appeal

Ayos v. State, 4D17-3840 and 4D17-3857 (June 19, 2019) (on motion for rehearing)

Ayos appealed after a no contest plea to a combination of sexual and non-sexual offenses.

Defense counsel "stipulated to a factual basis at the time of the plea, thereby implicitly stipulating to a penetration finding, which was reflected in the scoresheet's inclusion of 160 sexual penetration points." Testimony of the victim at the sentencing hearing supported the inclusion of the points. The defendant argued, however, that the information to which he pled alleged "union or penetration" in the alternative. The Fourth District rejected the challenge to the inclusion of the points finding that the primary argument of the defense at sentencing was that the sexual

contact was consensual, and alternatively, that any error was harmless as the record demonstrated beyond a reasonable doubt that penetration had occurred.

Multiple cost assessments were reversed. The $60 assessment for misdemeanor counts under section 938.05, Florida Statutes is "per case," not "per count." Assessments under section 318.18 were imposed, but they are for traffic offenses only, and the defendant was not charged with any. Assessments under 17th Circuit Administrative Order VI-02-D-3 are for county court cases only. An assessment under section 938.085, Florida Statutes was stricken because the convictions in this case were not enumerated under that statutory provision.

C.C. v. State, 4D17-3890 (June 19, 2019)

The trial court erred in departing from a DJJ recommendation when committing C.C. to a high risk-residential program. The juvenile probation officer testified that although DJJ recommended a nonsecure placement, she recommended the high-risk program because C.C. picked up new charges, demonstrating "that he was still committing crimes and failing to adhere to the terms of his probation."

The trial court failed to comply with E.A.R. v. State, 4 So. 3d 614 (Fla. 2009). "Here, although the trial court gave sound reasons for deviating from DJJ's recommendation, . . . the trial court failed to articulate its understanding of the opposing restrictiveness levels. The court did not engage in any discussion about the type of juvenile offenders who are more suited for non-secure programs than high-risk programs, the possible length of stay for a non-secure program versus a high-risk program, or the treatment programs and services available at a non-secure program rather than at a high-risk program. . . . Second, the trial court's stated reasons did not contain significant information that the DJJ overlooked, failed to sufficiently consider, or misconstrued regarding appellant's programmatic, rehabilitative needs, along with the risks that appellant posed to the public. Instead, the trial court relied on factors the DJJ had considered before making its recommendation."

Fifth District Court of Appeal

Rivera v. State, 5D17-1397 (June 21, 2019)

Rivera, a juvenile at the time of the offense for which he was charged, first-degree murder, appealed, and the Fifth District reversed because the trial court "restricted Rivera's cross-examination of his co-defendant, a key State witness."

Defense counsel tried "to inform the jury about the specifics of Soto's plea deal. The trial court ruled that Rivera could elicit that Soto was convicted of first-degree murder and the agreed-upon fifteen-year sentence. However, the trial court denied defense counsel's request to advise the jury that Soto's conviction carried a potential forty-year to life sentence with a twenty-five-year minimum mandatory because the trial judge was concerned that this information would inform the jury of Rivera's potential sentence."

While it was correct that the jury is not supposed to learn about the maximum sentence a defendant is facing, and Rivera and Soto were charged with the same offense, the "exclusion of this evidence prevented Rivera from demonstrating the full extent of Soto's interest in the case and his motivation to testify consistent with the State's theory of prosecution." "At the very least, the trial court should have allowed Rivera to inform the jury that Soto was facing a significantly more severe or substantial sentence in the absence of his plea agreement." Soto was an especially significant witness, the only one who offered evidence of premeditation.

One judge dissented from the Court's holding regarding the limit on cross-examination of Soto.

Piccinini v. State, 5D17-2929 (June 21, 2019)

On appeal from convictions for two counts of animal cruelty, the Fifth District reversed the sentence because the "trial court erred in considering Piccinini's failure to accept responsibility for the dog's injuries and death."

Piccinini moved for a nonstate prison sanction based on his sentencing scoresheet total of less than 22 points and presented a psychologist who concluded that there was no evidence of psychopathy and that Piccinini did not present a danger to the community. The trial court rejected that testimony and imposed a sentence of 51 weeks in county jail plus one year of community control and three years of probation on one count, and four years of probation plus one year of community control on the other. The judge stated on the record that the defendant "has taken no responsibility for any of the injuries." The judge reiterated that statement when addressing the psychologist's testimony.

Although the State argued that these statements were in response to the psychologist's testimony, the appellate court found that the judge's own comments belied this, as the "trial court focused on Piccinini's failure to accept responsibility

for his actions regarding the dog's injuries and death. The court then continued with that theme in discussing Dr. Cohen's testimony, noting that 'the **other** thing' that bothered the court was Piccinini's attempt to place blame on everyone else but himself."

Wilson v. State, 5D17-3568 (June 21, 2019)

The Fifth District affirmed a conviction for first-degree murder and addressed Wilson's argument that his statements to police should have been suppressed based on his invocation of his right to counsel.

Upon his arrest, Wilson was read his Miranda rights prior to questioning and he did not request an attorney or invoke his right to counsel. He denied knowing anything about the murder. A detective showed him a warrant for his arrest, and he said: "I don't know what to tell you. I need a lawyer, man." Questioning ceased at that time. The detectives returned to the jail five days later and questioned Wilson again. After he was read his Miranda warnings, he agreed to speak, "but said that he could not tell them much because he had to speak to his lawyer first." The detectives told him about the evidence against him and urged him to tell them what he knew. He was told that other suspects claimed Wilson committed the murder alone. While he continued denying involvement, he did admit to being in Crystal River around the time of the murder, something he had denied during the questioning five days earlier.

The Fifth District first found that Wilson's statement during the first interview, "I need a lawyer, man," was an unambiguous request for counsel. The detectives did cease questioning at that time, and suppression of the first statement, leading up to that invocation of the right to counsel, was properly denied.

The second interview, however, was an improper reinitiation of questioning by the detectives. The detectives went to the jail of their own volition and there was no break in custody in between the two interrogations. However, the Court concluded that the error in admitting the second statement was harmless based on the totality of the circumstances. The Court emphasized that Wilson did not "reveal anything incriminating that was not otherwise presented to the jury." There was independent evidence of his presence in Crystal River, including cell tower records and motel security footage. The only harm was that the second interview undermined Wilson's credibility because of the contradiction between the two statements. But that was insignificant because the jury saw the motel video, cell phone records and toll plaza photos which also undermined the earlier statement.

Ovenshire v. State, 5D18-913 (June 21, 2019)

An appeal from a sentence after a no contest plea was dismissed. The Court lacked jurisdiction because the defendant failed to file a motion to withdraw plea.

State v. Avella, 5D18-1407 (June 21, 2019)

The State appealed an order dismissing charges that Avella practiced veterinary medicine without a license and committed cruelty to animals. The Fifth District reversed as to the animal cruelty charge. The relevant facts were stated by the Court:

> The charges arose out of Avella's use of a homemade device in an attempt to treat a problem that his miniature dachshund, Thor, was having. Avella asserts that he attempted the treatment himself because he could not afford veterinary treatment. After Avella's home-treatment injured the dog, he took Thor to a local veterinarian for professional treatment. The veterinarian insisted that the dog, who allegedly was in pay and may have had internal injuries, needed to go to an advanced care veterinary facility to treat the original condition and the home-treatment caused injury; however, Avella did not do so based on claimed lack of funds.

The Court affirmed as to the unlicensed practice charge based on the statutory exception for trying to care for one's own animals. The animal cruelty charge was reversed for further proceedings based on the use of a homemade tool to remove bone fragments from the dog's rectum and then failing to take the do to an advanced care clinic under section 828.12(2), Florida Statutes (2018). Although Avella argued that he did not intend to cause pain, the statute does not require a specific intent to cause pain; it punishes an intentional act that results in the excessive infliction of unnecessary pain or suffering.