

Case Law Update
August 5, 2019
Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

[United States v. Feldman](#), 17-13443 (July 30, 2019)

The Eleventh Circuit affirmed convictions for conspiracy to commit wire fraud and conspiracy to commit money laundering. An earlier trial had resulted in acquittals on some counts, convictions on others, and a reversal of the convictions for retrial. This was the appeal from the retrial. The primary argument on appeal was that the “retrial on an alternate theory of the money-laundering-conspiracy charge – for which the first jury verdict was silent – violated [Feldman’s] double-jeopardy rights.”

At the first trial, the jury found Feldman “guilty of conspiracy to commit money laundering by the international transmission of funds to promote unlawful activity . . . , but it expressed no finding about conspiracy to commit money laundering by financial transactions to conceal the nature and source of illegal proceeds. . . .” The verdict form had three options – one to mark guilty for each of the two alternative means of committing the money laundering conspiracy, and a third for “not guilty.” At the second trial, after the reversal for retrial, the jury found Feldman guilty of the money-laundering conspiracy “including both money-laundering objects.”

The first jury did not check the box next to guilty for money laundering conspiracy by concealment. The Court rejected the argument that the absence of an express finding of guilt constituted an implied acquittal as to that alternative means of committing the offense. If a conviction for “one offense is equally consistent with both guilt and innocence of another, then it cannot accurately be said to ‘imply’ anything.”

Nor did the dismissal of the jury “without returning any express verdict” as to the second alternative means of committing the conspiracy result in a termination of jeopardy. “To whatever extent the district court might be said to have ‘fail[ed] to try a discrete portion of [Feldman’s] case before the original jury,’ Feldman impliedly consented to that failure.”

The case involved the defendant's involvement in Miami Beach nightclubs where women from Eastern Europe were hired to pose as tourists and trawl for eligible patrons – well-dressed men using high-value credit cards, and then get them to spend “exorbitant sums on drinks for themselves and the . . . girls.” The Eleventh Circuit detailed the evidence and found that it was sufficient as to both convictions on retrial.

The Eleventh Circuit held that the prosecutor's reference to Fagin, from *Oliver Twist*, did not violate the defendant's due process rights by playing upon the fact that both Fagin and the defendant were Jewish. Fagin was referred to by the prosecutor three times. Once, during voir dire, when questioning if jurors could understand that the mastermind of a crime could be guilty when using others to commit the crime. The second was an inquiry as to “whether a prospective juror would be unwilling to credit a witness's testimony just because the witness was himself a criminal.” The third, in the rebuttal closing argument, compared both Feldman and a government witness, who was not noted by the record as being Jewish, to Fagin.

The Court also addressed multiple sentencing issues: the application of the loss-amount and ten-or-more-victims enhancements; the obstruction-of-justice enhancement based on perjury at the first trial; the application of the sophisticated-money-laundering enhancement; and the substantive reasonableness of the above-guidelines sentence.

[In Re: Neil Navarro](#), 19-12612-C (July 30, 2019)

The Eleventh Circuit denied an application for leave to file a successive motion to vacate under 28 U.S.C. s. 2255.

The application asserted two claims, both relying on *United States v. Davis*, 139 S.Ct. 2319 (2019), which found the residual clause of 18 U.S.C. s. 924(c)(3)(B) unconstitutionally vague, with the result that conspiracy to commit Hobbs Act robbery no longer qualified as a predicate crime of violence.

Although *Davis* did apply retroactively, Navarro's factual proffer for his plea established that he committed two drug trafficking crimes and carried a firearm during and relation to those offenses. It did not matter that he was not convicted of, or charged with, those offenses as long as the government demonstrated that he used or carried a firearm “during and in relation to a crime of violence or drug-trafficking crime, and the factual proffer can be a sufficient basis. . . .”

[In re: Felix M. Palacios](#), 19-12571-G (July 30, 2019)

The Court denied an application for a successive motion to vacate under 28 U.S.C. s. 2255. The application sought to raise a claim based on the recent decision in Rehaif v. United States, 139 S.Ct. 2191 (2019), to challenge a conviction for possession of a firearm as a convicted felon.

Rehaif did not announce a “new rule of constitutional law, “but, instead, clarified that, in prosecuting an individual under 18 U.S.C. s. 922(g) and 18 U.S.C. s. 924(a)(2) – which provides that anyone who ‘knowingly violates’ s. 922(g) can be imprisoned for up to 10 years – the government must prove that the defendant knew he violated each of the material elements of s. 922(g).” Furthermore, the Supreme Court did not hold that Rehaif applied retroactively.

[Paez v. Secretary, Florida Department of Corrections](#), 16-15705 (July 31, 2019)

In an appeal from an order finding a habeas corpus petition untimely under 28 U.S.C. s. 2254, the Court addressed the question of whether “a district court may, on its own initiative and without hearing from the State, decide that the statute of limitations bars the petition.”

As a preliminary matter, the Court held that the district court, on its own, could take judicial notice of entries on a state court’s on-line docket. However, the Court held that on the basis of Rule 4 of the Rules Governing Section 2254 Cases, the district court could not dismiss a petition on timeliness grounds “without first ordering the State to respond in some way, though district courts have broad discretion to choose the form of the response.” One judge dissented from this holding.

[Al-Amin v. Warden, Commissioner, Georgia Department of Corrections](#), 17-14865 (July 31, 2019)

The Court affirmed the denial of a petition for writ of habeas corpus under 28 U.S.C. s. 2254.

The state and federal courts had both agreed that Al-Amin’s Fifth and Fourteenth Amendment rights were violated “when the prosecution engaged in a mock cross-examination of him after he invoked his right not to testify.” “The prosecutor’s closing argument highlighted the *defendant’s* failure – not the defense’s

failure – to explain inculpatory evidence.” The analysis in both state and federal courts turned on the question of harmless error.

The Court noted that the harmless error standard on collateral review was more stringent than the standard applicable to direct review. The habeas court could not grant relief “unless we have ‘grave doubt’ that the constitutional error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’ . . . To prevail, a petitioner must show ‘actual prejudice’ from the constitutional error. . . . ‘To show prejudice . . . there must be more than a reasonable possibility that the error contributed to the conviction or sentence.’” The Eleventh Circuit concurred with the district court’s view of the evidence of guilt as “weighty” or “overwhelming.” That, in and of itself, however, was not dispositive “in the face of a substantial and uncured error.” The defense theory was that Al-Amin had been framed and the FBI had planted incriminating evidence to connect him to the crime. This theory turned on the credibility of a deputy’s identification of Al-Amin, and the reliability of physical evidence – issues which the Court concluded were unlikely to have been substantially affected by the prosecutor’s “attempt to highlight that Al-Amin had not explained his whereabouts or activity.”

Al-Amin also argued that there was an error under the Sixth Amendment Confrontation Clause by precluding Al-Amin from cross-examining an FBI agent about that agent’s “previous involvement in a shooting of an allegedly unarmed Muslim man in 1995.” Given the trial court’s “significant discretion to limit the scope of cross-examination where appropriate, we find no constitutional error.” The agent was investigated and cleared of any wrongdoing; newspaper accounts regarding wrongful conduct did not allege any wrongdoing by this agent. The proposed questioning was found to be “inherently speculative and likely to lead the jury astray.” Broad cross-examination was otherwise permitted.

[In re: Drew Pollard](#), 19-12538-J (July 31, 2019)

The Court denied an application for a successive motion under 28 U.S.C. s. 2255. The application sought leave to present argument based on United States v. Davis, 139 S.Ct. 2319 (2019) While Davis applied retroactively, and while its holding, that the residual clause of 18 U.S.C. s. 924(c)(3)(B) was unconstitutionally vague, was relevant to Pollard’s predicate offense of armed robbery of a credit union, Davis was ultimately irrelevant because armed robbery of a credit union qualified as a crime of violence under s. 924(c)(3)(A)’s “use-of-force” clause.”

First District Court of Appeal

Williams v. State, 1D17-4593 (Aug. 1, 2019)

Where “it is unclear whether the trial court used the correct standard to deny a motion for new trial, ‘the *potential* that the trial court erred does not reach the level of fundamental error.’”

Eversole v. State, 1D18-3659 (Aug. 1, 2019)

The First District affirmed convictions for burglary and dealing with stolen property and rejected the argument that the defendant’s statements to police should have been suppressed when they were made without counsel present.

The defendant had retained counsel and had been in custody for seven weeks at the time of the interview. The defendant stated: “If we were to try to get a hold of [counsel] and get him out here do you think we could get him out here?” This did not qualify as an unequivocal request for counsel; it was deemed comparable to saying “maybe I should talk to a lawyer.”

The defendant further argued that the response by the detectives was not straightforward, and “‘steamrolled’ him into answering their questions.” The Court disagreed. The detectives said that it was his choice; that they did not know the attorney’s schedule; and when the defendant asked if he needed a different attorney, he was told that if he was unhappy with his attorney, he could ask the court for a different one.

Hill v. State, 1D19-1077 (August 1, 2019)

Neither Alleyne v. United States nor Apprendi v. United States render Florida’s Prison Releasee Reoffender statute unconstitutional.

Abaunza v. State, 1D17-5181 (July 29, 2019)

The trial court did not err in denying a full trial on whether Abaunza should be discharged from his commitment as a sexually violent predator.

The Court first addressed a preliminary question, and found that as a result of a statutory amendment in 2014, which provided a right of the committed individual

to attend the post-commitment probable cause hearings for annual review along with counsel, review of the trial court's finding of probable cause was not de novo.

Regardless of whether the standard of review was de novo, the Appellant still failed to demonstrate error. The Court found it "particularly troubling that Appellant refuses or fails to participate in available treatment." The Court further discounted the testimony of one psychologist, who concluded it would be safe to release the Appellant, as that psychologist's view was that "the entire concept of civil commitment, the treatment offered, and the facility itself are ineffectual."

Second District Court of Appeal

[Wilson v. State](#), 2D17-3161 (August 2, 2019)

The Second District held that its own decision in Lewars v. State, 42 Fla. L. Weekly D1098 (Fla. 2d DCA May 12, 2017), approved, 259 So. 3d 793 (Fla. 2018), regarding the prison releasee reoffender statute, was an evolutionary refinement in law, and not a major constitutional change, and therefore did not apply retroactively to cases on collateral review. Wilson therefore could not rely on it as the basis for filing a Rule 3.850 motion beyond the two-year limitations period. The affirmance of the denial of the Rule 3.850 motion was without prejudice to seek relief under Rule 3.800(a).

[Nieves v. State](#), 2D18-613 (Aug. 2, 2019)

Nieves appealed from an order revoking probation, based on the commission of a new offense – resisting arrest without violence. The Second District reversed, "because the police officers were not engaged in the lawful execution of a legal duty when they arrested Mr. Nieves, which is an essential element of the resisting offense."

While on probation, Nieves was arrested on domestic battery charges, for which the State filed an affidavit of violation of probation, also adding the offense of resisting an officer without violence. The arresting officer and others responded to a call regarding a domestic violence incident at a motel. The arresting officer spoke to the victim in the parking lot and decided to arrest Nieves. The officer went to the motel room that Nieves and the victim shared and he and other officers spoke to Nieves through an open window, telling him he would be arrested for the domestic battery. He refused to leave the room. Rather, he barricaded himself in the room. Officers obtained the room key from the motel manager, but the barricade precluded

them from entering with the key. An officer kicked through the door; others removed the screen from the open window and pulled Nieves out through the window. He struggled at the time.

Although officers had probable cause to arrest Nieves for domestic violence, they still needed a warrant to enter the room absent an exception to the Fourth Amendment's requirement of a warrant. The only possible exception was that of exigent circumstances, and the evidence did not support it. The victim was already out of the room and safe; there was no testimony that Nieves posed a danger to anyone else; there was no basis for finding that Nieves intended to flee or had the ability to do so.

The offense for which probation was revoked – resisting without violence – includes the element that the police were engaged in the lawful execution of a legal duty. As that was not satisfied by the evidence, the order revoking probation was reversed. Because the trial court did not address or rule on the other ground of violation of probation – domestic violence – the Second District left it to the trial court to decide, on remand, “whether and to what extent the State should be permitted to introduce additional evidence on the domestic battery allegation in the event the State decides to pursue it.”

[Foster v. State](#), 2D18-2136 (Aug. 2, 2019)

The Second District reversed the summary denial of a Rule 3.850 motion for further proceedings. Foster alleged that three potential witnesses were not called to testify at his second trial. The trial court's order did not append attachments to conclusively refute the claims and the Second District rejected the trial court's rationale that the claims were inconsistent with one another, viewing them, instead, as alternative claims: “Mr. Foster asserts in one claim that Mr. Grimsley was available to testify and that trial counsel was ineffective for failing to present him, and in another he alleges that trial counsel was ineffective for not having Mr. Grimsley's testimony from a prior trial admitted if Mr. Grimsley was not available. The trial court should have regarded these claims as alternatives: Both claims are sufficiently pleaded, and unless one or the other is conclusively refuted by the record, and evidentiary hearing would be required.”

[Gammage v. State](#), 2D18-2954 (Aug. 2, 2019)

On appeal from the summary denial of a Rule 3.850 motion, two of Gammage's three convictions for attempted tampering with jurors were reversed as

double jeopardy violations – they occurred during a single criminal episode and did not constitute distinct acts.

As prospective jurors were arriving at the courthouse on the day of the commencement of Gammage’s then-pending trial for drug offenses, Gammage’s girlfriend and another friend handed out flyers to the prospective jurors. Gammage gave them the flyers to hand out, and they discussed a confidential informant “who had recently admitted to lying and planting evidence to help law enforcement make arrests.” While that particular CI was not involved in Gammage’s case, another CI was. “Gammage specifically told his girlfriend that the purpose of handing out the flyers was to influence prospective jurors concerning the credibility of testimony from any confidential informant.” She handed out three flyers to three separate prospective jurors during a 20-minute period and stopped at the time Gammage’s trial started.

The Second District construed section 918.12, to determine whether the legislature “intended for a defendant to be separately prosecuted for tampering with each individual juror or whether tampering with any juror – whether it be one or more – constitutes the completed offense such that only one offense occurs whether the defendant tampers with, e.g., one, two, five, or ten individual jurors in a single criminal episode.” This question entailed the rule of statutory construction that focuses on the distinctive uses of the article “a,” as opposed to the adjective “any.” The use of “a” would support each discrete act to constitute a unit of prosecution; “any” indicates an ambiguity, implicating the rule of lenity in favor of one accused of a crime.

The juror tampering statute refers to any person “who influences the judgment or decision of any grand or petit juror on any matter . . . which may be pending, or which may by law be brought, before him or her as such juror, with intent to obstruct the administration of justice. . . .” This statutory language was deemed ambiguous, and the ambiguity had to be resolved in favor of the defendant.

The Court then addressed the facts and found that it was a single criminal episode, given the short time period and location, without any temporal break between the acts “other than what was necessary to approach the various individuals as they approached the courthouse. There were no intervening acts. There was no change in location. And there is nothing in the record to show that a new criminal intent was formed.”

Finally, the acts involved were not “distinct acts,” “but rather were part of a single ‘common stream of action’ for which Gammage could only be punished once.”

[Jeansimon v. State](#), 2D17-4020 (July 31, 2019)

The Second District reversed convictions for three drug offenses and resisting an officer for both a new trial and a new suppression hearing.

The trial court “ruled that because Jeansimon was not an authorized driver of the rental car, he did not have a reasonable expectation of privacy in the car so as to challenge the search of the car.” However, the United States Supreme Court held, in [Byrd v. United States](#), 138 S.Ct. 1518 (2018), that an unauthorized driver of a rental car does have standing to challenge a search. As [Byrd](#) was decided prior to the finality of Jeansimon’s conviction on direct appeal, it was applicable. Thus, a new suppression hearing will be held to determine whether the arrest of the defendant or the search of the car were supported by probable cause, or whether any other valid legal basis for the search existed.

During cross-examination of the defendant, the prosecutor asked whether one person, referenced by the defendant, “‘come in here and claim’ the drugs, and whether Jeansimon’s sister ‘would come in here.’” “The prosecutor continued to ask Jeansimon if he asked his sister to come in and say that the drugs belonged to Jay-Jay.” In closing argument, “the prosecutor stated that Jay-Jay did not have the courage to come in and testify that the drugs belonged to him.” The defendant testified that he borrowed the car belonging to Jay-Jay [his sister’s boyfriend] to pick up his daughter from school, and the defendant further stated that he told officers that the drugs in the car were not his.

The prosecutor’s comment erroneously was one on the defendant’s failure to produce evidence to refute an element of the crime. While a “narrow exception to this rule exists when the defendant has assumed some burden of proof by voluntarily asserting a defense such as alibi, self-defense, or defense of others, relying on facts that could be elicited only from a witness who is not equally available to the State,” “Jeansimon did not present a defense for which he assumed a burden of proof. He simply claimed that he did not commit the offense,” and the “narrow exception” was inapplicable.

[State v. M.B.W.](#), 2D17-4149 (July 31, 2019)

The State appealed an order suppressing evidence seized during a warrantless entry into M.B.W.'s hotel room, and the Second District affirmed. The State failed to prove the existence of exigent circumstances.

There was an outstanding probable cause affidavit for M.B.W. regarding a misdemeanor domestic battery. Officers learned that M.B.W. was at the hotel and spoke to the manager. Upon learning that M.B.W. was a minor, the manager asked officers to remove him. The room had been rented by another occupant, J.S., who was also a minor and who used a false name.

The manager and officers went to the room; the manager knocked and M.B.W. answered the door. The officers recognized him. A detective reached into the room and grabbed M.B.W.'s arm and arrested him. M.B.W. was secured in the hallway. An officer saw another occupant of the room dart towards the back of the room and a third was discovered hiding in the bathroom. Officers then entered the room, with M.B.W. handcuffed, and observed a scale with cocaine in plain view, with a backpack adjacent to it. The three occupants, after being given their Miranda warnings, disclaimed ownership of it, and the officers opened it, believing it to have been abandoned, and discovered contraband inside.

On the subject of standing, the fact that M.B.W. did not rent the room was not dispositive; the question was whether he had a reasonable expectation of privacy in the room, and hotel guests generally have such a reasonable expectation of privacy. A related argument by the State, that the person who rented the room did so illegally as a minor and used a false name, was both waived based on insufficient argumentation and without merit, as there was no case law to support that proposition.

As to the existence of exigent circumstances, M.B.W. was handcuffed prior to any search of the room and posed no threat to the officers. There was no testimony as to why any officer believed observing anyone else in the room raised safety concerns at that point in time. Any such argument was “undercut by the fact that the officers dragged M.B.W. back into the hotel room with them. It is not apparent to us why three officers would place M.B.W., a restrained juvenile into a potentially hazardous situation from which he had been removed.”

Nor could the search be justified as a protective sweep. There was no evidence that the requisite safety threat existed; nor was there evidence regarding

the need for preservation of evidence. “The State offered no evidence of what, if anything, the officers sought to protect in their search from imminent destruction as it relates to the [domestic] battery” charge for which the outstanding warrant existed. “Only after making the warrantless entry did law enforcement offices observe the scale containing cocaine and a backpack containing drugs.”

[J.S. v. State](#), 2D18-1221 (July 31, 2019)

A juvenile disposition order withholding adjudication on a charge of grand theft firearm was reversed for a new adjudicatory hearing due to the failure to hold a sufficient hearing regarding a potential discovery violation.

Prior to the trial, the State did not disclose any evidence placing J.S. near the scene of the burglary and theft or any witness who would place the stolen firearms in his possession. The only identified witness had “given a statement to the police indicating that he saw the stolen firearms only after they were brought to his house and abandoned there.” At the trial, this same witness now “testified that he picked up J.S. and his codefendants on Bell Shoals Road near the scene of the burglary and that when he did so J.S. was carrying one of the stolen rifles.”

Upon objection and request for a hearing as to the potential discovery violation, the court inquired whether the witness, Rodriguez, had been listed and deposed. Upon learning that the witness had been listed, but not deposed, the court refused to conduct any further inquiry. The focus on the failure of the defense to depose a known witness was “insufficient to overcome the state’s failure to inform the defense of a statement made by the defendant to which the witness testifies.””

Third District Court of Appeal

[Pena-Vazquez v. State](#), 3D16-2358 (July 31, 2019)

The Third District rejected a double jeopardy claim that convictions for two counts of lewd or lascivious molestation were improper because the counts, as alleged in the information, were “identically worded.” The two counts alleged that the offense, whose elements were set forth in identical language, occurred between the dates of August 18, 2009 and August 18, 2011.

Because the two counts alleged a range of dates, which could permit the occurrence of distinct acts on different dates within that range, the Court found that the claim was, “in reality, merely an assertion that the time frame in the Amended

Information is too expansive and should have been narrowed to avoid the potential error” now being claimed.

The Third District distinguished the case from the Florida Supreme Court’s recent opinion in Lee v. State, 258 So. 3d 1297 (Fla. 2018), which held that double jeopardy analysis regarding the “same elements” test should “consider only the charging document – not the entire evidentiary record.” The Court explained:

At no time did the State allege or contend that Pena-Vazquez committed these two offense by engaging in a single act. In point of fact, the State charged a total of four counts of lewd or lascivious molestation (Counts Two, Four, Six and Seven) and used the identical language, wording and two-year timeframe in each of these counts. Two propositions logically follow from this: (1) there can be no little doubt, based upon these four identically-worded counts, that the State intended to prosecute Pena-Vazquez for four distinct and separate acts of lewd or lascivious molestation upon C.P., committed over the course of the two-year timeframe; and (2) the jury had no apparent difficult in differentiating among the counts and in determining whether Pena-Vazquez violated the same criminal statute on separate dates by engaging in distinct and separate acts upon C.P. over the two-year period – the jury convicted him of two counts of lewd or lascivious molestation and acquitted him of two counts of lewd or lascivious molestation.

[State v. Martin](#), 3D18-945 (July 31, 2019)

The trial court excluded portions of Martin’s videotaped statement to police, concluding that the probative value was outweighed by the prejudice. The State appealed and the Third District reversed the pretrial order.

The defense sought the exclusion of the video clips at issue because they showed Martin in an orange jumpsuit and because an officer questioned him about two different victims during the same interview. The State sought to use these portions of the statements to “assist the jury in determining the credibility of Martin’s consent defense in his trial for, among other things, sexual battery.” In

portions of the statement at issue, Martin claimed he had no knowledge of one of the victims, and that was inconsistent with his defense of consensual sex.

As to a separate claim that Martin was confused by a detective's questioning, the Third District reviewed the videotape and found that the claim of confusion was refuted. Additionally, to the extent that the trial court's order barred the use of the evidence during cross-examination of the defendant by the State if he testified, it would not be justifiable to "allow a defendant to 'affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.'"

The statements were deemed "highly probative to this case because they go directly to the credibility of the consent defense." Significant redactions had been made and the video was changed from color to black and white to conceal the color of the jumpsuit.

Fourth District Court of Appeal

[Kemp v. State](#), 4D15-3472 (July 31, 2019) (on rehearing)

The Fourth District reversed convictions for five counts of vehicular manslaughter for a new trial because "the trial court abused its discretion in admitting expert testimony that did not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)." "A key factual dispute . . . was whether appellant was in control of the car at the time of the crash. To prove this disputed element, the State relied on expert opinion testimony that appellant had applied the brakes before the crash. The expert's braking opinion was based solely on his visual observation of crush damage to the victims' car." "The expert's braking opinion was not shown to be based upon sufficient facts or data, was not shown to be the product of reliable principles and methodology, and amounted to little more than a subjective and unverifiable opinion."

The Court first addressed the applicability of Daubert. At the time of the trial, in 2015, the legislature had adopted Daubert and the legislative amendment to the evidence code had not been declared unconstitutional at that time. In 2018, the Florida Supreme Court held that the amendment was procedural in nature and that it infringed on the Supreme Court's rulemaking authority, but neither party challenged the constitutionality of the Daubert amendment in the trial court. Several months later, the Supreme Court adopted the legislative amendments; as a result, the constitutional defect of the legislature intruding on the Supreme Court's rulemaking authority has now been eliminated.

The witness at issue explained that he “was able to look at the shape of the damage to the Lexus to infer that appellant’s vehicle was dipping, and therefore braking, at the time of the collision.” He admitted “that his opinion was based solely on his visual impression of the shape of the damage to the Lexus.” His ultimate opinion was “that because the damage to the Lexus went downward in an ‘arc-type fashion,’ appellant’s car must have been dipping at the time of the collision,” it indicated that appellant was braking. The fact that appellant may have been braking was significant because there was a dispute as to whether he was in control of the car at the time of the crash. He claimed that he had fainted and did not have control.

The Fourth District emphasized portions of the witness’s testimony in which he stated that he did not recall specifically studying matters pertaining to the subject of his opinion. There were also “vague” responses as to questions regarding the scope of what he had studied pertinent to this opinion. “Where an expert is relying solely or primarily on his experience, the proponent of the testimony bears the burden ‘to explain how that experience led to the conclusion he reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case.’”

Additionally, the witness “failed to address what the ‘known or potential rate of error’ was for attempting to discern braking from a visual inspection of the shape of crash damage to another vehicle.” And, when asked whether the damage observed “was consistent within a reasonable degree of scientific certainty’ with the Mercedes braking, Dooley simply replied: ‘I can’t tell you about the scientific – or anything about the braking of the Mercedes. . . . I’m just telling you what it means to me.’”

One judge dissented.

[Zieler v. State](#), 4D18-3408 (July 31, 2019)

The Fourth District previously reversed a conviction and remanded for a nunc pro tunc determination of competency. Upon remand, the trial court made a determination of competency and ordered the defendant returned to the Department of Corrections to continue serving his sentence.

Zieler appealed that order and the Fourth District dismissed due to a lack of jurisdiction, as an order determining competency is not independently appealable. “Until the circuit court reimposes the original conviction and sentence, this Court

lacks appellate jurisdiction to review the circuit court’s *nunc pro tunc* competency determination.”

[Simeone v. State](#), 4D18-3470 (July 31, 2019)

On motion for rehearing, the Fourth District certified the following question to the Florida Supreme Court, as a question of great public importance:

Is a defendant who satisfies the criteria for eligibility into veterans court as stated in section 948.08(7), Florida Statutes (2018), entitled to admission into veterans’ court, or does a judge have discretion to deny an otherwise eligible defendant’s admission into veterans’ court on a case-by-case basis, based on factors such as the nature of the defendant’s charges and the defendant’s possible sentences, as long as the judge does not apply any kind of blanket policy, rules, or criteria, in addition to those set forth in section 948.08(7)?

Fifth District Court of Appeal

[Romero v. State](#), 5D18-3004 (Aug. 2, 2019)

The Fifth District reversed the denial of a Rule 3.850 motion alleging ineffective assistance of counsel and ordered a new trial.

During closing argument, the prosecutor urged the jury to “consider the negative reaction during Appellant’s testimony of a witness sitting in the courtroom audience” and defense counsel agreed “to instruct the jury that it could consider such reactions.” The Fifth District found that defense counsel’s performance was deficient. “A witness’s reaction to another witness’s testimony is not ‘evidence introduced at trial,’ nor is it ‘the manner and demeanor of the witness [while] on the stand.’” And, a “prosecutor is not allowed to present his or her private observations to the jury as though they were facts.” At an evidentiary hearing, defense counsel explained that he thought this “was fair game for the State’s closing argument, and that instructing the jury that it could consider it was likewise not debatable.”

The Court further found that counsel’s deficient performance prejudiced the defendant. The case was deemed a “credibility contest,” and the “fact that the jury asked during deliberations whether it could consider such off-the-stand witness

behavior or reaction as evidence certainly suggests that the State’s closing argument and perhaps the wife’s nonverbal conduct were on the jury’s collective mind as it considered Appellant’s guilt or innocence.”

[Chester v. State](#), 5D18-3930 (Aug. 2, 2019)

The summary denial of a Rule 3.850 motion was reversed and remanded for further proceedings as to two claims. In one, the defendant alleged that counsel was ineffective for failing to secure the testimony of a confidential informant. The CI testified at the first trial, which resulted in a mistrial; the second trial resulted in a conviction. At the first trial, the CI testified that he did not recall the defendant ever selling drugs and that he would not have called to set up a drug buy.

The trial court denied the claim because the State’s had subpoenaed the CI, believing that that somehow “cured defense trial counsel’s failure to do so. There was no indication by the court of how defense counsel could compel Tweedy’s presence through the State’s subpoena. Further, defense counsel has an obligation to exercise due diligence to secure a witness’s testimony, and that obligation was not addressed by the postconviction court.”

[White v. State](#), 5D19-637 (Aug. 2, 2019)

The trial court erred in denying a Rule 3.800(a) motion to correct illegal sentence as a successive motion as the prior motion was decided by the court “on unrelated grounds.” The Fifth District, however, affirmed. White’s claim, that the amounts of contraband were “consistent with personal usage,” which supported only felony convictions, not trafficking, was a claim which went to the underlying conviction, not the legality of the sentence; and the claim was not cognizable in a Rule 3.800(a) motion to correct illegal sentence.

[Wynn v. State](#), 5D19-2018 (Aug. 2, 2019)

Wynn was convicted of aggravated battery with a firearm, a second-degree felony, punishable by up to 15 years in prison. The jury further found that he discharged a firearm, resulting in great bodily harm for the victim, for which his offense was reclassified. He was then sentenced to a term of 30 years, based on the reclassification to a first-degree felony; and he received a 25-year mandatory minimum based on the 10-20-Life statute, for the discharge of the firearm with great bodily harm.

In an appeal from the denial of a Rule 3.800(a) motion to correct illegal sentence, the Fifth District reversed. Once “the trial court imposed the required twenty-five-year mandatory minimum-prison sentence, it could not thereafter exceed the fifteen year maximum penalty for the second-degree felony.” The Court’s conclusion as based on its prior decision in Wooden v. State, 42 So. 3d 837 (Fla. 5th DCA 2010), approved by Hatten v. State, 203 So. 3d 142 (Fla. 2016).