Case Law Update
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Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

United States v. Pearson, 17-14619 (Oct. 15, 2019)

On appeal from the denial of a motion under 28 U.S.C. s. 2255 and a new sentence that had been imposed at a resentencing pursuant to that motion, the Eleventh Circuit affirmed and held that Pearson "failed to meet his burden of showing that his new sentence is substantively unreasonable."

Pearson was convicted and sentenced on multiple convictions arising out of two bank robberies. Subsequent to Johnson v. United States, 135 S.Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminals Act was unconstitutionally vague, and Welch v. United States, 136 S.Ct. 1257 (2016), which held that Johnson applied retroactively, Pearson was granted leave to file a successive motion under section 2255.

In the district court, the government conceded that Pearson no longer qualified for the ACCA enhancement on one of the counts, and that sentence was vacated. The district court, under the "sentencing package doctrine, then vacated sentences for two other counts. As a result of the interrelation of sentences under the guidelines, "if a sentence is vacated on one of the component counts . . . 'the district court should be free to reconstruct the sentencing package . . . to ensure that the overall sentence remains consistent with the guidelines, the s. 3553(a) factors, and the court's view concerning the proper sentence in light of all the circumstances.'" The Eleventh Circuit further observed that this doctrine can be resorted to by the district court, even as to sentences that had not been challenged as being unauthorized by law, to "correct the sentence as may appear appropriate" to the court.

The combined resentencing for the three counts, mixing concurrent and consecutive portions, resulted in a total of 447 months' imprisonment, down from 564 months. Pearson, at the resentencing hearing, challenged two of the convictions, claiming the indictment did not allege that he "used, possessed, or carried the firearm." That claim was beyond the scope of Pearson's successive s. 2255 motion, as well as the Eleventh Circuit's authorization for a successive motion.

On appeal, Pearson challenged two of the convictions based on the allegation that the indictments did not allege every element of the offenses. The district court had ruled on the merits of that claim and rejected it; the Eleventh Circuit vacated that merits decision due to a lack of subject matter jurisdiction.

As to the total sentence of 447 months, which was at the high end of the Guideline range, the district court found that a lower sentence would be insufficient based on the "nature and circumstances of the offense." This was balanced against Pearson's "stellar behavior" while incarcerated. A claim that a 384-month sentence for three of the five counts was "enough" punishment was rejected, as was a claim that the sentence of 447 months was unnecessary to protect the public because the 384-month sentence would result in Pearson's release from incarceration at age 57.

McWilliams v. Commissioner, Alabama Department of Corrections, 13-13906 (Oct. 15, 2019)

On remand from the Supreme Court, the Eleventh Circuit concluded that McWilliams was entitled to habeas corpus relief as to his death sentence.

The Supreme Court concluded that the state court's denial of McWilliams's request at sentencing, under Ake v. Oklahoma, that a psychiatrist be appointed to assist in the evaluation of McWilliams's mental health status constituted a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law." The Supreme Court remanded for consideration of whether that error was harmless under Brecht v. Abrahamson, 507 U.S. 619 (2017). The Eleventh Circuit, with one judge dissenting, concluded that the error was not harmless, and granted a new sentencing hearing.

Brecht addresses two classes of error when reviewed in federal habeas corpus proceedings. Trial errors, subject to harmless error review, result in a query as to whether the errors were prejudicial – whether they had a "substantial and injurious effect or influence in determining the jury's verdict." Structural errors are not subject to harmless-error analysis and mandate the granting of relief.

The error in this case was deemed structural:

> Like the denial of counsel, the *Ake* error infected the entire sentencing hearing from beginning to end, as McWilliams was prevented from offering any meaningful evidence of

> mitigation based on his mental health, or from impeaching the State's evidence of his mental health. The assistance a psychiatrist *would have* provided McWilliams's counsel in "evaluating, preparing, and presenting the defense that *Ake* requires" is unknown and, as such, cannot be quantitatively assessed in the context of the evidence presented to the sentencing judge. To determine whether it "would have mattered" – i.e., would have helped McWilliams defend against the State's case for a death sentence and present mitigating evidence – would require us to speculate as to *how* a psychiatrist would have assisted the defense, *what* mitigating evidence the defense would have offered to impeach the State's evidence, and *how* the State would have responded in rebuttal. Such a hypothetical exercise, as with the denial of counsel, is all but impossible. Because *this Ake* error defies analysis by harmless-error review, prejudice to McWilliams must be presumed.

The Court noted decisions from other Circuits applying harmless-error analysis to *Ake* claims, but distinguished them. They involved denials of appointment of psychiatric experts in anticipation of efforts by the prosecution to prove future dangerousness. As the government never produced such evidence, the *Ake* claim could be evaluated on appeal.

The Court further distinguished its own decision in Hicks v. Head, 333 F. 3d 1280 (11th Cir. 2003), which held that an *Ake* error was subject to harmless-error analysis, and which decision formed the basis for the dissenting opinion in McWilliams. That case was decided in the context of a collateral review proceeding, not direct review. And, it was further decided in conjunction with a claim of ineffective assistance of trial counsel, for which an evidentiary hearing had been granted, thereby enabling the appellate court to see what evidence would have been developed had an expert been appointed.

Bailey v. Swindell, 18-13572 (Oct. 16, 2019)

Bailey sued for false arrest, and the district court rejected the claim, finding that Bailey obstructed a deputy sheriff, Swindell, in the lawful exercise of his duty, resulting in a misdemeanor under Florida law, and entitling the sheriff to qualified immunity. The Eleventh Circuit reversed for further proceedings, The Court did

not address the question of whether the arrest was supported by probable cause, or how that affected immunity, finding, instead, that even if probable cause existed, the deputy "crossed what has been called a 'firm' and 'bright' constitutional line, and thereby violated the Fourth Amendment, when he stepped over the doorstep of Bailey's parents' home to make a warrantless arrest."

The deputy was responding to a dispatch to investigate a domestic argument. He was talking to Bailey on the porch of the residence, while other relatives were present on the porch as well. The deputy stepped back about 13 feet, ordered the other relatives to go back inside, and asked Bailey to speak with him privately by his patrol car. All of those requests were rejected. "Bailey then announced that he was heading inside and turned back into the house. Without first announcing an intention to detain Bailey, Swindell charged after him and 'tackle[d] [him] . . . into the living room,' simultaneously declaring, 'I am going to tase you.' Importantly for our purposes, by that time Bailey was . . . already completely inside the house. Swindell then proceeded to arrest Bailey."

This arrest clearly violated the prohibition against warrantless arrests within a home because it occurred "completely inside [Bailey's] parents' home before Swindell arrested him. Swindell neither physically nor verbally, and neither explicitly nor implicitly, initiated the arrest until Bailey had retreated fully into the house." As a result, this case was governed by the principles set forth in Payton v. New York, 445 U.S. 573 (1980), rather than Untied States v. Santana, 427 U.S. 38 (1976), which held that a warrant was not required to initiate an arrest as to one who was standing in a doorway or on a porch, which was considered a public place.

Steiner v. United States, 17-15555 (Oct. 16, 2019)

Steiner appealed the denial of a motion to vacate his conviction for aiding and abetting the offense of using or carrying a firearm during and in relation to a crime of violence under 28 U.S.C. s. 2255. He argued, on the basis of Rosemond v. United States, 572 U.S. 65 (2014), that there was insufficient evidence to prove that "he had advance knowledge his co-conspirators would use or carry a firearm during the underlying crime of violence, as required by *Rosemond*."

The Eleventh Circuit held, for the first time, that *Rosemond* applied retroactively to cases on collateral review. However, he was not entitled to relief because the evidence as to the requisite advance knowledge was deemed sufficient.

As to retroactivity, Rosemond "announced a new rule because it produced a result that was not dictated by pre-existing precedent." Furthermore, the new rule was "substantive, as it narrowed the scope of aiding and abetting a s. 924(c) offense." As Rosemond "'alters the range of conduct . . . that the law punishes,' it constitutes a new substantive rule that applies retroactively on collateral review."

The Eleventh Circuit recognized that the evidence of advance knowledge in this case was "thin." However, "the evidence of Steiner's continued participation in the offense after Wilson and Ware first fired the guns supports finding that he had advance knowledge. Specifically, after Wilson and Ware initially fired the guns, Steiner and his co-conspirators discovered that the Blazer would not start, paused to converse amongst themselves, and decided to take Patterson's Impala. Steiner then participated in freeing the Impala from the ditch and hiding in the woods when Burkett drove down the road. Indeed, Walker testified that it was Steiner who ultimately drove the Impala away from the scene and evaded the police."

The Court further rejected a claim of ineffective assistance of counsel for failing to request jury instructions based on the reasoning in Rosemond because the trial took place five years prior to that decision.

Jefferson v. GDCP Warden, 17-12160 (Oct. 17, 2019)

The State appealed the granting of federal habeas corpus relief as to a new penalty phase proceeding on a death sentence. Following an extensive collateral review history, the Eleventh Circuit addressed an issue formulated for the Court by the Supreme Court, requiring application of pre-AEDPA law: whether Jefferson "received ineffective assistance of counsel during the sentencing phase of his trial because his lawyers failed to adequately investigate his mental health, and, in particular, whether he suffered from organic bran damage at the time of the killing."

As a preliminary matter, the Court concluded that the state court's findings were not entitled to a presumption of correctness, as the court "adopted verbatim the State's proposed order; it offered no guidance to the Assistant Attorney General drafting the proposed order, including how to resolve important credibility conflicts; apparently, it did not review the order, other than signing it, dating it, and changing the concluding sentence, notwithstanding the glaring errors it contained; and it did so ex parte without so much as affording Jefferson a chance to challenge any of it or propose an alternative order."

Ultimately, the Court concluded that Jefferson had been prejudiced by counsels' deficient performance "in light of the substantial evidence Jefferson put forward showing that he suffers from organic brain damage that significantly affected his conduct and impulse control at the time of the killing."

At the evidentiary hearing, trial counsel and an expert who had been consulted prior to the penalty phase provided conflicting accounts of what transpired. Counsel asserted that the expert concluded that neuropsychological evaluation would not be worthwhile; that although Jefferson was a sociopath or a psychopath, that was just the way he was; and that counsel believed that a sentence in the expert's written report recommending further testing was just a "'throw-out in the report.'" The expert, however, testified that he never backed off his written recommendation for further testing and denied counsel's other characterizations of their discussions. As there was no evidence of any strategic decision on the part of counsel, the federal district court's conclusion that counsel acted out of neglect was not clearly erroneous. An argument by the State that counsel's decision was strategic, based on the pursuit of a residual doubt defense at the penalty phase, was rejected because it was not emphasized at sentencing and was "only barely mentioned . . . in passing."

This deficiency was accompanied by prejudice to Jefferson as the evidence of brain damage that would otherwise have been introduced "would have profoundly challenged the character of the penalty phase of the proceedings by fundamentally transforming Jefferson's sentencing profile." During the penalty phase, trial counsel's arguments were based on a "tough childhood," with a defendant who had an "attitude problem" and who was not a "good guy." By contrast, the effects of the "brain damage likely manifested in an inability to control his impulses and exercise sound judgment and meaningfully set him apart from an unimpaired person. It also makes it harder for Jefferson to deal with difficult or chaotic situations." "There is a powerful difference between someone who grew up poor and without a father and a person who grew up suffering from organic brain damage yielding debilitating mental impairments that worsened into adulthood. There is an even bigger difference between someone who has an 'attitude problem' and someone whose frontal lobe was permanently damaged at a young age and who is therefore not capable of controlling his impulses or reactions to external stimuli at critical moments."

First District Court of Appeal

Simmons v. State, 1D18-1657 (Oct. 17, 2019)

The First District affirmed the denial of a Rule 3.800(a) motion to correct illegal sentence.

A claim challenging dual convictions was beyond the scope of a Rule 3.800(a) motion. Additionally, it was without merit. There was no improper double enhancement with convictions for burglary with a battery and sexual battery.

Likewise, a claim that Simmons could not be sentenced for two counts of sexual battery because both counts arose from a single transaction or episode was a challenge to the convictions, not the sentences, and was beyond the scope of a Rule 3.800(a) motion. Additionally, the acts at issue were sufficiently distinct so as to permit dual convictions even if committed within a single episode – sexual battery by touching the victim's vagina with his penis and penetrating the victim's vagina with his finger.

A claim that a sexual predator designation was illegal due to the absence of proper written findings was rejected. Such a claim can be raised in a Rule 3.800(a) motion only where "it is apparent from the face of the record that the defendant did not meet the criteria for such a designation." Here, the record showed that the defendant had been convicted for a qualifying offense.

Worrell v. State, 1D18-3531 (Oct. 17, 2019)

The First District affirmed the summary denial of a Rule 3.850 motion with multiple claims of ineffective assistance of counsel. The court addressed one claim based on the failure to present testimony from two doctors. It was alleged that one of the doctors would have testified as to a psychosexual evaluation of the defendant and about the absence of a propensity to molest children. The other would allegedly have testified that the defendant had unsuccessfully been treated for erectile dysfunction.

The claim was refuted by the colloquy of the defendant at trial. When asked if there were additional witnesses he wanted to call, he named two – neither being the doctors referenced in this claim. Additionally, testimony about propensities or characteristics of the defendant as a possible child molester would not have been admissible at trial. And, both the defendant and his wife testified at trial as to erectile

dysfunction. When weighed against the accounts of two unrelated victims of the charged offenses, any additional testimony regarding erectile dysfunction would not have probably affected the outcome of the trial.

Gordon v. State, 1D18-4102 (Oct. 17, 2019)

The First District affirmed the denial of a post-conviction motion in which Gordon argued that counsel was ineffective for misadvising the defendant about the likelihood of an acquittal, which resulted in the defendant's rejection of plea negotiations. Such a claim was deemed "too speculative to merit relief." And, to "the extent the State indicated a willingness to entertain a plea, Appellant rejected the opportunity. Thus, because there was no actual offer made by the State, under *Alcorn* Appellant cannot show he was prejudiced by counsel's alleged deficient performance."

Second District Court of Appeal

Marshall v. State, 2D18-1095 (Oct. 18, 2019)

A motion to enforce the mandate of an earlier Second District opinion was denied as a result of an intervening supreme court decision establishing that the Second District's opinion was no longer correct.

Marshall, a juvenile at the time of the offense for which he was convicted and sentenced, received a 99-year prison sentence with the possibility of parole for nonhomicide offenses. After the Second District's original decision and prior to resentencing, the Florida Supreme Court issued its opinions establishing that a term-of-years sentence with parole eligibility for a juvenile offender did not violate the Eighth Amendment. The motion to enforce mandate was therefore denied.

State v. Miller, 2D17-4922 (Oct. 16, 2019)

The State appealed an order suppressing evidence – a briefcase containing money. "Because Miller voluntarily disclaimed any interest in the briefcase, which deputies readily observed while lawfully in his motel room, we reverse the court's suppression order."

When officers were in the motel room and became aware of the briefcase, they asked Miller "if it belonged to him, and Miller . . . said no. Only then did the deputies open the case. It was full of money." Miller argued "that he had had a reasonable

expectation of privacy in the motel room and that the deputies should have obtained a search warrant before seizing and opening the briefcase." Miller "argued that the unlawful seizure occurred when deputies "took hold of the briefcase to bring it downstairs," which preceded their inquiry as to whether it belonged to Miller. The Court disagreed: "The deputies' act of bringing the unopened briefcase to Miller, who had been secured in the patrol car pursuant to a valid arrest warrant, for the sole and explicit purpose of asking whether it belonged to him, was the antithesis of a Fourth Amendment seizure."

"Because Miller voluntarily disclaimed ownership of the briefcase that the deputies readily observed while lawfully in the motel room, he abandoned any reasonable expectation of privacy in the briefcase and, therefore, lacked 'standing' to seek its suppression."

Heare v. State, 2D18-2630 (Oct. 16, 2019)

Heare filed a Rule 3.800(a) motion, challenging a restitution order, arguing that he did not receive notice and was not present at the restitution hearing. The trial court denied the motion on multiple grounds, and the Second District found that Heare should have been provided an opportunity to amend one portion of the motion for presentation under rule 3.850 instead of rule 3.800.

The record attached to the motion did not refute allegations that the defendant did not receive notice of the hearing and was not present at it. A claim based on absence from the restitution hearing is the subject of a Rule 3.850 motion, as is a claim based on lack of notice of the hearing.

Although these claims would normally have been barred by the two-year limitations period for rule 3.850, Heare alleged that he did not learn of the restitution order until April 2018, five years after its entry. Thus, there was an open factual question, to be resolved in the trial court upon an amended motion, as to whether the exception to the two-year limit, based on the discovery of new evidence that could not have previously been discovered with due diligence, was applicable.

Third District Court of Appeal

O.P-G. v. State, 3D18-1304 (Oct. 16, 2019)

In an appeal from a finding of guilt for disruption of a school function under s. 877.13, Florida Statutes, the Third District affirmed and found no error in the lower court's finding "that off-campus conduct evidenced a statutory violation."

Two days after the Parkland school shooting, law enforcement officers became aware of an online post asserting that the poster was going to "shoot my school in Florida," that the poster was 13 and had been bullied and was getting revenge. The school was identified and investigation resulted in the identification of the poster. Although "'section 877.13(1) is limited to the disruption of activities "on school board property,"' it does not, by its express terms, insulate conduct that occurs off-campus. . . . Rather, it penalizes behavior, regardless of where initiated, that 'create[s] a foreseeable risk of substantial disruption within a school,' and ultimately impairs school function."

A vagueness challenge to the statute based on its application to off-campus conduct, was similarly rejected. "Given this context and the causal relationship required between the *mens rea* of the perpetrator and the requisite disruption, the statute gives fair notice to ordinary people of common intelligence as to the prohibited conduct and 'provide[s] minimal requirements to guide law enforcement in order to prevent police officers, prosecutors, and juries from pursuing their "personal predilections."'"

The Court also rejected an overbreadth challenge to the statute: Here, the statute limits any punishment for speech to that which causes a disruption to the school functions. Thus, although an offender is not required to initiate the disruption on-campus, the impact is necessarily measured within the geographic boundaries of the school or school-sponsored event, in accord with the perimeters imposed by Tinker [v. State]." Tinker was elsewhere quoted in the Court's opinion for the limits on the offending conduct:

> [C]onduct by the student, **in class or out of it**, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of free speech.

Finally, a discovery violation, the failure of the State to disclose the assistant principal as a witness, did not warrant reversal. "In the instant case, upon learning of the assistant principal's role, the defense did not seek a recess, continuance, or mistrial. . . . Instead, it lodged and subsequently withdrew an initial objection, then waited until later in the trial to renew its objection." Other relevant factors were that the defense had been aware that the assistant principal was present during O.P.-G.'s admission and that the defense was aware of the "collective admissions from formal, timely discovery disclosures." The assistant principal served as a cumulative witness. Most significantly, "the defense did not articulate any alternative course of trial preparation or strategy it would have pursued in the event of prompt disclosure. Rather it merely stated it may have engaged 'a different approach.'" As the defense was based on the scope of the statutory offense, procedural prejudice did not exist.

Molina v. State, 3D18-2502 (Oct. 16, 2019)

There was no abuse of discretion in the trial court's overruling of an objection, based on bolstering, to the prosecutor's closing argument. The prosecutor argued:

> [The victim's] testimony about the fact that this was a causal relationship, is corroborated by the phone records. This is not a woman who is making up a story because she's upset. This is a woman who is testifying truthfully, and it's corroborated. . . .
>
> The prosecutor did not personally 'vouch' for the victim, place the government's credibility or prestige behind the victim, or argue or imply the prosecutor was aware of information not presented to the jury, bearing on the victim's credibility, reliability or motive for testifying. . . . Instead, the prosecutor's statement addressed why, based upon the jury instructions and the evidence, the jury should conclude that the witness was being truthful. This is permissible argument.

Fourth District Court of Appeal

Geliga v. State, 4D18-1984 (Oct. 19, 2019)

The denial of a requested downward departure sentence based upon mental disorder was reversed "because the court erroneously concluded that [the defendant's] mental condition must be connected to the criminal behavior in order to constitute a ground for departure." Under the relevant statutory provision defining the mitigating circumstance for treatment of a mental disorder, "there is no requirement that a defendant's mental health issue must have a connection to the criminal conduct to be a ground for downward departure."

Additionally, the trial court's finding of a lack of connection, even if relevant, was incorrect. The only witness testifying as to this, the defendant's therapist, testified that a relationship existed between the defendant's childhood trauma, her bipolar disorder and her current behaviors.

Rodriguez v. State, 4D18-2988 (Oct. 16, 2019)

Rodriguez appealed convictions for attempted first-degree murder; attempted arson; and aggravated battery.

The absence of the defendant from a bench conference addressing issues regarding a defense expert testifying when the expert was a friend of the judge did not constitute fundamental error, especially where no adverse rulings were made during the bench conference.

Fifth District Court of Appeal

Maisonet-Maldonado v. State, 5D18-942 (Oct. 18, 2019)

The single-homicide rule prohibited multiple convictions for vehicular homicide and fleeing and eluding causing serious injury or death that involve the same victim. On remand, the trial court was ordered to vacate the judgments for fleeing and eluding and to resentence the defendant in light of the modified convictions. The Supreme Court also certified to the Florida Supreme Court a question of great public importance – whether the single homicide rule set forth in Houser v. State, 474 So. 2d 1193 (Fla. 1985), precluded separate convictions for vehicular homicide and fleeing and eluding causing serious injury or death that involve the same victim.

Everett v. State, 5D19-1082 (Oct. 18, 2019)

Although it would have been error for counsel not to advise a defendant of credit for time served, a post-conviction motion was properly denied because the defendant did not further claim that "but for counsel's alleged misadvice, he would have insisted on proceeding to trial. Rather, Appellant explicitly denied any desire to withdraw his plea and requested only to alter its terms."

Quick v. State, 5D19-2518 (Oct. 18, 2019)

A prohibition petition seeking disqualification of a judge was granted where "the trial judge made comments indicating that he had prejudged the petitioner's guilt and doubted both his sincerity and truthfulness regarding a medical episode experienced during trial proceedings."