

Case Law Update
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Eleventh Circuit Court of Appeals

[Knight v. Florida Department of Corrections](#), 18-13390 (Aug. 30, 2019)

The Eleventh Circuit reviewed two issues in this appeal from the denial of a habeas corpus petition challenging a sentence of death under Hurst v. Florida, 136 S.Ct. 616 (2016), and a conviction for first-degree murder based on ineffective assistance of trial counsel. The Court affirmed the denial of the habeas petition.

Prior to this appeal, the Florida Supreme Court had found that Hurst applied retroactively. Hurst held that the lack of juror unanimity as to the sentence of death rendered Florida's sentencing scheme violative of the Sixth Amendment. Knight therefore argued in the Eleventh Circuit that that the retroactivity of Hurst was a given, and that the only remaining issue related to it was whether any error under Hurst was harmless. The Eleventh Circuit disagreed. State courts are free to come to their own conclusions regarding retroactivity of United States Supreme Court decisions and can choose to give broader retroactive effect to such decisions than the federal judiciary does. Thus, the Eleventh Circuit conducted its own retroactivity analysis under Teague v. Lane, 489 U.S. 288 (1989), and concluded that Hurst did not apply retroactively.

Hurst announced a new constitutional rule; it did not merely apply an old rule. It was not dictated by prior Supreme Court precedent. As such, retroactive application would ensue only on the basis of two exceptions to the bar against retroactive application: "(1) holdings that create substantive (not procedural) rules that place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' and (2) holdings that constitute 'watershed rules of criminal procedure.'" Hurst did not fall under either of those exceptions and therefore did not apply retroactively.

The ineffective assistance claim challenged counsel's decision not to call an expert to contest DNA evidence. Applying the deferential standards of federal habeas review, the Court concluded that the state court rejection of this claim did not constitute an unreasonable application of clearly established federal law or an unreasonable application of it. Under the facts of the case, detailed in the Court's

opinion, the Florida Supreme Court’s conclusions that the decision of counsel was a valid matter of trial strategy and that prejudice was not demonstrated were entitled to deference. As to trial strategy, the potential defense expert “would have largely corroborated [the prosecution’s] testimony while also costing Knight an advantage at closing arguments.”

[Jenkins v. Commissioner, Alabama Department of Corrections](#), 17-12524 (Aug. 30, 2019)

The Eleventh Circuit affirmed the denial of a habeas corpus petition and rejected claims addressing ineffective assistance of counsel during the penalty phase of a death penalty case and a claim that Jenkins was not eligible for the death penalty due to an intellectual disability.

Jenkins argued that counsel failed to develop mitigating evidence as to childhood abuse. At a state-court evidentiary hearing, one of the trial attorneys testified “that he did not really know what he was doing and that he failed to make strategic choices with respect to mitigating circumstances and sentencing.” However, that attorney acknowledged that Jenkins’ other counsel was responsible for the penalty phase. On the basis of a “limited record” from the state court, indicating that penalty-phase counsel spent at least 71 hours preparing for trial over 17 months, the state court interpreted this as “reflecting a penalty-phase strategy of residual doubt.”

The Eleventh Circuit found this limited record sufficient to refute Jenkins’ claim, as there were 35 hours of “jailhouse conversations with Jenkins during 18 separate meetings,” and even discussions pertaining to the guilt-phase “were surely relevant to Downey’s penalty-phase strategy of residual doubt.” Any assessment of deficiency on the part of penalty-phase counsel, Downey, would hinge on what Jenkins told Downey about childhood abuse and whether Downey was present when the second guilt-phase counsel, Scofield, learned about Jenkins’s childhood abuse. There was nothing in the state court record addressing this.

Additionally, “Downey’s manifest strategy of residual doubt was [not] objectively unreasonable under the circumstances.”

. . . Jenkins’s case is precisely the sort where reminding the jury of the misgivings it may have held about the State’s case could have been effective. Scofield’s guilt-phase closing argument from that very morning, which

explicitly emphasized doubt and the weakness of the State's evidence, would have been fresh in the minds of the jury. Although we are not questioning the jury's guilty verdict or the sufficiency of the evidence, which are beyond the scope of our habeas review, we acknowledge that the State's case against Jenkins was – as Downey reminded the jury during the penalty phase – entirely circumstantial. Indeed, Scofield maintained post-conviction that the case for reasonable doubt was '[v]ery strong.' No one saw Jenkins commit either the murder or the robbery and kidnapping that elevated Hogeland's murder to a capital crime. Scofield's guilt-phase closing argument challenged the inferential leaps the State was asking the jury to make in finding that Jenkins committed these capital-predicate offenses and that he formed the intent to kill. This situation was not one where a guilt-phase strategy of acquittal – and therefore a penalty-phase strategy of residual doubt – was unreasonable in light of the evidence.

The Court also rejected Jenkins's argument about prejudice: "The trial court found at sentencing two statutory aggravating factors: the robbery and the kidnapping of the victim. . . . Because none of the mitigation offered in the Rule 32 hearing bears on those factors, we see no reasonable probability that the aggravating factors would have been determined differently by the jury or the court." Two statutory mitigating factors had been found, with evidence of intoxication that could have supported a third statutory factor. The prejudice argument was based on the possible finding of non-statutory mitigation. The state court rejected the prejudice argument based on the depravity of the crime, the strength of the aggravating circumstances, and credibility determinations which were adverse to the mitigating witnesses. The state court's conclusions did not involve "an unreasonable determination of the facts." Applying the deferential federal habeas standards of review, the state court conclusions were entitled to deference.

The intellectual disability claim was based primarily on an IQ test score of 76, reflecting "borderline intellectual functioning." Contrary to Jenkins's argument, the Eleventh Circuit found that the state court did not say that it was applying a strict cutoff of 70; "it merely stated that Dr. Kirkland had measured Jenkins's IQ as 76." The Eleventh Circuit emphasized other testimony: Dr. Kirkland placed Jenkins in a range "between mild mental retardation and low average intellectual functioning."

There was no clinical assessment finding “mental retardation or intellectual disability.” Additionally, Jenkins was “not retroactively entitled to have the state courts take into account the margin of error of the IQ test.” And, problematically, Jenkins “did not raise the Flynn effect issue [margin of error] in the Alabama state courts,” and those courts did not have a “full and air opportunity to consider this issue, because it was not explicitly presented to them.” The claim was therefore treated as both unexhausted and procedurally barred.

On another aspect of this claim “the adaptive-skill component of intellectual disability requires substantial present limitation in at least two of the following areas: ‘communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.’” The state court’s conclusion that Jenkins did not have substantial deficits in at least two areas was supported by the record. While Jenkins may have been substantially limited in functional academics, other areas were not shown to be substantially limited. While Jenkins emphasized his transient employment, he was able to find work quickly and had an established work record. “Jenkins was able to communicate well enough to solicit an alibi and to sell his car, including writing out a bill of sale. He then was able to arrange for his flight from Alabama, including purchasing a bus ticket and hitchhiking across the country.”

As to the final component of intellectual disability, onset before age 18, the state courts did not address this, so the Eleventh Circuit reviewed the federal district court’s legal conclusions de novo and factual findings for clear error. This claim was rejected. “School assessments at age 12 reported an IQ score of 83, an adaptive behavior rating of ‘low,’ and noted overall an intellectual capacity of ‘average,’ a diagnosis of dyslexia, and ‘poor functional skills.’” Difficulties, which included failing several grades of school, were attributed to behavioral problems, a high number of absences, frequent moves, school changes and family instability.

One judge dissented as to both the ineffective assistance and intellectual disability claims.

Supreme Court of Florida

[Rogers v. State](#), SC18-150 (Sept. 5, 2019)

The Supreme Court affirmed a conviction and death sentence for first-degree murder.

Rogers argued, on the basis of Hurst v. State, 202 So. 3d 40 (Fla. 2016), that the trial court committed fundamental error by failing to instruct the penalty-phase jury that “it must determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances.” Hurst did not require the application of the reasonable doubt standard to these two findings, however. Under Hurst, “the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.” Any statement suggesting the contrary in Perry v. State, 210 So. 3d 630 (Fla. 2016), was noted to have been a “mischaracterization,” from which the Court previously implicitly receded when it adopted the current standard jury instructions.

The admission into evidence of letters written by Rogers “to a predecessor judge and the elected state attorney, which included his reflections on race, politics, and his own character and predispositions,” did not constitute fundamental error, as to either the guilt or penalty phase. Rogers discussed “being a black revolutionary, a member of the Crips, and a ruthless, cold-blooded, cutthroat gangster, how he feels it is necessary to seek vengeance when white people kill black people, his lack of remorse for the murder, that he has a tendency to be very violent with little or no provocation. . . .” Most of the assertions were relevant and not outweighed by the danger of unfair prejudice. Statements about the violence getting worse as the years go by and that Rogers thought every day about who he could hurt and kill were irrelevant, but did not rise to the level of fundamental error.

Instructing the jury on the CCP aggravator was not fundamental error, and the evidence supported that factor. A doctor “testified that the killing was not an act prompted by ‘emotional frenzy, panic, or a fit of rage,’ and that the fact that Rogers stopped beating Martin in order to tie him up and to converse with other inmates demonstrates that there was a certain amount of restraint regarding the crime.” The doctor further “said that the murder was calculated, premeditated, and not based on any mental illness.” By “Rogers’ own admission, he planned for roughly a month to kill a white man in retaliation for the shooting of Trayvon Martin and he intended ‘to kill [Ricky Martin] in the cell that night.’”

The evidence of premeditated murder was sufficient. “Rogers admitted that he punched Martin in the face several times without provocation, that he stomped his head into the concrete floor, that he kicked him in the face several times, that he tied Martin up when Martin tried to get up off the floor, and that he ‘killed Ricky Martin’ and is ‘responsible for the death of Ricky Martin.’” The premeditated intent

to kill was established by the above-noted letters to the judge that were introduced into evidence.

The imposition of the death sentence was deemed proportional. Five aggravating factors, including three of the weightiest – prior violent felony, CCP and HAC – were proven beyond a reasonable doubt. No statutory mitigating circumstances were found. Although 49 nonstatutory mitigators were found, proportionality is not a numbers game, and many were cumulative.

The format of the Court’s opinion is noteworthy. When it lists each of 68 mitigating circumstances that the defense asserted in the trial court, the opinion parenthetically notes, after each one, whether or not it was found by the jury or the court; if found to exist by the jury, the jury’s vote for that factor; and, if found by the court, what weight the court gave it.

Second District Court of Appeal

[State v. Fay](#), 2D17-4803, 2D18-933 (Sept. 6, 2019)

The trial court granted a sworn motion to dismiss the charge of burglary of an unoccupied dwelling. The State appealed, and the Second District reversed, as the facts alleged in the motion set forth a prima facie case of guilt. The following facts were alleged in the sworn motion:

Approximately six months after a burglary occurred, the victim was organizing clothes in her dresser when she noticed small stains on one of her white shirts. The shirt was stored beneath one of the drawers that was ransacked during the burglary. The victim could not remember the last time she wore the shirt but guessed it had been over a year. She testified during her deposition that she would not have put the shirt away with the stains on it and that the person who left the stains was therefore the burglar. The police sent the shirt to a forensic analyst, who determined that the stains were droplets of blood and that the DNA in the blood matched Fay’s DNA.

Fay argued that the circumstantial evidence failed to disprove his “reasonable hypothesis of innocence that Fay’s blood could have transferred on the victim’s shirt at some point in time.” This is an argument that went not to the existence of a prima

facie case, but to the weight of evidence. And, “even “if the state’s evidence is all circumstantial, whether it excludes all reasonable hypotheses of innocence may only be decided at trial, after all of the evidence has been presented,” and the issue cannot be resolved by a rule 3.190(c)(4) motion to dismiss.”

[Bolduc v. State](#), 2D18-2734 (Sept. 4, 2019)

The Second District reversed the summary denial of a rule 3.850 motion as to a claim of “ineffective assistance of counsel based on a failure to object to a legally inaccurate self-defense instruction.” The claim was facially sufficient and was not conclusively refuted by the record. It was remanded for further proceedings.

The self-defense claim was based on section 776.012(1), Florida Statutes (2011). At that time, “the statute did not require that the person using deadly force not have been engaged in unlawful activity when such force was used.” However, at the same time, another provision, section 776.013(3), “governing the use of force outside the home, did contain such a requirement.”

Based on the statutes in effect at the time of the offense, the trial court should not have instructed the jury that self-defense was available only if the defendant was not engaged in illegal activity. The trial court had given the post-2014 instruction, based on a statutory amendment that did not apply to the offense which was committed in 2011.

The trial court concluded that the defendant failed to establish prejudice because his “‘version of events was that he was not involved in any activity that might be construed as criminal,’ and thus ‘to find that [he] acted in self-defense, the jury would had to have believed [his] version of events wherein he adamantly denied participating in any criminal activity at the time of the confrontation.’”

The Second District disagreed with that analysis. Based on the attachments to the trial court’s order, the Second District found that “the jury need not have believed every part of Mr. Bolduc’s story in order to conclude that his use of force was justified.” Under some of the potential factual scenarios, the Court found that a correct instruction would have made a jury acquittal likely.”

Third District Court of Appeal

[Silver v. State](#), 3D17-2320 (Sept. 4, 2019)

The Third District affirmed convictions for first-degree murder and conspiracy to commit armed robbery and rejected the argument that the trial court “erred in admitting Williams rule evidence and hearsay by inescapable inference” during the trial.

As to the collateral offense evidence, the Third District found a sufficiently unique pattern of criminal activity based on similarities:

Here, the robberies at issue were committed in close temporal proximity and at the same restaurant chain. During both robberies, two perpetrators approached the rear of the business at the time of closing. They concealed their identities by donning ski masks and dressing in dark clothing. By obtaining employment prior to committing the crimes, Silver and Pedley were able to thoroughly scout the venues. The information garnered was then diagrammed on the same dry-erase board in the same dormitory room for each target location. The two crimes were committed using the same firearms. Silver and Pedley changed or discarded their clothing immediately following the crimes.

The Court disagreed with Silver’s argument based on dissimilarities between the crimes, “including Wright’s inconsistent participation and the unsuccessful nature of the latter offense.” Such dissimilarities ““are not fatal when they “seem to be a result of differences in the opportunities with which [the defendant] was presented, rather than differences in modus operandi.””” This case involved a difference in opportunities – i.e., the presence of an armed security guard – as opposed to “significant differences in modus operandi.”

The Court also included a footnote regarding the use of the same firearm in multiple robberies. In such instances, the only inquiry is the relevancy to the issue of the perpetrator’s identity, ““not whether the evidence revealed uniquely similar factual situations.””

The hearsay issue related to testimony from law enforcement Wright, the girlfriend of Silver’s cohort, Pedley. Wright, provided detectives with information inculcating both Pedley and Silver. Shortly afterwards, the detectives obtained forensic DNA evidence as to both Silver and Pedley. Although Silver was correct that “[w]here ‘the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant’s guilt, the testimony is hearsay, and the defendant’s right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated,’” here, “Wright was not a ‘non-testifying witness.’ At trial she confirmed that she implicated Silver in the robbery to law enforcement, and was thus subsequently subject to a vigorous cross-examination.”

[Allen v. State](#), 3D18-2375 (Sept. 4, 2019)

On appeal from the denial of a Rule 3.800(a) motion to correct illegal sentence, the Court agreed with one claim, that the minimum-mandatory sentence for personal possession of a firearm was erroneously imposed because “the verdict form failed to provide the ‘clear jury finding’ that Allen personally possessed a firearm.”

The information alleged that Allen and a codefendant committed the crimes with a firearm. The jury was instructed that Allen could be found guilty as a principal. The verdict found Allen guilty of all three offenses at issue, with the additional finding of “with a firearm.”

[Hernandez v. State](#), 3D19-91 (Sept. 4, 2019)

Upon a confession of error by the State, the Court granted a habeas corpus petition alleging ineffective assistance of appellate counsel, and remanded the case for resentencing pursuant to [Williams v. State](#), 186 So. 3d 989 (Fla. 2016).

Hernandez was convicted of attempted first-degree murder, aggravated battery and aggravated assault. “The jury expressly found Hernandez possessed and discharged a firearm during the commission of the attempted first-degree murder, and possessed a firearm while committing both the aggravated battery and aggravated assault.” The trial court imposed consecutive mandatory minimum sentences based on the firearm for all three offenses.

The trial court imposed the consecutive sentences pursuant to the Third District’s decision in [Morgan v. State](#), 137 So. 3d 1075 (Fla. 3d DCA 2014). Prior

to the filing of the direct appeal brief of appellant, the Florida Supreme Court, in Williams, held to the contrary, and found that consecutive mandatory minimum sentences were improper “if the offenses arose from the same criminal episode and a firearm was merely possessed but not discharged.”