

Case Law Update  
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Supreme Court of Florida

[Mallet v. State](#), SC19-1038 (Oct. 10, 2019)

Discretionary review in the Supreme Court of Florida is not authorized on the basis that the decision of the district court of appeal “may present federal issues.” The fact that federal habeas corpus decisions from the United States Supreme Court require, for federal habeas corpus purposes, that a federal habeas petitioner exhaust remedies in state court when the state supreme court has discretionary control over its own docket does not establish a jurisdictional basis in the Florida Supreme Court. The Florida Supreme Court’s jurisdiction is strictly limited by provisions of the Florida Constitution and is not affected by United States Supreme Court decisions which may compel federal habeas petitioners to seek discretionary review in the Florida Supreme Court prior to seeking federal habeas corpus review.

Eleventh Circuit Court of Appeals

[Riechmann v. State](#), 18-10145 (Oct. 7, 2019)

The Eleventh Circuit affirmed the denial of a federal habeas corpus petition and addressed two issues: 1) whether trial counsel was ineffective for failing to “investigate and present available evidence that Riechmann’s relationship with the victim was loving and respectful and that he did not ‘live off’ her; and (2) whether the state’s failure to disclose the statements of Swiss and German witnesses interviewed by German police violated Brady v. Maryland. . . .”

Riechmann was convicted for the murder of his former girlfriend. The prosecution’s theory of the case was that Riechmann was upset that the victim intended to cease working as a prostitute and that he killed her because he was the beneficiary of substantial insurance policies. In a fact-intensive opinion, the Eleventh Circuit rejected the claim of ineffective assistance of counsel based on the failure of Reichmann to demonstrate prejudice in light of other evidence that the jury did see in which Riechmann and the victim were shown as being involved in a loving relationship. Much of “the desired testimony was repetitious.” The Court addressed challenges to the applicability of the deferential standard of review that typically

applies in federal habeas corpus challenges to state court convictions, and ultimately held that even if the deferential standard was inapplicable and review was de novo, the Court would still find that Riechmann failed to demonstrate prejudice for the claim of ineffective assistance of counsel.

The Brady claim was procedurally defaulted. The claim related to 27 statements from German and Austrian witnesses that German investigators obtained when they were investigating the murder. The claim was raised in a state court 3.850 motion, but, due to unusual facts, the Florida Supreme Court held that the claim should have been raised on direct appeal. The existence of these statements had been known prior to the trial, and, based on the state court record, Riechmann could have and should have argued the failure of the State to produce the statements on direct appeal. The Eleventh Circuit rejected an argument that the state court's procedural bar should not be honored because the Florida Supreme Court treated the Brady claim in a different manner for the guilt and penalty phases of the trial. The Court rejected Riechmann's reading of the Florida Supreme Court's opinion. Contrary to Riechmann's argument, the Florida Supreme Court had not granted relief on the penalty-phase Brady claim. A resentencing had been mandated by the Florida Supreme Court for reasons unrelated to the Brady claim. The fact that the Florida Supreme Court had further stated that the Brady material would need to be turned over during the subsequent resentencing did not amount to a reversal of the sentence on the basis of the Brady claim. Thus, the failure of the Florida Supreme Court to grant relief on the Brady claim as to the guilt phase did not reflect inconsistent treatment of the claim as far as the validity of the procedural bar was concerned. Thus, the federal habeas court was required to defer to the state court's procedural bar of this claim.

Additionally, when a procedural bar is challenged in federal habeas corpus proceedings, the habeas petitioner must demonstrate cause for the procedural bar and prejudice from it, in order to overcome the procedural default. Riechmann's Brief of Appellant was devoted to the argument that the Florida Supreme Court's treatment of the claim was inconsistent as to the guilt and penalty phases. Absent argument as to cause and prejudice to overcome the procedural default, such a claim was "likely abandoned" in the federal appeal.

Ultimately, the Eleventh Circuit held that the procedural bar issue would be academic because the Brady claim lacked merit. As the Florida Supreme Court ruled, in the alternative, that the claim was procedurally barred and without merit, the alternative holding on the merits constituted an adjudication on the merits, and

the deferential standards of review therefore were applicable. The Florida Supreme Court did not unreasonably apply Brady.

On the merits, the Court addressed the significance of the four witnesses whose nondisclosed statements were the focus of Riechmann's arguments. Two were former girlfriends of Riechmann and had not seen him for many years prior to the murder. One was a landlady who had minimal contact with the victim and did not have a close relationship with Riechmann. The fourth was a witness who referenced Riechmann's winning of a substantial sum in a German lottery, a fact the defense wanted to use to demonstrate Riechmann's lack of a financial need to murder the victim. The lottery information was information which was known to Riechmann at the time of the trial. And, these witness statements came "nowhere close to undermining the state's powerful evidence of Riechmann's motive to kill" the victim.

[United States v. Thomason](#), 17-11668 (Oct. 10, 2019)

The district court did not abuse its discretion in denying a resentencing hearing after it granted a motion to correct sentence under 28 U.S.C. s. 2255. The sentencing error at issue affected four of eight counts but did not change the guideline range. The district court had originally imposed an upward departure sentence of 327 months; the guidelines range was 235-293 months.

Addressing whether a sentence correction is a critical stage requiring a resentencing with the defendant present, the Court focused on two inquiries: 1) whether "the errors [that required] the grant of habeas relief undermine[d] the sentence as a whole" and 2) whether "the sentencing court exercise[d] significant discretion in modifying the defendant's sentence, perhaps on questions the court was not called upon to consider at the original sentencing."

"A district court need not conduct a full resentencing when correcting the error does not change the guideline range and the district court does not make the sentence more onerous."

[United States v. Van Buren](#), 18-12024 (Oct. 10, 2019)

Van Buren was charged with and convicted for "honest-services fraud through bribery) for undertaking an 'official act' in his capacity as a police officer, in exchange for money." The jury was instructed that "an 'official act' is a decision or action on a 'question' or 'matter.'" However, the jury was not instructed that "the

‘question’ or ‘matter’ in this context must be comparable in scope to a lawsuit, hearing, or administrative determination.” The failure to provide such further instruction constituted reversible error on the conviction for honest-services-fraud and that was remanded for a new trial.

“Official act” is defined in 18 U.S.C. s. 201(b)(2) as “any decision or action on any question matter, cause, suit, proceeding or controversy, which may at any time be pending. . . .” The Supreme Court has noted that the statutory language in section 201(a)(3) connotes “formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination.”

Van Buren was also convicted of felony computer fraud. The district court did not instruct the jury on the lesser-included misdemeanor version of the offense. Although the charged offense encompassed all the elements of the lesser misdemeanor offense, Van Buren was not entitled to relief because he could not “demonstrate that the evidence would have allowed a rational jury to acquit him of the greater offense while convicting him of the lesser.” The felony-level offense required proof that the defendant engaged in computer access for financial gain. There was nothing in the record to suggest any other reason for engaging in computer access.

The conviction for computer fraud was also found to have been supported by sufficient evidence. Van Buren, a law enforcement officer, accepted \$6,000 to conduct a private investigation and used the State of Georgia’s Criminal Information Center database to run an unauthorized tag search.

[United States v. Bishop](#), 17-15473 (Oct. 11, 2019)

Bishop appealed a conviction and sentence following a conditional guilty plea to knowingly possessing a firearm as a convicted felon.

A pat-down search after a lawful traffic stop was found to have been supported by reasonable suspicion that Bishop was armed. Bishop had a known criminal history; he refused to comply with a directive to exit the truck; he was observed as being “agitated, ‘fidgeting around,’ moving around in the seat,’ and ‘very defensive.’” While none of these factors were sufficient alone, the analysis was controlled by the totality of the circumstances. The Court noted the potential danger of reliance on prior criminal records, as that could subject all individuals with prior records to a Terry frisk. This factor was therefore given “little weight relative to the other factors.”

A four-level sentencing enhancement of the base offense level for use or possession of “any firearm or ammunition in connection with another felony offense” was found to have been erroneous. If the offense involved is drug trafficking, the sentence enhancement applies automatically if “the firearm is found in close proximity” to drugs. For other felonies, it applies “only if the court finds that ‘the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense.’”

The Eleventh Circuit agreed with other federal appellate courts that “mere proximity between a firearm and drugs possessed for personal use cannot support the s. 2K2.1(b)(6)(B) enhancement without a finding that the gun facilitated or had the potential to facilitate the defendant’s drug possession.” Here, the district court applied the enhancement based on proximity between the firearm and one hydromorphone pill. As the district court relied solely on proximity and did not consider any other factors, the case was remanded to the district court with leave to consider the required finding.

An enhancement of the base level offense under s. 2K2.1(a)(3) for a Florida conviction for drug conspiracy under s. 893.13(1)(a), Florida Statutes, was proper. The Florida conviction qualified as a predicate “controlled substance offense.” The Eleventh Circuit previously rejected the argument that s. 893.13(1)(a) did not qualify as it lacked mens rea element.

#### First District Court of Appeal

[Williams v. State](#), 1D17-5399 (Oct. 11, 2019)

The case was remanded for further proceedings because the record did not reflect that the trial court made an independent determination of competency to proceed after having appointed an expert to determine competency. Although defense counsel represented that the expert had found the defendant competency, the trial court did not make an independent determination.

[Cuffy v. State](#), 1D18-1715 (Oct. 11, 2019)

The case was remanded for the trial court to enter a written adjudication of its competency determination nunc pro tunc.

## Second District Court of Appeal

[Banks v. State](#), 2D17-3206 (Oct. 11, 2019)

Banks appealed convictions for scheme to defraud and grand theft. On the grand theft, Banks chose to be instructed only as to the highest degree of the offense – value exceeding \$100,000. He then argued that the verdict should be reduced to a lower level of felony grand theft because the verdict form did not reflect the value of the property. Based on Banks’ waiver of lesser degrees of grand theft, as the verdict form conformed with the jury instructions, and the value exceeding \$100,000 was not in dispute, Banks’ challenge to the verdict form was not preserved and any error was invited.

The trial court had, in fact, reduced the verdict to a third-degree felony and the State cross-appealed that ruling. The Second District, for the above reasons, directed that the first-degree felony conviction be reinstated.

[Hernandez v. State](#), 2D18-4310 (Oct. 11, 2019)

A “court may not impose a sentence ‘consecutive to a sentence *yet to be imposed* on another offense.’”

## Fourth District Court of Appeal

[Demus v. State](#), 4D17-3497 (Oct. 10, 2019)

The Fourth District reversed convictions for two counts of failure to register as a sexual offender. The information charged appellant “with failing to register within forty-eight hours after establishing or maintaining a permanent or transient address in Broward County. . . .” The State “presented no evidence that appellant had established any type of residence in Broward County within the time frame alleged in the information.”

The State argued on appeal that defense counsel conceded that the defendant was residing in Broward County during oral argument when counsel “stated that appellant mistakenly was let off a bus in Broward County rather than Miami. Not only is what is said in argument not evidence, but defense counsel never admitted that appellant resided in Broward. Even if he had been let off the bus in Broward, defense counsel stated that appellant’s intent was always to reside in Miami. Defense counsel never admitted that appellant spent even a night in Broward.”

Fifth District Court of Appeal

[Strong v. State](#), 5D18-1638 (Oct. 11, 2019)

A motion to suppress was properly denied, as the combination of an informant's tip, the defendant's location, and a 9-1-1 call provided probable cause. There was a tip that Strong planned to rob a McDonald's using the informant's vehicle. "The informant rented a car, solely in her name, and allowed law enforcement to attach a GPS tracking device to the vehicle. Strong borrowed the rental car, and law enforcement tracked Strong's movements via the GPS. The GPS tracking information placed Strong near a McDonald's in Volusia County, and shortly after, law enforcement received a 9-1-1 call reporting robbery at that McDonald's. Law enforcement pulled Strong over, arrested him, and searched the rental car."

Although the trial court erred in concluding that Strong lacked a privacy interest because he was not listed on the rental agreement, the search was supported by probable cause. The opinion noted that Strong abandoned his argument related to the GPS tracking information by failing to brief it.

[Fields v. State](#), 5D18-2786 (Oct. 11, 2019)

The denial of a Rule 3.850 motion after an evidentiary hearing on one claim was affirmed. The motion set forth four claims of ineffective assistance of counsel. All of the claims related to the Stand Your Ground law.

In 2010, the relevant statute did not require a person to retreat before using deadly force. Counsel did not object to a jury instruction that contained a requirement of a duty to retreat.

Here, the jury was instructed that Fields was justified in using deadly force against Kennerly if he reasonably believed it necessary to prevent imminent death or great bodily harm to himself or another. Second, the instruction made no mention of Fields's status as a convicted felon in the context of his ability to justifiably use deadly force. Third, the only caveat contained in the instruction was that the use of deadly force was not justifiable if Fields was the initial aggressor, unless the

force being used against him or another was so great that he reasonably believed that he or another was in imminent danger of death or great bodily harm, and he had exhausted every reasonable means to escape the danger other than by using deadly force. Put differently, if the jury did not believe Fields to be the initial aggressor, then the instruction, as given, allowed the jury to find that Fields was justified in his use of deadly force to defend his brother and thereafter to acquit him. Because the evidence at trial presented a jury question as to whether Fields was the initial aggressor, we conclude that the instruction was appropriate under *Floyd* and that it provided the jury with sufficient guidance as to the law to apply to the evidence before it.

On a related claim, although Fields was correct that counsel's advice that a convicted felon could not pursue a pretrial motion to dismiss based on stand your ground immunity was erroneous, it was clear from the record that had any such motion been filed, the trial court would have denied it. Fields therefore failed to establish prejudice for the claim that counsel erred by not filing such a motion.

[Boutiette v. State](#), 5D18-2935 (Oct. 11, 2019)

The Fifth District applied its own prior decisions and granted a new pretrial immunity hearing based upon the retroactive application of the 2017 amendment to the burden of proof in the Stand Your Ground law. The Court certified conflict with decisions of the Third and Fourth Districts.

[Pierce v. State](#), 5D19-1123 (Oct. 11, 2019)

The trial court granted a Rule 3.850 motion and vacated a conviction on one count. The State then chose not to pursue retrial. Pierce then sought a resentencing based on a recalculated scoresheet under Rule 3.800(a). The trial court denied the motion, but the Fifth District held that he was entitled to a resentencing based on a recalculated scoresheet.