

Case Law Update  
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Supreme Court of Florida

[Reed v. State](#), SC19-714 (Mar. 19, 2020)

Pursuant to the Supreme Court's recent decision in Poole v. State, there was no Hurst error "because a unanimous jury finding establishes the existence of at least one statutory aggravating circumstance beyond a reasonable doubt." The opinion further quoted from the decision of the United States Supreme Court, in McKinney v. Arizona, 140 S.Ct. 702, 707 (2020), that "under Hurst v. Florida, 'a jury must find the aggravating circumstance that makes the defendant death eligible,' but that a jury 'is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.'" Two of the four aggravating circumstances in Reed's case were necessarily found by a unanimous jury which found him guilty of the contemporaneous felonies of sexual battery and robbery, which offenses formed the basis for the two aggravating circumstances.

[Boyd v. State](#), SC18-1589 (Mar. 19, 2020)

The Court's opinion in Boyd is the same as in Reed, above. The aggravating circumstances in Boyd were satisfied by the jury's unanimous finding of guilt for the contemporaneous offenses of kidnapping and armed sexual battery, which served as the basis for the aggravating factor that the murder was committed while Boyd was committing or attempting to commit those offenses.

Eleventh Circuit Court of Appeals

[United States v. Cingari](#), 17-12262 (Mar. 17, 2020)

The defendants were convicted of falsifying immigration forms, mail fraud, and conspiracy to commit mail fraud. The district court found that they received more than \$740,000 in criminal proceeds and held them jointly and severally liable for a forfeiture money judgment in that amount.

The defendants, husband and wife, argued on appeal that they should not have been found jointly and severally liable. The Court disagreed. The arguments on appeal were reviewed under the plain error standard, absent objection in the lower court. The defendants' argument was based on the Supreme Court decision of Honeycutt v. United States, 137 S.Ct. 1626 (2017). That decision limited joint and several liability "for property that [a] co-conspirator derived from the crime but the defendant himself did not acquire." That case was based on a criminal forfeiture statute, 18 U.S.C. s. 853, which was not at issue in this case and which had distinctive language to support the Supreme Court's holding. The forfeiture in the instant case was based on 18 U.S.C. s. 982(a)(6), and 18 U.S.C. s. 981(a)(1)(c), the latter of which is a civil forfeiture statute. Additionally, even if Honeycutt analysis was applicable, the defendants' argument failed under the facts. They were both involved in the criminal enterprise which resulted in the criminal proceeds. Even if the husband had a lesser role, he still worked on at least 200 fraudulent applications.

The Court also addressed an argument that sentencing should have been imposed under Guidelines section 2L2.1 instead of 2B1.1; the Court disagreed. Section 2B1.1 applies to mail fraud offenses; 2L2.1 applies to immigration-document convictions. Due to the multiple convictions, another section mandates application of the guideline that produces the highest offense level, which is what the district court did. While there were other guideline sections at issue in resolving this, ultimately, based on prior court precedent, the Court concluded that 2B1.1 was applicable because it "more aptly fit the specifics of the crime committed." The "crime committed" was viewed as a fraudulent scheme to get rich, rather than a more limited scheme involving falsification of federal documents.

### First District Court of Appeal

[State v. Ware](#), 1D18-1443 (Mar. 20, 2020)

The First District addressed a suppression issue as to which it observed that little case law existed: "an officer unlawfully intrudes onto protected property, and from there proceeds onto unprotected property and discovers evidence there." The Court held that a suppression motion was erroneously granted. "Ware had no reasonable expectation of privacy in the area where the evidence was located, and because the officer could not have seen the evidence until he left the protected property, we find that, in the circumstances presented here, the evidence was not subject to suppression, irrespective of the unlawful intrusion that preceded it."

Ware was a suspect in a homicide and attempted homicide investigation. Deputy sheriffs went to his residence for a “knock and talk.” His mother lived in the actual residence and he lived in a shed behind her mobile home. That home was set off by woods and a fence along its front, with a no-trespassing sign. When no one answered, a deputy walked to the edge of the woods to urinate and saw a hog pen. The deputy looked in and discovered a purse matching the description of the victim’s purse and a man’s wallet. The officers then obtained a search warrant before returning to retrieve the items.

The Fourth Amendment does not extend to open fields. The trial court had concluded that the officers exceeded the scope of the knock and talk, and that the subsequent discovery in the open field was tainted by the prior illegality. The First District disagreed: “The evidence was discovered in an open field, irrespective of the earlier improper intrusion.”

One judge dissented.

### Second District Court of Appeal

[J.M.H. v. State](#), 2D17-3721 (Mar. 20, 2020)

J.M.H. was convicted for a first-degree murder, committed in 2001, when she was 17-years old, pursuant to a plea agreement under which she was sentenced to life without parole and the State waived the death penalty. In 2014, she was resentenced under the new juvenile sentencing statutes, and was resentenced to life, with judicial review after 25 years. On appeal from that sentence, the Second District found that the trial court abused its discretion in imposing the sentence of life.

The Second District agreed with J.M.H.’s argument that the trial court failed to “‘meaningfully . . . assess J.M.H.’s background, the effects of the sexual abuse perpetrated by a man sixty years her senior, or her remarkable rehabilitation and transformation in prison.’”

The trial court erred in placing emphasis on the fact that the defendant was 35 days shy of her 18<sup>th</sup> birthday at the time of the murder. While the trial court noted the defendant’s background and history of abuse, it further found the existence of a loving family and emphasized that siblings managed to be law-abiding members of society. “This finding indicates that the trial court failed to duly consider the evidence regarding J.M.H.’s sexual abuse by Townsend as well as the overwhelming

evidence of her unstable background.” There was no evidence that the siblings suffered the same sexual abuse that J.M.H. did.

The trial court had further found that facts regarding the offense did not reflect a lack of maturity on the defendant’s part. The Second District concluded that this finding indicated that the trial court “essentially disregarded the fact that J.M.H. was a juvenile.” The Court referenced language from decisions of the Supreme Court of the United States which found that “children have a lack of maturity” and that immaturity and impetuosity are “hallmark features of a juvenile.”

As to the defendant’s capability for rehabilitation, the trial court minimized her accomplishments in prison based on the prison’s “secure, regulated environment.” The Second District found that there was no evidence in the trial court to support the conclusion that the “prison environment was more conducive to rehabilitation.” In addition to prison being J.M.H.’s only opportunity to demonstrate rehabilitation, the Second District noted that Miller v. Alabama contemplated the relevance of a juvenile’s rehabilitation while incarcerated.

The Court mandated resentencing before a different judge.

[Cox v. State](#), 2D17-3822 (Mar. 20, 2020)

The trial court erred in dismissing a Rule 3.850 motion for rehearing as untimely. The trial court’s calculation was based upon its conclusion that the motion was filed 17 days after the trial court’s order. This ignored the defendant’s entitlement to an additional three days from the date of service of the prior order denying the 3.850 motion by mail.

[State v. Moran](#), 2D18-942 (Mar. 20, 2020)

The trial court found that section 775.082(1)(b)(1), Florida Statutes (2017), was unconstitutional, and the State appealed.

Moran was a juvenile at the time of the commission of a first-degree murder. He was subsequently given a resentencing hearing, at which time he argued that the minimum statutory sentence now allowable under the juvenile sentencing statutes was unconstitutional under Miller v. Alabama, because it divested the trial court of meaningful discretion. The trial court agreed and resentenced Moran to 24 years in prison plus 20 years of probation. The State appealed from this sentencing order.

On the basis of the Second District’s own prior decision in Bailey v. State, 277 So. 3d 173 (Fla. 2d DCA 2019), the Court rejected the defendant’s argument and reversed the trial court’s order, as Miller v. Alabama did not apply to a 40-year sentence with judicial review after 25 years.

[Pittman v. State](#), 2D18-4199 (Mar. 20, 2020)

Correcting a written sentencing document does not require de novo resentencing. However, when the trial court made its correction, it did so in the form of a memorandum. The correction needed to be done through an amended written sentence.

[Agosto v. State](#), 2D18-4318 (Mar. 20, 2020)

The defendant appealed a conviction for direct criminal contempt. During pretrial proceedings in a criminal case, the defendant was ordered to provide the passcode to his cell phone. At an evidentiary hearing, the court heard evidence that the defendant stated in jail that he did not want to provide it. The court also heard substantial evidence that the defendant engaged in several efforts to unlock the phone and said that he could not recall the password. The trial court made credibility determinations and found the defendant’s statements about being unable to recall not to be credible.

The conviction for direct criminal contempt was reversed. Direct contempt must be based solely on the judge’s own observations in court. The court could not base a conviction for direct contempt on testimony as to what the defendant did or said outside the courtroom. The failure to unlock the phone occurred in the courtroom, but the testimony about statements in jail and unsuccessful efforts related to matters occurring outside the courtroom.

[Alvarez v. State](#), 2D19-565 (Mar. 20, 2020)

Alvarez was charged with violating sex offender condition of probation 21, which prohibits possessing, viewing or owning pornographic or similar materials “that are relevant to the offender’s deviant behavior pattern.” The Second District reversed the revocation of probation because the evidence was insufficient “to establish a rational relationship between his deviant behavior pattern and the sexually explicit material found on his cellphone.”

The only evidence adduced at the revocation hearing was the photos from the defendant's phone. "Indeed, the evidence presented at the hearing gives us no idea what Alvarez's deviant behavior pattern is." The Court rejected the State's argument on appeal that the nature of the charged offense, lewd and lascivious molestation, was sufficient, in and of itself, to define the deviant behavior pattern. The State also presented argument based on facts set forth in the arrest affidavit. However, that affidavit was not introduced into evidence at the revocation hearing.

[State v. Hall](#), 2D19-2092 (Mar. 20, 2020)

During pretrial proceedings in a prosecution for molestation of a child, the State sought certiorari review of the trial court's order excluding evidence of the molestation of a child other than the victim in this case. The Second District granted the State's petition. The similarity standard applied by the trial court has been abrogated, and the exclusion of the evidence constituted a material injury to the State.

In child molestation prosecutions, the requirement of strict or substantial similarity has been relaxed when the charged offense involves acts alleged to have been committed in the familial context. The only issue in such cases is relevance. The similarity or lack of similarity may be considered only as to the issue of whether the probative value of the collateral offense is outweighed by prejudice from such evidence.

The Second District remanded the case to the trial court for reconsideration under the correct standard and did not express any opinion as to the admissibility of the evidence.

[Woolman v. State](#), 2D19-4459 (Mar. 18, 2020)

The Second District reversed convictions for sexual battery while in a position of familial or custodial authority and lewd or lascivious molestation for a new trial. The trial court erred "in admitting the recording of a controlled phone call which included evidence of uncharged collateral crimes" and in instructing the jury on sexual battery.

The phone call included extensive references to sexual conduct with the victim after age 16. The information alleged offenses for which the victim's age, being under 16, was an element. As a result, whatever relevance the phone call had, its probative value was outweighed by prejudice. And, evidence of such conduct

after the age of 16 was also not intertwined with the charged offenses, as it was not needed to provide an intelligent account of the charged offenses.

The sexual battery offense with which the defendant was charged required proof that the defendant was in a position of familial or custodial authority. With respect to the term “custodial,” the court granted the State’s proposed instruction, which referred to a person who has “custody or control” over another person. That was an incorrect statement, as custodial requires proof that the defendant as custody and control over another. Although the defense did not object to the language at issue during the trial, this error was deemed to constitute fundamental error.

[Nelson v. State](#), 2D18-39 (Mar. 18, 2020)

On appeal from convictions after a trial, the Court held that Nelson was entitled to a new stand your ground immunity hearing, applying the amended burden of proof from the 2017 legislation placing the burden on the State. The pretrial hearing in this case was held on June 9, 2017, the day the statutory amendment became effective, and that amendment applied to all immunity hearings held after the statute became effective.

[Ford v. State](#), 2D18-4106 (Mar. 18, 2020)

The trial court’s order failed to specify which conditions of probation were revoked. The case was therefore remanded for the entry of an amended order revoking probation.

[Bailey v. State](#), 2D19-1395 (Mar. 18, 2020)

The trial court erred by revoking probation based solely on hearsay testimony. The defendant was charged with moving from his residence without the probation officer’s consent. The officer was the only witness at the revocation hearing. He testified that the defendant was not present when he went to the defendant’s known residence, that a neighbor said that she had not seen the defendant for more than a week, and that the defendant’s girlfriend confirmed, in a phone call, that the defendant moved out of that residence a week earlier. The fact that the officer could not make contact with the defendant was not sufficient to establish that the defendant had moved.

## Third District Court of Appeal

### Potter v. State, 3D18-324 (Mar. 18, 2020)

Potter was convicted for purchasing oxycodone, as a lesser included offense of trafficking, and argued that the trial court erred in denying a “valid prescription defense” instruction. The Third District affirmed the conviction and found that any error was harmless.

The Third District first observed that it was unclear whether the “valid prescription defense” applies to the offense of purchasing as opposed to possessing, but found that that was not relevant, because in this case, in addition to purchasing, the defendant did possess the oxycodone.

The Third District found that the failure to give the instruction was harmless based upon the facts of the case, which included the following: Potter was purchasing the oxycodone for Bailey. Potter purchased the pills and placed them in a Walgreens prescription bottle and ripped the previously existing label on the bottle off. Potter later told Bailey that Potter placed the pills in Bailey’s purse while the police were searching the apartment. Potter had prescription bottles from an expired prescription for oxycodone, which Potter kept to have an “explanation” for possession of the pills if ever arrested. The search of the motel room used by Potter and Bailey found 58 oxycodone pills plus heroin, marijuana, cocaine, drug paraphernalia and \$503 in cash. Potter’s 2014 prescription was for a different weight than the pills found in 2016. Evidence Potter was relying on was self-serving hearsay – statements in jail calls between herself and Bailey.

### J.J. v. State, 3D18-0398 (Mar. 18, 2020)

The trial court erred in failing to suppress marijuana because there was a lack of probable cause that J.J. was “in actual or constructive possession of cocaine found in a stove in the kitchen where he sat.”

An officer observed what appeared to be a hand-to-hand drug transaction outside a residence; J.J. was not a party to that transaction. The officer then entered the residence. J.J. was one of three persons sitting in the kitchen; he was the closest to the stove, but neither facing it nor touching it. The other two individuals were adults. J.J. was holding and looking at his cell phone when the officer entered. The officer observed apparent drug paraphernalia on top of the stove. There was no evidence as to J.J.’s residence or connection to the residence entered by the officer.

Besides those who were in the kitchen, a total of six-eight individuals were in the residence at the same time. After J.J. was arrested, baggies of marijuana were found in his personal possession.

The Court found that the fact of being the closest to the stove and the cocaine was insufficient to establish dominion and control over the cocaine. Mere proximity does not provide probable cause for an arrest. The Court's opinion addressed the Supreme Court's decision in Maryland v. Pringle, 540 U.S. 366 (2003), which held that constructive possession and probable cause to arrest multiple persons existed as to contraband found in a car. The Third District concluded that Pringle did not apply to multiple individuals found inside a residence with contraband.

Based on the reversal due to the lack of probable cause to establish dominion and control, the Court did not address the separate issue of the warrantless entry into the residence.

One judge dissented.

#### Fourth District Court of Appeal

[State v. Ervin](#), 4D19-626 (Mar. 18, 2020)

The trial court may not withhold adjudication for first-degree felonies or offenses of higher degrees. However, the State failed to object at trial and therefore could not prevail on the claim on appeal as it did not constitute fundamental error.

[Mathieu v. State](#), 4D19-1029 (Mar. 18, 2020) (on motion for clarification)

Mathieu asserted two claims of ineffective assistance of counsel with respect to his revocation of probation and rejection of a plea offer. The Fourth District reversed and remanded for further proceedings because the record documents attached to the trial court's order did not conclusively refute the claims.

Mathieu first argued that counsel was ineffective for assuring him that the victim would not show up for the probation revocation hearing and that the State could not prove its case with hearsay and without the victim. Counsel was alleged to have been ineffective for not knowing that hearsay could be used at a revocation hearing.

Mathieu further alleged that counsel was ineffective for advising him that the court could not impose consecutive sentences for a revocation of probation when the original sentences were concurrent.

[Graves v. State](#), 4D19-1040, et al. (Mar. 18, 2020)

Graves filed a pro se motion to withdraw plea, alleging misadvice from counsel. The trial court struck the motion, finding that it was unauthorized since he was represented by counsel. Under such circumstances, when the motion alleges an adversarial relationship between attorney and client, the pro se motion should not be stricken. If it appears that an adversarial relationship exists and the allegations are not refuted by the record, the court should either permit counsel to withdraw or discharge counsel and appoint conflict-free counsel.

Fifth District Court of Appeal

[State v. Griffith](#), 5D19-1405 (corrected)

The State appealed a downward departure sentence. The parties agreed that three of four reasons for the departure were insufficient. The Fifth District addressed the fourth reason, “that the victim and her family law attorney used the criminal proceeding to gain leverage in family court,” and found that it was not supported by the facts and was legally insufficient.

The defendant and victim were engaged in a romantic relationship and had a daughter together. This case was based on charges of domestic violence. An attorney for the victim sent an email – it was unclear as to whom it was sent – stating that if the defendant agreed to sole custody on the part of the victim, it “would go a long way” in the victim’s sentencing recommendation. The trial court had ruled that this was inadmissible hearsay at the trial, but defense counsel interjected it into cross-examination of the victim. The victim stated that she disagreed with it, as she had no control over the verdict or sentence. There had never been a custody battle between the defendant and victim and the victim denied calling the police to gain custody of the daughter. She disavowed the attorney’s email, which did not come into evidence.

In addition to the lack of evidentiary support for the reason, the Court found that since the defense impeached the victim with the email, and the victim responded to that impeachment, and the jury returned a verdict finding the defendant guilty, there was no legal basis for the departure reason.

[Frazier v. State](#), 5D19-1671 (Mar. 20, 2020)

The Fifth District reversed a conviction for battery on a detention or commitment center official due to discovery violations and the failure of the lower court to make required findings after a hearing on those violations.

The State originally provided discovery which consisted of the video of the incident at issue. This video, when reviewed by defense counsel, led to the discovery that there were multiple additional witnesses with potential evidence, including statements from several of them, as well as a statement from the victim. Over the next several months, despite repeated demands for the discovery from defense counsel, the State produced only one witness statement.

At a pretrial hearing, 12 days prior to the trial, the court heard arguments about the discovery violations, but did not make any findings. Immediately prior to jury selection, the parties addressed the remaining discovery issues. Much, but not all, of the information had been furnished by that time. Witness statements of several witnesses were not accompanied by addresses. Two witnesses whose information had been provided failed to show up for depositions on short notice. Frazier had not been able to contact others, whose information had been provided 48 hours prior to the start of jury selection. Defense counsel moved for a continuance, but it was denied.

The Fifth District reversed the convictions. The trial court failed to make the required findings. The discovery violations were clearly substantial and numerous. The Fifth District rejected the State's argument on appeal that the violations did not affect the defense's ability to prepare for trial.

Prior to the disclosure of the identity of the six witnesses, the only evidence related to the alleged battery was Frazier's testimony, the victim's testimony, and unclear surveillance footage. Two of the late-disclosed witnesses testified at trial; Frazier was able to utilize one witness at trial, and the State utilized the other. Ultimately, however, four witnesses were unable to be deposed prior to trial. Thus, as argued by Frazier below, there is a reasonable probability that Frazier's trial preparation or strategy would have been materially different had the discovery violations not occurred.

Furthermore, because the missing discovery was not provided to Frazier until after the expiration of the speedy trial period, the Court ordered that Frazier be discharged.