

Case Law Update
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Eleventh Circuit Court of Appeals

[United States v. Oliver](#), 17-15565 (Jan. 6, 2020)

The Eleventh Circuit found that Oliver’s prior conviction for making terroristic threats was not a predicate violent felony under the elements clause of the Armed Career Criminal Act. As a result, Oliver lacked three qualifying predicate offenses and the case was remanded for resentencing.

The Georgia state terroristic threat statute lists three types of threats, in the alternative, that qualify as a violation of the statute: “(1) threats ‘to commit any crime of violence,’ (2) threats ‘to release any hazardous substance,’ and (3) threats ‘to burn or damage property.’” It was “clear from the face of the statute that not all threats criminalized by the statute require the ‘threatened use of physical force against the person of another,’ as is required to satisfy the ACCA’s elements clause. . . . Specifically, the statutory phrase criminalizing a threat ‘to burn or damage property’ lacks any requirement of physical force against a person.”

The Court’s analysis then turned to the question of whether the Georgia statute was indivisible or divisible. If indivisible, the statute cannot serve as a predicate violent felony under the ACCA. The Court found that the statute was indivisible. This turns on the question of whether the types of threats in the statute refer to “elements” or “means.” The Court considered multiple sources of state law to resolve this question – the language in the statute itself; decisional law; pattern jury instructions; the record of conviction. After reviewing all of those sources, the issue was not resolved and remained inconclusive. Under such circumstances, the issue of divisibility must be resolved in favor of indivisibility. Thus, “the statute is indivisible and it is overbroad,” and “it categorically does not qualify as an ACCA predicate offense.”

One judge dissented.

[Paez v. Secretary, Florida Department of Corrections](#), 16-15705 (Jan. 7, 2020)

The Court granted the State’s motion for rehearing, withdrew its opinion of July 31, 2019, and issued a new opinion.

In federal habeas corpus cases reviewing state court convictions, the district court must review the petition, before ordering the state to respond, and if “it plainly appears from the petition . . . that the petitioner is not entitled to relief,” the court should dismiss the petition. In this case, the district court dismissed the petition as untimely. As that determination is being made, on the face of the petition, before directing the state to respond, two issues arose: first, “whether the District Court could properly take judicial notice of the online state court dockets in Mr. Paez’s criminal cases;” second, “whether it was error to dismiss Mr. Paez’s petition as untimely without ordering the Secretary to respond.”

The Eleventh Circuit first held that the district court has discretion to take judicial notice of the state court online dockets. When doing so, the court must provide the petitioner with an opportunity to be heard after the court takes notice. The Eleventh Circuit also urged that district courts be cautious when taking such judicial notice. In this case, Paez had “an opportunity to object to the Report and Recommendation after the magistrate judge took judicial notice of the dates from his state court dockets,” and he did not raise any issue regarding the taking of judicial notice or the dates relied upon by the district court. One potential area where problems may arise stems from the prisoner mailbox rule. Filing dates of state postconviction pleadings are often critical to the determination of whether the federal habeas petition is timely. The pro se prisoners seeking federal habeas relief are generally entitled to the benefit of the prisoner mailbox rule, establishing the filing date as the date on which the state court pleading was tendered to corrections officials for mailing. The state court online dockets, however, typically provide the filing date of the date on which the pleading was received by the clerk of the state court.

The Court further found that the district court has discretion to dismiss a petition as untimely on its face, including judicial notice of the state online dockets, without first directing the state to respond.

[United States v. Santos](#), 18-14529 (Jan. 9, 2020)

The Eleventh Circuit affirmed convictions and sentences for procuring naturalization unlawfully and misuse of evidence of an unlawfully issued certificate of naturalization.

The Court first found that a Form N-400 Application, with an officer's red marks annotating it, was admissible as "non-hearsay as an adopted admission of a party-opponent under Federal Rule of Evidence 801, and, (2) alternatively, was properly admitted under the public record hearsay exception in Federal Rule 803." The officer made corrections in red ink on the form, and Santos expressly adopted those corrections by signing the application and swearing or affirming under penalty of perjury that the annotated form with the corrections was "true and correct to the best of [his] knowledge and belief."

A public record is admissible if, inter alia, it sets out: (1) "matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel," and (2) the party opposing admission "does not show that the source of information or other circumstances indicate a lack of trustworthiness." The Court compared the N-400 form to other forms previously deemed admissible under the public records exception. The form is part of an alien's A-file. It is a part of the interview process which is required for all applicants for naturalization. It is reviewed by an adjudicator and it must be signed by the applicant under oath. "In other words, USCIS adjudicators routinely complete N-400 forms during the course of their non-adversarial duties of processing applications for naturalization." Its primary purpose is "to aid USCIS in obtaining and verifying the ministerial information the agency needs to administer the naturalization process."

The Court further held that the admissibility of the annotated N-400 form did not result in a violation of the Confrontation Clause. The annotated form was a "nontestimonial public record produced as a matter of administrative routine' and 'for the primary purpose of determining [Santos's] eligibility for naturalization.'"

Where an exculpatory portion of Santos's post-Miranda statement did not explain or clarify its earlier inculpatory part, the district court did not err, under the rule of completeness, when admitting only the inculpatory portion and prohibited further testimony about the exculpatory portion.

The Court also addressed the sufficiency of evidence, including the mens rea element that the false statements were knowingly made, and the materiality element.

“As to materiality, . . . the government must show a ‘means-end connection’ or ‘causal influence,’ between the defendant’s false statement made under oath and his naturalization.” This is an objective inquiry. The causal link can be shown in two ways. First, under the disqualifying-fact theory, if the real facts “are themselves disqualifying” such that “the official would have promptly denied [the] application” had they been known. Second, under the investigation-based theory, if the real facts “‘could have led’ immigration officials to discover other disqualifying facts that would have justified denying the citizenship application.” Either method was sufficient to establish materiality based on the facts of this case, which the Court details. Santos would have been “deemed lacking in good moral character because he provided false oral testimony about his travel, criminal history, and use of an alias during his naturalization interview.” And, had there been proper disclosure of a prior arrest, conviction or sentence in the Dominican Republic, that would likely have led to further investigation uncovering one or more legal disqualifications from naturalization.

[United States v. Brown](#), 17-15470 (Jan. 9, 2020)

Brown appealed convictions for multiple offenses and challenged the district court’s dismissal of one juror during deliberations; the Eleventh Circuit affirmed.

During deliberations, Juror 13 informed the other jurors that “[t]he Holy Spirit told [him]” that Brown was not guilty on all counts. The district court conducted an inquiry when another juror brought it to the court’s attention. The juror was dismissed upon the Government’s motion over the defense’s objection. The appellate court found no error in the district court’s conclusion that the juror’s comments regarding the Holy Spirit prevented that juror from “fulfilling his duty to follow the court’s instructions about the law and base his verdict on the evidence presented at trial.” At the inquiry regarding what the juror said during deliberations, the district court heard from the reporting juror, Juror 13, and the foreperson of the jury. Based upon the conclusion that Juror 13 was not capable of reaching a verdict based on the evidence, there was no abuse of discretion in dismissing the juror and replacing the juror with an alternative.

The Court also rejected Brown’s argument that the inquiry into the statement violated Rule 60(b) of the Federal Rules of Evidence, which relates to the validity of a verdict. That rule prohibits a juror from testifying “about any statement made or incident that occurred during the deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.” There are three exceptions referenced in the rule. The Court

concluded that “nothing in Rule 606(b) applies to mid-deliberation inquiries into alleged juror improprieties.”

The Court also addressed and rejected arguments that the district court violated the RFRA, the First Amendment and the Sixth Amendment. All of these claims were evaluated under the plain error standard. Ensuring that jurors are able to follow the law and apply the facts in an impartial way is a compelling governmental interest, and the dismissal of a juror who is unable to do that is the least restrictive means to achieving that end.

One judge dissented, emphasizing the “tough” standard – “beyond a reasonable doubt” – required for dismissal of a juror; and the difficulty that this decision will create for religious individuals who believe that God speaks to them to serve as jurors.

[Jordan v. Commissioner, Mississippi Department of Corrections,](#)
17-12948(Jan. 10, 2020) (on rehearing)

The Court withdrew its prior opinion and held, in a section 1983 action, which challenged Mississippi lethal injection protocols, that a motion to quash a subpoena was properly granted. The subpoena had sought documentation regarding Georgia’s protocols; the 1983 action challenged the Mississippi procedures.

The Court first held that the district court applied the correct standard of review regarding the magistrate judge’s ruling – “the clearly-erroneous or contrary-to-law standard of review.” Second, the Court either found, or highly doubted, that information sought by the subpoena was relevant.

“That a drug supplier under statutory assurances of absolute confidentiality has agreed to provide Georgia with pentobarbital for use in executions says nothing about the willingness of that supplier to provide Mississippi with the drug should the supplier’s identity be revealed in this litigation.” The Court’s opinion provides historical background as to the development of confidentiality agreements between State’s and manufacturers of drugs used for lethal injections. While it was unlikely that the Plaintiffs “would gain any information helpful in pursuing its claims challenging Mississippi’s death penalty protocol should the subpoena be enforced, it is clear what the GDC [Georgia Department of Corrections] would lose: its source for compounded pentobarbital.”

First District Court of Appeal

[Franklin v. State](#), 1D18-4276 (Jan. 8, 2020)

The First District affirmed two convictions for possession of a firearm by a convicted felon.

The trial court did not abuse its discretion in admitting a photograph of a firearm found in the vehicle Franklin was driving when stopped by the police. The photo was relevant to what Appellant was in possession of, and the photo was relevant to testimony from an officer that two firearms were found under the car's seats. The Court rejected arguments that the photo was misleading and that it would confuse the jury.

The trial court also denied a motion for new trial based upon the denial of the prior motion for judgment of acquittal. Franklin argued that the trial court employed the wrong standard when denying the motion. The trial court, in its ruling on the motion, stated that the court "will stand by my previous ruling and my reasons for those rulings" – references to the rulings on the prior motion for judgment of acquittal.

A motion for new trial under Rule 3.600(a)(2) challenges the weight of the evidence, not its sufficiency. Although the trial court referenced its prior ruling on the motion for judgment of acquittal, the trial court additionally referenced "the arguments made today." Based on that language, the appellate court concluded that the lower court was denying the motion for new trial not solely on the basis of the sufficiency of the evidence, but on the weight of the evidence as well.

[Levin v. State](#), 1D19-3578 (Jan. 8, 2020)

In an appeal from the summary denial of a Rule 3.850 motion, Levin sought to supplement the record on appeal with pleadings from the trial court file that were not attached to the 3.850 motion, the response to it, or to the trial court's order. Such pleadings are beyond the scope of a record on appeal in appeals from summary denials of postconviction motions, and the record could not be supplemented with those documents.

Second District Court of Appeal

[State v. Johnson](#), 2D18-4436 (Jan. 10, 2020)

The State appealed from a downward departure sentence. Under the Criminal Punishment Code, prior offenses, with some exceptions, are not scored if they were committed more than 10 years prior to the current primary offense. In this case, they were properly included on the scoresheet because of a 2013 misdemeanor conviction for driving with a suspended license. The trial court stated the departure reason as follows: “His 2013 traffic matter is what allows his prior before 2006 to be scored and the court is persuaded that he did not have the benefit of an understanding that would have the impact that it has, and it was a traffic violation.”

Here, “the defense requested a departure based upon *non-statutory* grounds and presented no evidence that Mr. Johnson was impaired or lacked the capacity to appreciate the criminal nature of his conduct at the time of the 2013 traffic violation. Instead, as evidenced by the trial court’s comments, the trial court was more focused on the perceived harshness of the lowest permissible sentence on Mr. Johnson’s scoresheet, due to the misdemeanor traffic violation in 2013.”

[Lewis v. State](#), 2D15-4203 (Jan. 8, 2020)

Lewis appealed convictions and sentences for grand theft and money laundering.

A woman was facing foreclosure on her home and met Lewis, who spoke to her about “short sales,” leading her to believe that he was communicating with her mortgage company. He then “orchestrated a series of fraudulent acts in order to secure a reverse mortgage” for \$194,000, to use for the purchase of the home. The woman signed settlement statements for the short sale and the reverse mortgage. The short sale statement indicated a payoff of \$143,500 for a first mortgage to his own fictitious company; the reverse mortgage statement indicated a payoff of \$239,500 to the same company. The woman then started receiving foreclosure notices from her original mortgage company and lost her home. She learned that the payoff funds had not been sent to her mortgage company.

The trial court awarded restitution of more than \$240,000, based on the loss to Chicago Title Insurance Co. The closing was conducted by Online Title Services, which was underwritten by Chicago Title. There was no evidence, however, that

Chicago Title covered the loss or suffered the damages. The Second District reversed and remanded for further restitution proceedings.

[Vann v. State](#), 2D18-4704 (Jan. 8, 2020)

Probation was improperly revoked where the revocation was based solely on hearsay evidence. Vann was alleged to have changed his residence without his probation officer's consent.

At the revocation hearing, the officer was the sole witness and she testified that when she went to the defendant's home, his father greeted her and said that he was not there and had not been there for a while. While hearsay is admissible at a probation revocation hearing, probation cannot be revoked solely on the basis of hearsay.

Fourth District Court of Appeal

[Nebergall v. State](#), 4D18-2327 (Jan. 8, 2020)

The Court denied the State's motion for rehearing, rehearing en banc and correction of the Court's prior opinion of November 6, 2020. A motion for clarification was granted, and the Court issued a new opinion which included "further trial transcript facts in the opinion, in the event the state petitions for review in the Florida Supreme Court." The prior opinion is discussed in the Case Law Update of November 11, 2019, and the Court reversed convictions for attempted sexual battery and simple battery based upon testimony from the victim, in violation of a prior court order, suggesting that DNA test results linked the defendant, when the results in question were "inconclusive."

[Campbell v. State](#), 4D18-2456 (Jan. 8, 2020)

The State conceded that a judgment and sentence had to be reversed on direct appeal where the court reporter was unable to transcribe portions of the notes for the trial due to damage, and efforts at reconstructing the missing portion of the transcript had not been successful. It was agreed that "Campbell satisfied his threshold burden of demonstrating a basis for his claim that the missing transcript would reflect matters that prejudiced him."

[Harris v. State](#), 4D19-913 (Jan. 8, 2020)

A conviction for grand theft was reversed because the State “failed to produce any legally sufficient evidence of the value of items.” Stolen items included two iPads, an iPhone, an Alexa speaker, a signed baseball, a camera and jewelry.

As to some items, the victim could not provide any value. As to others, a ring had a value of “probably \$3000.” Earrings had cost \$900. A necklace was “worth probably about a hundred.”

All of the items had been purchased at times significantly prior to the theft. There “was no accounting for the general condition and quality or depreciation of the items.” As to the \$3,000 ring, there was no evidence to show the victims’ “personal familiarity with the value,” and the estimate – “probably” – was speculative.

[Morris v. State](#), 4D19-2334 (Jan. 8, 2020)

A trial court’s order summarily denying a Rule 3.850 motion must attach records from the court file which conclusively refute each claim.

[Interlandi v. State](#), 4D19-2470 (Jan. 8, 2020)

A Rule 3.800(a) motion seeking credit for time served in prison was properly denied. The defendant entered a plea to a probation violation on a 2005 case and a guilty plea to new charges in 2007 and 2008 cases, receiving probation sentences on the 2007 cases consecutive to the prison term for the 2005 case. In 2014, his probation was revoked on the 2007 and 2008 cases and he sought credit for time served in prison on the 2005 case. “[D]efendants who violate a consecutive term of probation are not entitled to credit for prison time served on a separate offense.”

[Batista v. State](#), 4D19-3023 (Jan. 8, 2020)

The trial court summarily denied a Rule 3.850 motion alleging newly discovered evidence as being facially insufficient, but failed to provide the defendant with leave to file an amended motion.

Fifth District Court of Appeal

[Peterson v. State](#), 5D19-507 (Jan. 10, 2020)

For the second time, the fifth District reversed the trial court’s summary denial of a motion for return of personal property, where the court did not either conduct an evidentiary hearing or attach portions of the record refuting the motion. After the first remand, the trial court conducted a hearing and heard argument of the parties, but did not receive any testimony. The trial court had, inter alia, attached an exhibit list “from another case that referenced pictures of the wallet and license [which the defendant sought]. It accepted the State’s unsworn and unsupported assertion that the other case might require a trial. It did not, however, base this decision in evidence, and the exhibit list does not refute Peterson’s facially sufficient motion.”

[Thomas v. State](#), 5D19-804 (Jan. 10, 2020)

On appeal from the denial of a Rule 3.800(a) motion, the Fifth District held that the trial court “lacked jurisdiction to enter a restitution order while Appellant’s direct appeal was pending.”