

Case Law Update
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Supreme Court of Florida

[Atwater v. State](#), SC19-1709 (Aug. 13, 2020)

The denial of a fifth, successive postconviction motion was affirmed in a capital case.

Atwater argued, on the basis of McCoy v. Louisiana, 138 S.Ct. 1500 (2018), that defense counsel was ineffective for not informing him of plans to concede guilt and not obtaining his consent to that strategy. McCoy was found to be distinguishable. Because McCoy “vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt,” counsel’s concession violated McCoy’s “[a]utonomy to decide that the objective of the defense is to assert innocence.” Atwater, however, did not allege that he instructed counsel to maintain his innocence or that he expressly objected to any admission of guilt. The claim asserted by Atwater was facially insufficient, and the failure of the trial court to conduct a case management hearing was therefore harmless error.

[Freeman v. State](#), SC19-1532 (Aug. 13, 2020)

The Supreme Court affirmed the denial of a second successive Rule 3.851 motion.

Freeman was not entitled to relief under the Hurst decision because his conviction and sentence became final prior to the United States Supreme Court’s 2002 decision in Ring v. Arizona. And, his intellectual disability claim was untimely. Freeman had IQ scores of 83 and 84 in the 1980’s and 1990’s and relied on a 2017 test score of 72. Although the Florida Supreme Court, in 2016, had held that the decision of the United States Supreme Court, in Hall v. Florida, 572 U.S. 701 (2014), applied retroactively, the Florida Supreme Court, in 2020, receded from its 2016 decision and held that Hall did not apply retroactively.

Eleventh Circuit Court of Appeals

[United States v. Hatum](#), 18-11951 (Aug. 11, 2020)

The Eleventh Circuit addressed the following issue in an appeal from the denial of the government’s forfeiture motion: “If a defendant is convicted of a money laundering scheme that caused no financial harm to an innocently involved bank, is an order of forfeiture still mandatory?” The Court held that it is mandatory and reversed the district court’s denial of the forfeiture motion.

18 U.S.C. s. 982(a)(1), “says that district courts ‘shall order’ forfeiture for defendants convicted of money laundering.” “Shall” is mandatory, and the district court erred by ruling on the basis of equitable considerations, such as the forfeiture statute’s purpose.

The Court further looked to the factual issue of whether there was any property “involved in” the money laundering scheme to implicate mandatory forfeiture. First, the Court concluded that “forfeiture money judgments” are property for purposes of the forfeiture statute. The Court also rejected the argument that because money had been returned to the victim bank, the imposition of forfeiture would constitute “impermissible double counting.”

The Court further rejected the district court’s conclusion that \$10,000 per transaction was the ceiling for a forfeiture order. The district court had based that conclusion on just one of the relevant factors – harm caused by the defendant – while failing to consider other factors, such as other penalties authorized by Congress or the sentencing commission. On remand, with respect to the factor of harm caused by the defendant, the Court directed the district court to make findings and consider “the adverse impact on society that money laundering generally has as well as the specific conduct that Mr. Waked engaged in.”

One judge dissented in part, concluding that it was premature to address some of the fact-specific issues, including the excessive nature of the forfeiture amount.

[United States v. Green](#), 17-10346 (Aug. 11, 2020)

Multiple defendants appealed convictions for RICO conspiracy, drug trafficking conspiracy, gun crimes and other offenses. The Eleventh Circuit reversed as to two sentencing issues, but affirmed in all other respects.

The two primary issues addressed were “whether RICO conspiracy qualifies as a crime of violence under 18 U.S.C. s. 924(c) – an issue of first impression in the Eleventh Circuit – and whether Carey’s sentence is procedurally and substantively reasonable.”

Based on evolving case law from the past few years, the government agreed that RICO conspiracy generally does not qualify as a crime of violence. The government argued an exception: that the defendants were convicted of “aggravated RICO conspiracy,” which should qualify. The RICO conspiracy statute includes language which may add an element and increase the maximum sentence to life in prison. The Eleventh Circuit did not determine whether such an offense of aggravated RICO conspiracy actually existed. There were no allegations in the indictment to indicate that the defendants had been charged with such an offense.

Defendant Corey’s guideline range, after revisions of the initial range, was 210-262 months, and he was sentenced to 1,440 months – 360 months for each of his four convictions, running consecutively. The district court was found to have made unclear pronouncements regarding the operative guidelines range. At one point, the judge referred to 210-262 months as the range; at another point, the judge referred to 210-262 as an agreement by the parties for a downward variance from the original range, which went up to 1,440 months. The district court had also relied on clearly erroneous facts to support the imposed sentence. Corey’s participation in a murder, the fact relied upon by the judge, was found by the appellate court to be something that was not supported by the record.

The Court briefly addressed several other issues. One defendant’s interest in a cell phone that had been seized was found to have been abandoned, and a suppression motion was properly denied. Law enforcement authorized release of the phone 48 hours after the defendant’s release, but he never picked it up. The abandonment therefore precluded a challenge based on the government’s alleged wrongful retention of the phone for four years.

While cell-site data was wrongfully obtained without a warrant, on the basis of recent decisions from the Supreme Court, suppression was not required, as the good-faith reliance doctrine of United States v. Leon and Davis v. United States was applicable. The officers reasonably relied on state-court orders issued under a Florida statute in 2013, and had no reason to believe at that time that the court orders were not valid.

[United States v. Carter](#), 18-14806 (Aug. 12, 2020)

After a jury trial and conviction, Carter was sentenced under the Armed Career Criminals Act. The issue on appeal was whether Carter had three qualifying predicate offenses. Two of the offenses for which he was previously convicted arose out of a single indictment and plea. The Eleventh Circuit affirmed the ACCA enhancement.

Under the ACCA, the three qualifying predicate offenses must have been “committed on occasions different from one another.” The Eleventh Circuit reviewed the indictment, admissions and Alabama law that pertained to the two predicate offenses, and concluded that “it was more likely than not that his marijuana and cocaine offenses were committed separately.”

Alabama law provided for enhancements for drug offenses if they were committed within three miles of a school or public housing. That enhancement was applied in state court only for the marijuana offense, not the cocaine offense, thus suggesting that the offenses occurred at different locations. Furthermore, the Alabama enhancement was mandatory when the facts of the case supported it.

[McKathan v. United States](#), 17-13358 (Aug. 12, 2020)

While on supervised release, McKathan faced a “classic penalty situation,” “when his probation officer asked him to answer questions that would reveal he had committed new crimes.” As a result, the Eleventh Circuit concluded that McKathan’s habeas corpus petition under 28 U.S.C. s. 2255 required further proceedings in the district court.

McKathan, a sex offender, was on conditional release when a probation officer discovered that he had opened a Facebook account, and then investigated to determine whether McKathan was in violation of any conditions of release which prohibited internet activity. The probation officer subsequently asked McKathan about his new phone and its internet access, and the officer examined the phone, after directing McKathan to unlock the phone with his PIN number. The officer then discovered inappropriate content, referencing “preteen” girls, and, upon inquiry, McKathan conceded that he had been viewing child pornography. McKathan’s supervised release was then revoked and he was also convicted on new charges of child pornography.

In a subsequent habeas corpus petition, McKathan argued that counsel was ineffective for not seeking the suppression of his statements to the probation officer and the fruits of those statements. In order to prevail on the suppression motion, McKathan had to demonstrate “(1) that the government compelled him to make a (2) testimonial communication or act and (3) that the testimonial communication or act incriminated him.” The parties and the Eleventh Circuit agreed that the second and third elements had been demonstrated.

The Court then proceeded to find that governmental compulsion existed. Under the terms of supervised release, McKathan was required to answer the probation officer’s questions, and the failure to answer the questions could result in the revocation of conditional release. The Court then inquired whether “there was any reasonable basis for McKathan to have thought that his invocation of his Fifth Amendment privilege would result in revocation of his supervised release.” A reasonable person in McKathan’s position would have understood existing case law “to authorize punishment for a supervised releasee’s refusal to answer his probation officer’s questions.”

Although the government was within its rights to revoke supervised release based on the incriminating statements, “it could not also use those same statements, which McKathan made under the ‘classic penalty situation,’ to prosecute McKathan for a new crime.”

On remand to the district court, the government was given the opportunity to demonstrate that the evidence from the phone would have been otherwise admissible, through doctrines such as inevitable discovery.

One judge dissented, finding that McKathan’s failure to exercise the Fifth Amendment should not be excused.

[United States v. Estrada](#), 17-15405 (Aug. 13, 2020)

Estrada and a codefendant, Hernandez, were indicted and convicted for smuggling Cuban baseball players into the United States and conspiring to commit crimes against the United States. The convictions and sentences were affirmed by the Eleventh Circuit.

The Court addressed issues related to the Cuban Adjustment Act and the Wet-Foot/Dry-Foot policy. The CAA, enacted in the 1960’s, “permitted Cuban citizens to apply for permanent residency if they had been admitted or paroled into the United

States and physically present in the United States for at least two years.” Under the Wet-Foot/Dry-Foot policy, “only Cuban nationals who had ‘dry feet’ – meaning they had reached United States soil – could take advantage of the CAA.” Based on prior case law, the Court rejected the argument that the CAA and Wet-Foot/Dry-Foot policy “gave the players ‘prior official authorization’ to enter the United States.” For that reason, the district court did not err in denying a motion to dismiss the indictment on the basis of the “prior official authorization” argument. Nor did the district court err in excluding evidence related to the CAA and Wet-Foot/Dry-Foot policy, as it was irrelevant. Similarly, the district court did not abuse its discretion in denying requested instructions related to the CAA and Wet-Foot/Dry-Foot policy.

The Court further found that the phrase “prior official authorization,” as used in 8 U.S.C. c. 1324(a)(2), was not unconstitutionally vague. It meant “permission to come to, enter, or reside in the United States that an immigrant acquired *before* actually coming to, entering, or residing in the United States.”

The Court also rejected several sufficiency-of-evidence challenges, and presented detailed statements of the sufficiency of evidence with respect to each defendant’s involvement in the scheme to bring the Cuban baseball players into the United States.

Two government witnesses were permitted to testify about government policies for unblocking licenses and visa applications, in the capacity of lay witnesses. The two witnesses were long-time government employees, familiar with the subject matter. They were both involved in the investigation, and were not involved in the prior review of the players’ unblocking or visa applications. Based on their experience in the field, their testimony was admissible and it was helpful to the jury “because it explained the process for reviewing and granting unblocking licenses and visas and emphasized the importance of the residency requirements.” The testimony “was not based on technical or specialized knowledge within the scope of Rule 702,” for expert testimony.

Although the indictment did not reference violence or extortion in furtherance of the conspiracy, the government presented evidence showing that the defendants “placed players and their family members in direct harm of violence and financed a violent smuggling organization.” The district court did not abuse its discretion in admitting this testimony, which the defendants argued was improper collateral offense evidence. This was “intrinsic evidence necessary to complete the story of the crimes and integral to the charged conspiracy.”

[United States v. Campbell](#), 16-10128 (Aug. 14, 2020)

The Court vacated its prior opinion and issued a new opinion. Although there was reasonable suspicion to stop a motorist, the patrolman unlawfully prolonged the stop. The denial of a motion to suppress was affirmed, however, based on the good-faith exception to the exclusionary rule.

An officer observed the vehicle cross the fog line for a second time and the vehicle's turn signal blinked at an unusually rapid pace. The officer decided to issue Campbell a citation and asked him to exit the vehicle and go to the patrol car with the officer for the writing of the citation. The officer then engaged Campbell in conversation, regarding his current trip to see his family, his work, his prior arrest and other matters. When the officer inquired about contraband and Campbell denied having any, the officer asked for consent to search the vehicle, which Campbell provided.

While the officer was writing the citation, another officer arrived and started searching the vehicle. After the citation was completed, the first officer joined in the search which a weapon, ammunition, a stocking cap and a camouflage mask.

Inquiring about the travel plans was found to be related to the traffic stop. The malfunctioning signal could have been explained by long-distance driving. The questions about contraband – counterfeit shoes, purses, shirts, CD's, DVD's, alcohol, drugs, and “dead bodies” – crossed the line and unlawfully prolonged the stop.

In an earlier decision in effect at the time of the arrest, Griffin, the Eleventh Circuit had held that “unrelated questioning lasting no longer than 30 seconds did not unconstitutionally prolong the stop” where the investigation had not yet been completed and the officer acted diligently. The Eleventh Circuit's Griffin decision was found to be contrary to the subsequent decision of the Supreme Court in Rodriguez v. United States, 135 S.Ct. 1609 (2015), which found a stop to have been unlawfully prolonged. The unrelated questions in this case lasted about 25 seconds, and good-faith reliance on the pre-Rodriguez decision in Griffin existed.

The government, however, did not raise the good-faith reliance issue in its brief on appeal. Nevertheless, the Court concluded that it could still consider that issue, as the constitutionality of the search was before the Court. “Without announcing a bright-line rule, we hold that we can review the applicability of the waived good-faith issue here because of the narrow posture of this case and because

the waived issue is resolved, as a matter of law, by our analysis of the constitutionality of [the officer's] search in this case.” The “narrow posture” referred to the briefing of the issue in the district court; the failure of the district court to reach the issue; and the failure of the government to explicitly raise the issue in its brief on appeal.

The Court’s opinion includes a lengthy discussion of policy reasons justifying its acceptance of the good-faith argument notwithstanding the waiver by the government. One judge dissented with respect to the good-faith issue based on the waiver by the government.

First District Court of Appeal

[Locklear v. State](#), 1D19-1236 (Aug. 12, 2020)

The First District affirmed a conviction and sentence for attempted first-degree murder.

The Court found that a PRR sentence was properly imposed on the basis of a packet of documents referred to as the North Carolina pen pack. The documents included a notarized, signed Certification of Records by the custodian from the state Department of Public Safety; a signed certification from the Secretary of State regarding the custodian of the NCDPS’s status; a signed letter from the custodian of the NCDPS regarding the correctness of the attached records; a signed letter from the custodian of the NCDPS addressed to a prosecutor, as to the defendant’s name, ID number, race, date of birth; and details of the sentences being served in North Carolina, including his release date.

Locklear argued that the documents were hearsay and did not qualify for self-authentication because only a single document in the pack included the state seal. The First District found that the trial court did err in admitting the documents as self-authenticating for that reason, which related to section 90.902(1), Florida Statutes. However, the documents qualified as self-authenticating under the alternative provision of section 90.902(2), for self-authenticating public records “not bearing a seal but purporting to bear a signature of an officer or employee of [a department of a state], affixed in the officer’s or employee’s official capacity.” The documents included in the packet were found to be the equivalent of a Florida “credit and time report,” including a prison release date.

[Fudge v. State](#), 1D19-1443 (Aug. 12, 2020)

Fudge’s stand-your-ground immunity hearing was held prior to the June 2017 effective date of the statutory amendment which placed the burden of proof on the State. Because his hearing predated the statutory amendment’s effective date, he was not entitled to the benefit of the change in the burden of proof. His convictions for second-degree murder and attempted murder were therefore affirmed.

Second District Court of Appeal

[Higdon v. Secretary, Department of Children and Families](#), 2D18-2620 (Aug. 14, 2020)

Higdon was committed under the sexually violent predator civil commitment act in 2001. At the annual review proceeding in 2018, the trial court heard evidence from two experts presented by Higdon. The trial court concluded that Higdon did not satisfy his burden of showing probable cause that he no longer qualified for commitment. Higdon appealed that order and the Second District reversed, concluding that Higdon did establish the requisite probable cause.

Two doctors testified that Higdon had made progress and no longer required commitment. The State presented a written report from one psychologist who noted Higdon’s positive progress, but which concluded that Higdon would still benefit from further treatment.

A statutory amendment to the commitment act in 2014 enables the trial court to weigh and consider the evidence when making the probable cause determination in conjunction with the annual review proceeding. Based on the conflicting evidence, the Second District concluded that the trial court erred in its conclusion. One of the defense experts evaluated Higdon nine times in the eight prior years, most recently a few weeks prior to the probable cause hearing. The second expert was the architect of the program that Higdon was participating in and in which he had made progress. Their combined testimony was sufficient “to cause a person of ordinary prudence and action to conscientiously entertain a reasonable belief that [Higdon’s] condition has changed so that it is safe for him to be at large.”

The State’s evidence paled in comparison to that of the defense experts. It did not question the qualifications or methodology of the defense experts; it did not identify any facts that the defense experts failed to consider. “Rather, it established only that experts differ as to whether Higdon’s condition has *in fact* changed or

whether it ‘remains such that it is not safe for [him] to be at large and that, if released, [he] is likely to engage in acts of sexual violence’ – the ultimate question to be resolved at a trial under section 394.918(4). Section 394.918(4). The State’s evidence, in short, jumped the gun.” In so doing, the trial court erred by merging the initial limited probable cause hearing, to determine whether Higdon established probable cause, with the ultimate trial on the issue of whether Higdon was entitled to release. The case was remanded for the full trial.

[Bent v. State](#), 2D19-1920 (Aug. 12, 2020)

Convictions on drug and paraphernalia charges were reversed because the evidence was obtained through an illegal traffic stop.

Bent was observed parked, late at night, on a rural road, with the vehicle’s

driver’s-side tires resting along the fog line at the edge of a two-lane road. A sheriff’s deputy on patrol encountered Bent sitting in the car, detained him, and ultimately arrested him for possessing contraband. At the suppression hearing the deputy testified that Bent’s car was parked illegally because “if anyone were to come down that south side lane, they would end up having to go into the northbound lane to swerve around so that – to not clip the edge of the vehicle.”

The car was not in a no-parking zone. The fog line was only four or five inches from the edge of the road, but the car, according to the deputy, was “on the roadway.” When asked if there was any hazard, the deputy responded that there was no traffic. The deputy stated that you cannot obstruct the road. Bent testified, agreeing that there was no traffic and adding that he was parked completely off the road.

The Second District looked to statutes which might implicate traffic violations. A statute dealing with obstruction of roads did not apply because it applied only to willful conduct, and it applied only when traffic or pedestrians were impeded. Potential interference, in the event that another car came along, did not suffice.

[Rubino v. State](#), 2D19-2514 (Aug. 12, 2020)

The summary denial of a Rule 3.850 motion was reversed for an evidentiary hearing on one of its claims.

Rubino was charged with burglary of a dwelling and theft. He alleged that counsel advised him to reject a plea offer of five years based on counsel's incorrect understanding of the law. He alleged that counsel told him that because the premises that were entered were dilapidated, the State could prove, at most, burglary of a structure, a third-degree felony, with a five-year maximum sentence. Rubino alleged that had he received correct advice, he would have accepted the five-year offer, and would not have ended up being sentenced to 15 years in prison as a PRR. He acknowledged that he was advised about the possibility of a PRR sentence.

The Second District reviewed and quoted portions of the plea colloquy, which it found to be unclear, and the colloquy did not conclusively refute the claim. The colloquy addressed the issue of whether burglary of a dwelling could exist if the building was uninhabitable. While the Second District found an uninhabitable building not to qualify as a dwelling in a 2006 decision, that was rejected by the Florida Supreme Court in 2013. There were statements in the colloquy about whether the defendant was forced to go to trial. "A denial by counsel that she told Rubino that his only choice was to go to trial would not conclusively refute his claim that she advised him not to take the plea offer and instead take his chances at trial, because, based on the State's evidence, the most he would serve would be five years anyway. Convincing a client to reject a plea offer based on a misunderstanding of the law is not the same as telling a client that he has no choice but to go to trial."

Third District Court of Appeal

[State v. Aaron](#), 3D19-0008 (Aug. 12, 2020)

The Third District reversed a trial court's order granting a suppression motion.

Aaron was charged with DUI manslaughter and leaving the scene of an accident involving death. Based on Aaron's demeanor, an officer concluded that a blood test was needed. When Aaron refused to consent, a warrant was obtained. The officer's affidavit for the warrant noted that under statutory requirements, two samples, about one hour apart, would be needed. The warrant, in turn, allowed for two samples, about one hour apart. Upon receipt of the warrant, paramedics drew

blood, using one test kit, filling two vials, one after the other. The motion to suppress alleged noncompliance with the warrant, as only one sample was obtained.

The Third District disagreed with the trial court's rationale. An ensuing search that is more limited than what the warrant permitted did not invalidate the warrant because the "searching officer exercised some level of discretion."

[Lagrandeur v. State](#), 3D19-1157 (Aug. 12, 2020)

The judgment of conviction incorrectly listed attempted second-degree murder with a firearm as a life felony; it is a first-degree felony.

[Wong v. State](#), 3D19-1291 (Aug. 12, 2020)

The Third District affirmed convictions for first- and second-degree murder, two counts of attempted manslaughter, aggravated battery and burglary. Primary issues at trial were the existence of premeditation and the level of offenses for convictions, as the jury returned verdicts for several lesser included offenses.

Logos, white skulls, were imprinted on the firearm used during the offenses. Defense sought to exclude this evidence, as the logo was a reference to a villainous character, the Punisher, from Marvel Comics and related movies and television shows. The defense wanted the logos to be covered with white paper. The court permitted voir dire of the jury panel regarding familiarity with the logo, but defense counsel stated that such questioning would be dangerous for the defense. The judge denied the pretrial motion in limine regarding the logo, but admonished the parties that the logo should not be highlighted to reflect upon the defendant's state of mind.

The Third District concluded that the firearm was properly admitted with the logo, as it was relevant evidence. The "logos were relevant because the clerk at the gun shop may testify that this was the firearm he gave to Mr. Wong because it was the only firearm at the store with that logo."

Wong's argument that probative value was nevertheless outweighed by prejudice was rejected. That argument was based on the assertion that the jurors would have been aware that the logo was a reference to the brutal character, the Punisher. The Third District found that that contention was too speculative. Defense counsel made a tactical decision not to explore that issue with the venire.

[Lightner v. State](#), 3D19-1681 (Aug. 12, 2020)

A successive Rule 3.850 motion, alleging newly discovered evidence, was denied after an evidentiary hearing, and that denial was affirmed on appeal.

One witness, Nealy, implicated Lightner in pretrial statements, as to the armed robbery offenses for which Lightner was tried and convicted. At trial, Nealy changed his pretrial statements, neither incriminating nor exculpating Lightner. Sixteen years later, Nealy provided an affidavit asserting that Lightner was not involved, adding that Nealy did not know who the perpetrator was.

The trial court concluded that Lightner did not satisfy his burden of demonstrating that Nealy's latest statement would result in an acquittal at trial. Other witnesses testified for the State, consistently with Nealy's original pretrial statements. Nealy's current statement was inconsistent with his pretrial statements, and he was unable to provide the trial court with a cogent explanation as to how he was suddenly able to recall that Lightner was not the perpetrator after 16 years. The Third District agreed with the trial court's analysis.

Fourth District Court of Appeal

[K.C. v. State](#), 4D19-2196 (Aug. 12, 2020)

In two separate probation revocation proceedings, the trial court concluded that it retained jurisdiction beyond the age of 19. The Fourth District affirmed as to one of the cases and reversed as to the other.

Section 985.0301 includes language extending the court's jurisdiction until the age of 21 for a juvenile sex offender. That extension, however, is limited by other statutory language. If additional sexual offenses are filed in a case that already allows the court to retain jurisdiction until age 21, the retention of jurisdiction is permitted for the purpose of allowing the juvenile to complete a treatment program. Based on the application of that general principle, the retention of jurisdiction was found to have been proper for one case, but not the other.

[E.J.A. v. State](#), 4D19-3520 (Aug. 12, 2020)

The Fourth District accepted the State's confession of error that a restitution order was erroneous because there was no causal connection between the offense or criminal episode and the costs incurred by the victim.

E.J.A. pled guilty to the charge of burglary of a car. The victim subsequently had to pay to have the car retrieved from a lot to which it had been towed, after it was located. There was also a charge incurred with a locksmith because the key, which the victim left in the car, had not been found. The State did not establish that E.J.A. was involved in the theft of the key or that E.J.A. had possession of the key. And, while it was possible that the car was towed for the purpose of a police investigation of E.J.A.'s crime, there was no evidence to support that.

Fifth District Court of Appeal

[Arrieta v. State](#), 5D19-2342 (Aug. 14, 2020)

During the pendency of a direct appeal, prior to briefing, Arrieta filed an authorized motion to correct sentence under Rule 3.800(b), Fla.R.Crim.P. The trial court erred by treating it as a motion to correct illegal sentence under Rule 3.800(a), and dismissing it under that rule. While Rule 3.800(a) motions may not be entertained by the trial court during a pending direct appeal, Rule 3.800(b) expressly authorizes motions to correct sentences during the direct appeal, when filed prior to briefing. The Fifth District ordered the trial court to rule on the motion.

[Rodriguez v. State](#), 5D19-2346 (Aug. 14, 2020)

Dual convictions for burglary of a dwelling and home invasion robbery resulted in a double jeopardy violation. On direct appeal, the Fifth District concluded that the correct conviction to vacate is the one whose elements are subsumed within the other, and the burglary conviction was then vacated, even though the burglary offense was punishable by life while the home invasion robbery was punishable only up to 30 years.