Case Law Update
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Eleventh Circuit Court of Appeals

In Re: Hammoud, 19-12458 (July 23, 2019)

Hammoud sought leave to file a successive motion to vacate under 28 U.S.C. s. 2255. He sought to challenge his conviction for use of a firearm during a crime of violence under 18 U.S.C. s. 924(c), and the claim was based on recent Supreme Court decisions, especially United States v. Davis, 139 S.Ct. 2319 (2019), which held that the residual clause of section 924(c)(3)(B), like the residual clause in ACCA, was unconstitutionally vague. That resolved a split among circuit courts of appeals.

The Eleventh Circuit proceeded to hold that Davis announced a new substantive rule that applied retroactively to criminal cases that became final prior to the announcement of the new rule. Hammoud, however, faced an additional bar to overcome. In In re Baptiste, 828 F. 3d 1337 (11th Cir. 2016), the Eleventh Circuit held that federal prisoners were barred from raising claims in successive section 2255 motions that were presented in a prior application, as was this claim. The Eleventh Circuit concluded, however, that the new rule announced in Davis was a "rule of constitutional law in its own right, separate and apart from (albeit primarily based on)," two earlier Supreme Court decisions regarding similar residual clause vagueness challenges.

Hammoud was therefore given leave for the successive motion to vacate.

Weeks v. United States, 17-10049 (July 22, 2019)

Weeks was granted leave to file a successive motion to vacate sentence under 28 U.S.C. s. 2255 because "he had made a prima facie showing that his prior convictions for resisting arrest and assault . . . no longer qualified as violent felonies under the ACCA in light of the ruling of the Supreme Court in Samuel Johnson v. United States [135 S.Ct. 2551 (2015)] that the ACCA's residual clause is unconstitutionally vague." Weeks then had the burden of demonstrating "that the residual clause was the sole basis for the enhancement." During the pendency of Weeks' direct appeal, there had been significant developments regarding that issue.

The Court had to decide, "when a claimant challenged his ACCA enhancement on direct appeal, whether the relevant time frame for this inquiry is limited to the sentencing hearing or if it extends through the claimant's direct appeal. We hold that, where a claimant challenged his ACCA enhancement on direct appeal, the relevant time frame to consider when determining whether the residual clause solely caused the enhancement of a claimant's sentence extends through direct appeal. Because Mr. Weeks has carried his burden of showing that it is more likely than not that the residual clause, and only the residual clause, caused his sentence to be enhanced and that he no longer has three ACCA predicate convictions, we reverse the district court's order denying his s. 225 motion and remand for resentencing."

In Re: Cannon, 19-12533 (July 25, 2019)

The Eleventh Circuit granted leave for the filing of a successive motion to vacate sentence under 28 U.S.C. s. 2255 as to one of several claims – that a firearms conviction under 28 U.S.C. s. 924(o) no longer qualified as a crime of violence under the residual clause of s. 924(c)(3)(B), in light of United States v. Davis, 139 S.Ct. 2319 (2019).

The firearm conspiracy conviction at issue "referenced multiple, distinct predicate offenses, including two carjackings, four drug crimes, and one conspiracy to commit Hobbs Act robberies of drug stash houses. The drug crimes and carjacking qualify without resort to s. 924(c)(3)(B)'s residual clause. However, this Court has not decided whether conspiracy to commit Hobbs Act robbery categorically qualifies as a crime of violence under s. 924(c)(3)(A)'s elements clause. As noted above, Cannon's predicate crimes seem inextricably intertwined. In other words, it is difficult to see how a jury would have concluded that Cannon was guilty of using a firearm during and in furtherance of the underlying Hobbs Act predicates without at the same time also concluding that he did so during and in furtherance of the underlying drug and carjacking predicates." It was unclear at this stage which crimes served as the predicate offenses for this conviction. It was therefore concluded that Cannon made a prima facie showing that his claim "satisfies the statutory criteria of s. 2255(h)(2) on the basis that his s. 924(o) conviction in Count 3 may – not that it does – implicate s. 924(c)(3)(B)'s residual clause and *Davis*."

First District Court of Appeal

Moorer v. State, 1D18-1224 (July 23, 2019)

The First District affirmed convictions for attempted second-degree murder. The instruction on the justifiable use of deadly force stated, in part, that if the defendant "was not otherwise engaged in criminal activity and was in a place he had a right to be, then he had no duty to retreat and had the right to stand his ground." There was no instruction, however, on the alleged "criminal activity." Moorer did not object to the instruction on this ground, and the First District reviewed the claim for fundamental error.

After the trial in this case, the standard instruction was amended and added, inter alia, a note that "[w]here appropriate, the court should state or define the applicable criminal activity that the defendant may have been engaged in." The defendant argued on appeal that the trial court should have defined the criminal activity at issue as stalking. The First District found that the omission did not qualify as fundamental error. The sole defense was self-defense and the "evidence supporting that defense was weak." The defendant's testimony was "both internally inconsistent and contradicted by the testimony of witnesses." Additionally, the State referenced the defendant being engaged in the criminal activity of stalking only in rebuttal "to the defense's argument that Appellant had no duty to retreat."

Moorer further argued that the trial court erred in giving the "aggressor" instruction – i.e., that the defense of justifiable use of deadly force is not available to a person who "initially provokes the use or threatened use of force against himself or herself." He argued that it was not supported by the evidence, focusing solely on his own testimony. The Court reviewed all of the evidence and found that the giving of the instruction was supported by testimony from other witnesses.

Howard v. State, 1D18-3824 (July 23, 2019)

Howard appealed from an order striking his pro se motion to withdraw guilty plea as a nullity and the First District affirmed.

At the time in question, Howard had been appointed counsel for a resentencing, following which he filed the pro se motion to withdraw plea. The motion alleged that the plea was involuntary because "he was under the impression he was HVFO when in fact he was not," and the court erred by sentencing him as an HVFO. The allegations "do not assign blame to defense counsel and do not give

rise to an adversarial relationship." As such, the general bar against filing pro se pleadings while represented by counsel was applicable and the motion was correctly stricken. An exception has been recognized, permitting such a pro se motion when the motion alleges that counsel "misadvised the defendant, misrepresented the terms of the plea, or coerced the defendant into accepting the plea," as those allegations allege "an adversarial relationship where the lawyer cannot both represent his client and refute the allegations."

When such allegations of an adversarial relationship exist, a court should hold a limited hearing, with the defendant, defense counsel and the State present. If it is found that the adversarial relationship has arisen and the allegations are not conclusively refuted by the record, counsel should be permitted to withdraw or should be discharged, and conflict-free counsel should be appointed.

Austin v. State, 1D18-3961 (July 23, 2019)

The First District affirmed the summary denial of a Rule 3.850 motion. The opinion goes through each of the five claims and then sets forth the evidence from the trial record that was attached to the lower court's order that did, in fact, conclusively refute the allegations of each claim.

R.C.O. v. State, 1D18-4515 (July 23, 2019)

The trial court erred in finding R.C.O. guilty of the lesser included offense of improper exhibition of a dangerous weapon as a lesser included offense. The petition alleged an aggravated battery by touching or striking the victim against her will and using a deadly weapon while doing so. The petition did not set forth all of the elements of the lesser offense of improper exhibition of a dangerous weapon, as the necessary elements of that offense include exhibiting the weapon in a "rude, careless, angry or threatening manner."

Johnson v. State, 1D19-0507 (July 23, 2019)

The summary denial of a Rule 3.850 motion alleging ineffective assistance of counsel was reversed and remanded for an evidentiary hearing. The motion alleged that counsel advised the defendant "to take the plea agreement without informing him of the weaknesses in the State's evidence. The asserted weakness in the State's evidence included that the State allegedly had no witnesses who saw anyone with a firearm, much less saw the Appellant with a firearm, and could not enter the firearm, shell casing, or bullet projectile as evidence under section 90.401, Florida Statutes."

The motion further alleged the defendant would not have taken the plea had he known of these weaknesses in the case.

Porter v. State, 1D17-3577 (July 22, 2019)

Porter appealed convictions for manslaughter with a firearm and two counts of possession of a firearm by a convicted felon. The victim of the killing was Porter's girlfriend, who was found shot in the head on the living room floor. A .35 caliber Marlin rifle was found on the bed in the bedroom that Porter shared with his girlfriend, and two empty .35 caliber cartridge casings were found. Additionally, a search outside the residence resulted in the discovery of a loaded .22 caliber Remington Speedmaster rifle.

The defense objected to the admission of the .22 caliber based on the lack of proof of corpus delicti. The First District held that the admission of the defendant's videotaped interview in which he admitted that after the shooting he moved the Remington rifle from the bedroom to the boat was supported by a sufficient corpus delicti:

> Appellant stipulated that he was a convicted felon, and the State introduced testimony that (1) Appellant was a hunter and an excellent shot; (2) Appellant had owned a .22 caliber Speedmaster rifle for many years; (3) the same type of firearm was found in an inoperable boat on Appellant's property and had been placed there recently; (4) freshly killed squirrels were found in Appellant's refrigerator; and (5) squirrels were hunted with the type of rifle found in the boat. This was sufficient circumstantial evidence – apart from Appellant's confession – tending to show that Appellant owned or had the rifle in his care, custody, possession, or control.

Alcazar v. State, 1D17-4462 (July 22, 2019)

Three years prior to a trial for six counts of vehicular homicide, the court appointed an expert to determine the defendant's competence to stand trial. A report finding the defendant competent was filed, but there was nothing in the record to show that the court conducted a hearing or made any findings. At the trial, three years later, the defendant discharged counsel and, after a Faretta hearing, the court

conducted a colloquy to determine if the defendant was competent to discharge counsel and make a knowing and intelligent waiver of the right to counsel.

After the convictions were affirmed on direct appeal, the First District granted a petition alleging ineffective assistance of appellate counsel, and directed the trial court to conduct a nunc pro tunc hearing to determine competency to stand trial, if possible. On remand, the trial court, without any hearing, attached the report from three years prior to an order finding the defendant competent.

The defendant appealed that order, and the State conceded that the trial court erred by entering the order without conducting a hearing. The First District remanded once again for such a hearing. The Court did not address the claim that the earlier competency report was stale by the time of the trial (three years later), as that claim had not been raised in the trial court.

Paul v. State, 1D17-5161, 1D17-5162 (July 22, 2019)

Paul appealed convictions for burglary of a dwelling, resisting an officer without violence, and an order revoking probation.

Paul argued that the trial court erred by admitting hearsay statements under the co-conspirator exception without making the required preliminary findings that the statement was by a person who was a coconspirator during the course, and in furtherance of, the conspiracy. This issue was not preserved by a specific objection. Regardless, had there been an objection, the claim would still have been rejected.

The trial court found that the challenged testimony was not hearsay. The State "did not attempt to use the cousin's testimony as to what he heard one of the men in the victim's yard say to prove the truth of the matter asserted, i.e., that any of the men there had a weapon. Instead, as the prosecutor argued, the State used the statement in order to prove that the men, including Appellant, were knowingly committing a crime." Additionally, there was independent evidence of a conspiracy – a video showing three men entering the victim's home and evidence of items being found outside the victim's home.

Paul argued that the court erred in instructing the jury that it could consider "the inference of guilt of burglary from property recently stolen." There was no objection, and fundamental error was not established "because the jury did not need to consider possession of stolen property to convict, and it was not an issue during

the trial." And, the defendant did not possess any stolen property when he was arrested.

Paul argued that the trial court erred by considering jail calls at sentencing "where there was no evidence that he was ever arrested, charged, or convicted of any crimes involving the witnesses or calls." The First District disagreed. The court was not relying on unsubstantiated allegations of wrongdoing. "Here, instead, the trial court heard the jail calls and was able to determine if what it heard supported the State's contention that appellant attempted to influence his mother and girlfriend." The calls involved the defendant and his mother and girlfriend "during which he was seeking to influence any potential testimony by witnesses or influence them to provide him an alibi."

Last, Paul argued that the sentence should have been treated as excessive given his age, 22, at the time of sentencing, because "brain science research" showed that he was not an "adult with respect to mental capacity." The Court rejected the claim, reiterating its prior holding that Graham v. Florida and Miller v. Alabama applied to those who were juveniles at the time of their offenses and did not mandate that the sentencing court consider mental age rather than chronological age.

Mattox v. State, 1D18-663 (July 22, 2019)

Mattox appealed convictions for two counts of armed robbery. The First District affirmed the convictions, but reversed the sentences. The trial court "erred in finding that it was required to run Appellant's twenty-five year sentences on the armed robbery offenses consecutively to his fifteen-year sentence in his violation of probation ('VOP') case as opposed to running only his two minimum mandatory ten-year terms on the armed robbery offenses consecutively to the VOP sentence."

The ten-year mandatory minimum sentences were under the 10/20/Life statute, based upon possession of a firearm. The relevant statutory language provides, in part, that "[t]he court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense." The key phrase in the quoted statute was "in this subsection." "The only terms of imprisonment provided for in subsection (2) are minimum mandatory terms." Furthermore, "[o]rdering only the ten-year minimum mandatory terms, as opposed to the twenty-five-year sentences , to run consecutively to Appellant's VOP sentence would not cause Appellant to serve his sentences in fragmented bits and pieces."

Gomez v. State, 1D18-1853 (July 22, 2019) (on motion for clarification)

Gomez pled guilty to two counts of second-degree murder. He filed a state court habeas corpus petition, alleging that there was no factual basis for the charges – i.e., "that there was no preexisting enmity between Appellant and the victims to support the depraved mind element of second-degree murder, and that there was no proof to time him to the victims' deaths."

The petition was treated as an unauthorized successive and untimely Rule 3.850 motion. In addition to being procedurally barred, the claim was "legally meritless." During a domestic dispute which resulted in violence, Gomez fought with the mother of a child, "pushing her until she drowned" in a pool. He then "dropped the child into the pool during the fight" and admitted to killing the mother. When he saw the child floating afterwards, he did not provide assistance and could not say why he did not. A factual basis for the plea clearly existed.

Davis v. State, 1D18-4786 (July 22, 2019)

The First District reversed an order revoking sex offender probation. The trial court found that the defendant was "noncompliant." That was "legally insufficient insofar as the court failed to specify – either orally or in writing – each condition of probation that Appellant had violated and indicate that the violation was willful."

Additionally, as to one of the alleged violations, Davis "testified that he was unable to update his driver's license with the DHSMV because he did not have the money to pay the $31 fee." The trial court did not engage in any analysis as to willfulness and ability to pay. On remand, the trial court would be permitted to consider the significance of a 2014 statutory amendment that provides an exemption for applicants who are homeless or whose annual income is at or below the federal poverty level. The failure to seek such an exemption might be relevant to the court's conclusion on remand.

State v. Jackson, 1D18-5224, et al. (July22, 2019)

In several cases involving juvenile life sentences, the defendants were granted resentencing pursuant to Atwell v. State, 197 So. 3d 1040 (Fla. 2016). The State did not appeal, and prior to the resentencing, the Florida Supreme Court issued opinions in State v. Michel, 257 So. 3d 3 (Fla. 2018) and Franklin v. State, 258 So. 3d 1239 (Fla. 2018), which implicitly overruled Atwell. After the mandate in Michel, but before the decision in Franklin became final, the State argued that the change

effected by Michel warranted rescission of the orders granting resentencing. The trial courts found that they lacked jurisdiction to rescind the resentencing orders and the State appealed. The First District concluded that the orders denying the State's motions to rescind the resentencing proceedings were not appealable orders and the State's appeals in these cases were dismissed.

The orders being appealed did not qualify as orders granting postconviction relief. The orders that granted postconviction relief, and which would have been appealable, were the earlier orders granting resentencing – the orders which the State did not appeal.

Third District Court of Appeal

Beal v. State, 3D17-1469 (July 24, 2019)

A conviction for trespass of a conveyance was reversed because the trial court erred in overruling a defense challenge to a peremptory challenge by the prosecution. The trial court rejected the defense objection based upon its conclusion that "white males are not a protected class," and that the defense was therefore not entitled to a race- or gender-neutral reason. Citing several of its own and Florida Supreme Court prior opinions, the Third District stated that the precedent "plainly articulates that white men fall under the protected class of *gender*."

On appeal, the Court would not entertain the State's argument that the reasons were genuine, because that would "put the cart before the horse." As no genuineness analysis had been engaged in by the trial court, it "could not be inferred." And, even if it could, the trial court did not provide the defense with an opportunity to respond to the State's explanation.

Milton v. State, 3D19-370 (July 24, 2019)

The Third District affirmed the denial of a motion to withdraw plea. The motion was filed about two weeks after the court accepted a no contest plea. The motion alleged that the plea was involuntary due to the "'pressure' of having to begin a jury trial and facing a 25-year minimum mandatory sentence if convicted." Such allegations are insufficient as a basis for withdrawal of a plea "based on involuntariness or coercion."

Fourth District Court of Appeal

Adams v. State, 4D17-966 (July 24, 2019)

The Fourth District reversed a conviction for first-degree murder for a new trial.

Adams challenged the admissibility of a codefendant's statements. Under Confrontation Clause analysis, out-of-court statements are inadmissible if they are "testimonial" – i.e., made in anticipation of use at trial. The initial statement to an informant did not result in a violation of the Confrontation Clause because it was not "testimonial." "The co-defendant and informant had a long-standing friendship. They grew up in the same neighborhood and hung out together. The co-defendant initially voluntarily confessed to his friend before he began working for the police. The co-defendant was not interrogated and did not make the statements in anticipation of litigation."

Subsequent conversations between the codefendant and the informant were recorded by law enforcement but the codefendant was unaware of that. Recording for "possible later use in police investigations does not automatically make them testimonial." These statements were also non-testimonial. They were made on the codefendant's "own initiative, giving details of the murder without any prompting."

The Fourth District next analyzed the statements under the hearsay exception for statements against penal interest. Here, the trial court erred by failing to redact portions of the statements which inculpated the defendant. The "co-defendant's statements inculpating the defendant were the glue that held all the evidentiary pieces of the murder crime together. Yet, the statements were not inextricably intertwined. The statements concerning the co-defendant's participation in the murder did not require the defendant's payment to him or threat against him to explain the crime."

The State argued that "the defendant forfeited his hearsay objection when he threatened the co-defendant's girlfriend and family in letters." The forfeiture-by-wrongdoing exception was codified in section 90.804(2)(f), Florida Statutes (2016). However, the trial court did not have the opportunity to rule on it because it denied the defendant's motion to exclude statements. On retrial, the State will be able to present the forfeiture argument to the trial court.

The defendant challenged the admission of letters and a book that he authored. "The defendant wrote to the co-defendant and another inmate housed in the same facility. He advised the other inmate that the co-defendant was 'running his mouth,' and about to testify against him. In retaliation, he threatened to commit a sexual act on the co-defendant's girlfriend." These "letters collectively showed the defendant's consciousness of guilt. He urged the co-defendant to recant, to tell the truth, and suggested the co-defendant's statements had been made while he was under the influence. He asked him to write a letter to the defendant's attorney admitting that neither of them were involved in the crime. He told the co-defendant to say that he was just trying to impress the informant, and was trying to be a character in the defendant's book."

To understand the references in the letters, the trial court "allowed the State to introduce parts of the book." The Fourth District found no error in this. Through redaction, the trial court struck a proper balance. The letters showed consciousness of guilt and explained why the codefendant recanted. Only one chapter of the book was admitted to provide context.

Lastly, a recorded phone conversation between the defendant and the victim's father was improperly admitted as the comments "were not probative of anything other than [the father's] opinions." In the recording, the father was heard telling the defendant: "You shot her"; "I heard you shoot her"; "I know you shot her, Prince"; "It's f____ed up that you shot her."

State v. Tigner, 4D18-3106 (July 24, 2019)

The Fourth District reversed an order suppressing evidence.

The officer making the initial stop "had reason to believe that the vehicle in which Tigner was a passenger had illegal tint because he was unable to see inside the vehicle. When the driver of the vehicle lowered his window, the officer smelled both burnt and fresh marijuana emanating from inside the vehicle." A backup officer arrived within a minute, with a K-9 dog and a tint meter. The meter confirmed the illegality of the tint. The backup officer also smelled marijuana coming from inside the vehicle. Five occupants of the vehicle were told to exit the vehicle for the K-9 to avoid the possibility of the K-9 biting anyone.

The driver then volunteered that he had smoked marijuana earlier but said there was none inside the vehicle. Tigner "was instructed to leave a purple Cigarillo

pouch located in his waistband in the vehicle for officer safety." It was not squeezed by the officers at that time.

The K-9 alerted to the purple pouch which was then searched and tested positive at the scene for ecstasy, although a subsequent lab test concluded it was "substitute cathinones," which is a controlled substance requiring a valid prescription.

The significant point in the case was that the officers smelled "fresh and burnt marijuana emanating from inside the vehicle *prior* to the canine alerting to the vehicle or the pouch." And, "the smell of marijuana in this case was not particular to any one occupant or location within the vehicle."

Fifth District Court of Appeal

Caraballo v. State, 5D18-706 (July 26, 2019)

A conviction for intentional viewing of materials depicting a sexual performance by a child were reversed because "the material did not meet the statutory definition of sexual performance." Facts related to this conclusion were not set forth in the opinion.

Helvey v. State, 5D18-1487 (July 26, 2019)

The summary denial of three claims in a Rule 3.850 motion was reversed for further proceedings because the trial court failed to attach court records conclusively refuting the claims.

One claim was that counsel was ineffective for misadvising the defendant "with respect to the inference applicable to being in possession of stolen property without a satisfactory explanation and with respect to what the jury would learn about his prior criminal history if he testified."

N.J. v. State, 5D18-1949 (July 26, 2019)

The trial court erred in denying a motion to suppress evidence.

An officer told Appellant and his two teenaged friends to stop based on a hunch that some people in the area were violating their probation-related curfews. The Appellant and his friends did not stop, and Appellant was heard to say that he

did not have to. When the officer reiterated his order to stop, they did. The officer said they were not in trouble; he was "only trying to put names with faces." He referenced probation violations in the area, told the three teens that they were not under arrest; they were only being detained. When learning that the two friends were not on probation, they were permitted to leave after answering the officer's questions.

Appellant had been on probation, which he admitted, but denied missing the curfew of 6:00 p.m. because he did not know the current time. He was then handcuffed and placed in the squad car. The officer then contacted Appellant's mother regarding the curfew violation. The officer then had the Appellant exit the car to search him before taking him to the juvenile facility for processing. The burnt remains of a marijuana cigarette were found in Appellant's pocket.

The trial court denied the suppression motion, finding that this was a consensual encounter that led to the discovery of the marijuana. The Fifth District disagreed. The three juveniles stopped only after a second order to do so, and Appellant was not free to ignore the officer; nor would any reasonable person have believed that he was free to go.

Geiger v. State, 5D18-2146 (July 26, 2019)

A conviction for felony driving while license or driving privileges were permanently revoked was reversed, because the defendant never had a driver's license. "'Individuals . . . who drive in Florida without ever having obtained a license or having an exemption to licensure, do not have any "driving privilege."'" "'A driver's license or driving privilege that does not exist cannot be canceled, suspended, or revoked.'"

Davidson v. State, 5D18-2655 (July 26, 2019)

Two claims of ineffective assistance of counsel in a 3.850 motion were summarily denied. The Fifth District reversed the denials of those claims for an evidentiary hearing where the trial court's order did not attach court records that conclusively refuted the claims.

One claim was that counsel failed to call a witness who allegedly would have testified that his own actions led to "unintentional downloading of the child pornography onto Appellant's computer." The other claim was that counsel failed "to call a generically described cybercrimes computer expert who Appellant alleges

would have testified that the child pornography was inadvertently downloaded onto his computer due to malware, which if proven would tend to negate the required 'knowledge' element of Appellant's possession of these illegal images."

Joseph v. State, 5D17-3907 (July 25, 2019)

The Fifth District reversed convictions for burglary of a conveyance while armed and grand theft based on the insufficiency of the evidence.

The victim's car was burglarized during the short period of time in which she left it parked outside a kennel; she found the windows smashed and several items stolen from the car on her return. During the time that she was gone, surveillance video showed a Chrysler 300 park next to the victim's vehicle; the Chrysler left shortly after the burglary and prior to the discovery of the burglary. Surveillance video only showed an unidentified man exiting the Chrysler during that time. About two weeks later, several of the stolen items were found in the residence where the defendant was living. The defendant had also rented a Chrysler 300 during this time period. The defendant's fingerprints were also found on papers that had been in the Chrysler.

The evidence adduced by the State linking the defendant to the offenses was entirely circumstantial. While there is a statutory inference that the person in possession of stolen property knew or should have known it was stolen, that applies only if possession was exclusive. Here, the stolen items were found in a spare bedroom closet and at least four individuals had, on occasion, stayed in that room. As there was uncontroverted evidence that the defendant was not the only person using the rental car or the spare bedroom, and his fingerprints were not found on the recovered stolen items, the State did not refute the reasonable hypothesis of innocence that he was not involved in the burglary or theft.

Weiand v. State, 5D19-500 (July 25, 2019)

After Graham v. Florida, Weiand received a new sentencing hearing under section 921.1401, Florida Statutes, and was sentenced to two consecutive life sentences for first-degree murder and other offenses. He subsequently filed a postconviction motion seeking his judicial sentencing review after 25 years because he had not been previously convicted of enumerated offenses in section 921.1402(2)(a), that would preclude such review. Weiand originally pled guilty in 1988. The trial court denied the motion for judicial review as premature, finding that the review period would being from the date of the resentencing in 2017; and,

that the trial court had also conducted that judicial sentencing review at the time of the resentencing.

The Fifth District disagreed. The motion was not premature. The 25 years had already expired. The record before the appellate court was unclear as to whether the trial court actually did simultaneously conduct the statutory judicial sentencing review at the same time as the new sentencing hearing. Thus, on remand, the trial court had to either attach records demonstrating compliance with the sentencing review under section 921.1402(2), or conduct the required review. Pursuant to the statute, a juvenile is limited to one such sentencing review.

State v. Kirkland, 5D18-3795 (July 24, 2019)

The trial court erred in granting statutory immunity under the Stand Your Ground Law. Kirkland "was engaged in criminal activity at the time he discharged a firearm."

The trial court hearing, pursuant to stipulation, consisted solely of a surveillance video of the incident. The appellate court reviewed the video and agreed with the State that it showed that "Kirkland was committing either the crime of open carry of a firearm . . . or the crime of improper exhibition of a firearm," "in the moments leading up to the shooting."

Kasper v. State, 5D19-179 (July 23, 2019)

A motion to dismiss based on double jeopardy was properly denied. Kasper argued that he had already been separately punished for the same conduct in an earlier federal court case. Under the dual sovereignty doctrine, "an act that constitutes a crime under both federal and state law can be separately prosecuted by both sovereigns without violating the prohibition against double jeopardy because the offenses are separate."

Kasper had acknowledged that doctrine but had litigated the issue because the United States Supreme Court was then entertaining a certiorari petition on the issue of whether the doctrine should be overturned. In Gamble v. United States, 139 S.Ct. 1960 (2019), the Court declined to overturn the dual sovereignty doctrine.

Jackson v. State, 5D19-305 (July 23, 2019)

Concurrent 22-year sentences (12 years in prison plus 10 years on probation) for four second-degree felonies were reversed as they exceeded the statutory maximum of 15 years for a second-degree felony.