Case Law Update
August 31, 2020 and September 7, 2020
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Supreme Court of Florida

Brown v. State, SC19-704 (Aug. 27, 2020)

The Florida Supreme Court affirmed the denial of a Rule 3.851 motion and denied a habeas corpus petition alleging ineffective assistance of appellate counsel. Brown had previously been convicted of first-degree murder and the conviction and sentence of death were affirmed on direct appeal.

Counsel was not ineffective for failing to strike a juror for cause on the basis of responses regarding the death penalty. While some of the juror's responses indicated that the juror would automatically vote for the death penalty if there was a conviction for first-degree murder, others did not. The juror did not express disagreement with defense counsel's questions to the entire panel, such as: "Do each of you agree that it's not automatic that [Brown] get the death penalty . . . if [Brown] would be found guilty of first-degree murder. . . . It's not automatic that she get the death penalty?" While one of the juror's responses raised some doubt as to his impartiality, that was "not enough to establish the requisite prejudice," and it was dispelled by the remainder of the record.

Counsel was not ineffective for failing to impeach witness Heather Lee with four prior inconsistent statements. Witness Lee was not questioned about these statements at the rule 3.851 evidentiary hearing, and it was therefore speculative what she would have said about them, and postconviction relief cannot be based on speculation. The same rationale was used to reject a similar claim about not using potential testimony from another witness, Corie Doyle.

Counsel was not ineffective for failing to impeach one witness with another witness's pretrial deposition. There was no authority upon which the deposition of the other witness could have been admitted into evidence. The Court did find that counsel was deficient for failing to call that witness to testify. The witness, Darren Lee, referenced incriminating statements made by Heather Lee, to both Darren Lee and the defendant. While counsel testified at the evidentiary hearing that he saw no benefit from the testimony from Darren Lee and that it would be inconsistent with

the defense strategy, the Supreme Court did not see any such inconsistency, as the defense strategy was to put as much blame on Heather Lee as possible.

The Supreme Court found that counsel was deficient for failing to use substantial impeachment evidence as to several witnesses, notwithstanding counsel's testimony at the postconviction evidentiary hearing. However, these claims of ineffectiveness were ultimately rejected in the Court's cumulative prejudice analysis based on the totality of the facts of the case.

With respect to claims that counsel was ineffective for failing to discover impeachment evidence as to several witnesses, the Court concluded that Brown failed to establish that counsel should have discovered the evidence at issue. Alternatively, the Court relied on counsel's testimony at the postconviction hearing, of not wanting to rely on trial testimony from jail snitches, especially where the same testimony had been admitted through another witness.

Brown argued that counsel was ineffective for failing to present extensive penalty-phase mitigation. The claim failed for several reasons. First, the trial court motion presented extensive allegations, but did not identify the sources of the allegations. Second, Brown, on appeal, challenged only the trial court's alternative ruling that the mitigating evidence at issue was cumulative. This constituted a waiver of the claim of ineffectiveness, through the failure of Brown, on appeal, to challenge the trial court's primary rejection of the claim. Third, the record did support the trial court's conclusion regarding the cumulative nature of the evidence.

A claim that counsel was ineffective for failing to call an additional expert witness regarding mitigating evidence was rejected because the trial court correctly concluded that the subject areas were sufficiently explored by the expert who did testify.

Claims of newly discovered evidence were rejected. An email from one witness's own trial counsel to an expert would not have been admissible, as it was confidential. Another claim of newly discovered evidence was procedurally barred because it was not raised on appeal until the appellant's reply brief. And, the claim at issue was not pled as a separate claim in the trial court rule 3.851 motion. Alternatively, the evidence at issue would not have satisfied the two-prong test for newly discovered evidence. Only some of the evidence qualified as evidence that could not have been discovered with due diligence prior to trial. Some of the evidence was cumulative, and while some went beyond what was presented at trial,

it would not have affected the outcome of the trial in light of the other evidence presented at trial.

Finally, although there was a Hurst error, as Brown was charged with both premeditated murder and felony murder, and the jury unanimously found the existence of the kidnapping, that meant that any jury that was properly instructed under Hurst "would have found beyond a reasonable doubt the existence of the statutory aggravating circumstance that the capital murder was committed while Brown was engaged in the commission of a kidnapping." The Hurst error was therefore harmless.

In a petition alleging ineffective assistance of appellate counsel, Brown challenged counsel's failure to allege that comments by the prosecutor were fundamental error. The Court noted that the prosecutor "likely crossed the line in referring to Brown, once, as a 'cold-blooded murderer,'" but the single comment did not rise to the level of fundamental error, and, absent objection, appellate counsel would not have prevailed on the claim had it been raised on direct appeal. The Court noted the similarity of the statement to those made in other cases where the Court refused to find fundamental error.

A rhetorical question by the prosecutor, asking how a State witness "would have learned information about the victim's murder apart from gaining it from Brown," could have been construed as improper vouching, by suggesting the witness learned it from evidence that the jury did not hear in court. There was also a possible factual construction of the statement that could have limited the statement as referring only to testimony that the jury heard. Ultimately, the comment was not so prejudicial as to vitiate the entire trial.

Davis v. State, SC19-1207 (Aug. 27, 2020)

The summary denial of a successive Rule 3.851 motion was affirmed.

Davis raised a Giglio claim. The Court assumed that Davis established that the prosecution knowingly presented false testimony from a witness, but then went on to conclude that the use of that trial testimony was harmless beyond a reasonable doubt. "Regardless of whether [witness] Cotton heard noises coming from Davis's apartment on December 9, 1992, the State presented ample evidence that the victim's injuries were not accidental and occurred while she was in Davis's care." The evidence would also not have affected Davis's alternative defense that someone else had injured the victim. That defense was one which the Court found to have

substantial credibility issues as it evolved over time, and Davis's claim that the child appeared uninjured was refuted by medical testimony.

A Brady claim as to the same evidence was found to be without merit based on the same analysis.

Dillbeck v. State, SC20-178 (Sep. 3, 2020)

The Supreme Court affirmed the denial of a successive Rule 3.851 motion as untimely. The one-year limit for the filing of the motion expired in 1996. Dillbeck argued that on which his claim were based could not have been known with due diligence at that time. The current claim was based on "the new diagnosis of ND-PAE and the qEEG and other neurocognitive test results supporting it."

Although the diagnosis has been in the DSM-5 manual since 2013, and the qEEG scans have been recognized since 2005, Dillbeck argued that they first became significant as to him in 2018, when he was evaluated by an expert. The Supreme Court rejected the claim that 2018 was the time for commencing the one year limitation period for a claim of newly discovered evidence. Dillbeck and his counsel did not exercise due diligence by waiting until 2018 to pursue evaluation, testing and diagnosis.

Eleventh Circuit Court of Appeals

United States v. Jimenez, 18-10569 (Aug. 25, 2020)

The Eleventh Circuit affirmed convictions for conspiracy to commit immigration-document fraud, conspiracy to commit money laundering, and money laundering.

In the main issues on appeal, the Court found that the evidence of conspiracy to commit immigration-document fraud was sufficient, "because the I-140 petitions and certain related documents contained false statements, and were required by immigration laws or regulations." And, the evidence was sufficient on the money laundering charges "because the immigration-document fraud was an underlying 'specified unlawful activity' for purposes of s. 1956(a)(1)(A)(i)."

Jimenez argued that the false statements did not qualify for the fraud charge because they were not on legally required documents. The relevant statutory language applied to "other document[s] required by the immigration laws or

regulations prescribed thereunder." An I-140 petition "undoubtedly falls within the other document[s] clause." Another document which demonstrated "the qualified relationship for the EB-1C visa program also falls within the "other document" clause. Relevant regulations required the I-140 petition to be accompanied by the secondary document.

United States v. Davila-Mendoza, et al., 17-12038, 17-12039, 17-12742 (Aug. 26, 2020)

"[T]hree foreign nationals in a foreign vessel in the territorial waters of a foreign nation were arrested by the United States Coast Guard with the consent of the foreign country and prosecuted in the United States for drug trafficking crimes under the Maritime Drug Law Enforcement Act." The defendants pled guilty, but reserved the right to appeal the denial of their motions to dismiss the indictment. The motions asserted that the MDLEA was unconstitutional "as applied to them because Congress lacks the authority to criminalize acts committed in the territorial waters of foreign nations." The Eleventh Circuit agreed, finding that the MDLEA, as applied to these three defendants, exceeded Congress's authority, and the convictions were vacated. The vessel had been stopped in territorial waters of Jamaica. It contained 3,500 kilograms of cocaine, and the captain stated that he was Nicaraguan and that the vessel was headed to Costa Rica.

The Eleventh Circuit first noted that the district court correctly concluded that the Constitution's "Define and Punish Clause" "does not authorize the MDLEA's operation in foreign territorial waters."

For the application of the MDLEA, in this case, to be proper under the Foreign Commerce Clause, the activities would have to have a substantial effect on commerce between the United States and foreign nations. In concluding that this nexus did not exist in the case under review, the Eleventh Circuit noted that the MDLEA did "not contain any congressional findings regarding international drug trafficking's effect on United States commerce 'with foreign nations.'" The "MDLEA does not contain a [] jurisdictional hook or nexus to tie wholly foreign extraterritorial conduct to the United States." The drugs were not bound for the United States, and "the government's attenuated argument that wholly foreign drug trafficking impacts the international drug trade, which could impact United States commerce with foreign nations, requires a chain of inferences" comparable to those found insufficient in a prior Supreme Court decision.

Finally, the Court rejected the government's argument based on the Necessary and Proper Clause of the Constitution. This claim had been made with reference to the 1989 Convention Against Illicit Traffic Treaty and the 1997 Jamaica Bilateral Agreement. The MDLEA, however, had been enacted long prior to either the treaty or the agreement.

United States v. Mastin, 18-14241 (Aug. 26, 2020)

The Eleventh Circuit affirmed Mastin's conviction for being a felon in possession of a firearm. The Court addressed two Fourth Amendment claims and a Sixth Amendment claim regarding the exclusion of topics from cross-examination.

Officers had arrest warrants for gang members Hines and Mock. The officers had information that they were staying at a specific hotel, possibly under names of girlfriends or relatives. Hines's girlfriend had checked into the hotel in question. The officers began surveillance of the hotel, and, after midnight, a few vehicles arrived, and three men and three women exited and went into the hotel. Two of the men matched descriptions of Hines and Mock. Shortly afterwards, two men and one woman left in one of the vehicles, but the officers did not know whether Hines and Mock were still in the hotel or in the vehicle that left. One team of officers pursued the vehicle; the other went to the hotel room. The door to the room was ajar, and when it swung open, officers observed a man inside the doorway with his hands in his hoodie. The man was neither Hines nor Mock; it was Mastin. The officers observed Hines' girlfriend and they ordered Mastin to take his hands out of his pockets. The occupants were ordered to get on their knees and place their hands up and then crawl out of the room and into the hallway. While Mastin was doing so, a firearm fell out of his waistband. During a subsequent sweep of the room, three more guns were observed. A computer check then disclosed Mastin's status as a probationer. The other police team conducted a planned traffic stop and arrested Hines. Mock was not there, but was later arrested at a different hotel.

The Eleventh Circuit first concluded that the officers had authority to enter the hotel room to execute the arrest warrants. The officers had an arrest warrant for Hines and Mock and reasonably believed the room was being used by at least one of them. The officers, part of a fugitive task force, also knew that hotel rooms were often registered under names of girlfriends or relatives. From surveillance, two men matching the descriptions of Hines and Mock were observed entering the hotel. And, although some men left the hotel, the officers still had a reasonable belief that either Hines or Mock remained behind. The absence of "complete certainty" did not "change the calculus."

Mastin further argued that he was just an innocent bystander who was ordered to crawl out of the room, and that that was an unreasonable search. The Court disagreed. Occupants of a dwelling can be ordered to exit while a search warrant is executed. The Eleventh Circuit extended the rationale of Supreme Court case law, whose rationale was safety during the execution of the warrant, to the execution of an arrest warrant.

Finally, Mastin argued that the district court erred by limiting his cross-examination. Mastin wanted to use cross-examination to develop his preferred defense, that the officers found the gun inside the room and then concocted the story that it fell out of his waistband. He wanted to question the officers about the scope of the arrest warrant, whether the officers obtained a search warrant, the kinds of equipment they brought to the hotel room. There was no error, as the questions Mastin sought to pursue were either cumulative or of "dubious relevance."

First District Court of Appeal

Colley v. State, 1D19-2831 (Aug. 28, 2020)

A revocation of probation was reversed because the plea colloquy was inadequate. Although the requirements of Rule 3.172 are not applicable to probation revocation proceedings, courts have recognized that the minimum colloquy in Florida "must inform the defendant of the allegations against him, his right to counsel, and the consequences of an admission or the right to a hearing and it shall afford him an opportunity to be heard." In this case, the defendant was not advised of the potential consequences of his admission.

Steiger v. State, 1D19-3217 (Aug. 25, 2020)

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

Steiger argued that trial counsel was ineffective for multiple failures during the course of the trial. Claims of ineffective assistance, when raised on direct appeal, require that the ineffectiveness be apparent on the face of the record. In addition to the absence of objections at the trial court level, appellate counsel for Steiger did not argue that any of the alleged trial court errors for which counsel failed to object constituted fundamental error. Absent any argument that the relevant trial court

errors were fundamental, the First District would not review the claims of ineffective assistance of counsel.

There was no abuse of discretion in admitting three autopsy photographs. The medical examiner testified as to the relevancy of each of the photographs. And, the trial court stated that none of the photos were more gruesome than the average autopsy photograph. The trial court further found that they were not of such a nature "that they would have prevented the jury from fairly considering the evidence." The First District agreed with the trial court's assessment.

Owens v. State, 1D20-540 (Aug. 25, 2020)

The First District affirmed a revocation of probation and disagreed with Owens' construction of the 2019 amended version of section 948.06(2)(f)1., Florida Statutes.

Under the recent statutory amendment, after finding a defendant in violation of probation, the court, in certain circumstances, is limited to either modifying probation or continuing probation, in addition to a maximum of 90 days in jail. Owens argued that when a defendant, such as he, admits to the violation, the court must either modify or continue probation, and that the court cannot impose a prison sentence.

The statutory provision references four conditions when the limit on sentencing applies. The trial court found that all of those conditions must be satisfied in order for a defendant to obtain the benefit of the sentencing limitation. The State argued that the statutory amendment was inapplicable, because the statutes in effect at the time of the offense are applicable. The First District engaging in statutory construction, observed that the use of the word "any" in the amended statute as opposed to "all" of the listed conditions, created an ambiguity. However, when the statutory provisions were read in context, reading the word "any" literally would have rendered some of the statutory provisions meaningless.

Thus, Owens' argument failed for two reasons – the 2019 statutory amendment was not applicable to his case, and the trial court correctly concluded that the amendment is applicable only if the defendant satisfies all four of the enumerated circumstances.

Varn v. State, 1D19-1967 (Sept. 3, 2020)

Varn sought certiorari review of a trial court order compelling him to give the State his passcode for his cell phone. The First District dismissed the petition because Varn failed to demonstrate the requisite irreparable harm. And, as the Court did in a prior decision, it certified to the Florida Supreme Court a question of great public importance: "what legal standards apply to compulsory disclosure of a cell phone passcode, and whether or when does the foregone conclusion exception apply?"

Varn argued that the irreparable harm required for certiorari review existed because disclosure of the passcode could form a link in the chain of evidence which might lead to criminal prosecution. He further relied on the possibility of being held in direct civil contempt as a basis for irreparable harm.

The First District rejected any argument based on a constitutional right not to be charged with a criminal offense. Beyond that, key facts in this case were that "the targeted contents on Petitioner's cell phone were identified already in great detail and traced to him before the State moved to compel disclosure of his passcode." Varn also admitted to having accessed his Instagram account on his cell phone. That account had already been linked to the transmission of child pornography by investigators. Law enforcement had already filed an affidavit seeking a search warrant for the home of Varn's parents, including extensive details.

The focus of the foregone conclusion exception is on whether the State "has identified with reasonable particularity the evidence it seeks within the passcode-protected cell phone." As the State satisfied that burden, Varn had "no legal right to prevent the State from obtaining is cell phone passcode," and he therefore could not demonstrate irreparable harm.

Second District Court of Appeal

E.C.T. v. State, 2D18-4332 (Sep. 4, 2020)

A fee was improperly assessed on E.C.T. under section 939.185(1)(a), because he was not adjudicated delinquent and the statute applies only if there is an adjudication. Another fee, for the public defender's services, was improperly imposed without providing E.C.T. with counsel and an opportunity to be heard.

Woodbury v. State, 2D19-2930 (Sep. 4, 2020)

The Second District reversed the summary denial of a Rule 3.850 motion for further proceedings.

Woodbury pled guilty to charges of DWLS and leaving the scene of an accident with property damage. His Rule 3.850 motion alleged that counsel was ineffective for "misadvising him to enter a plea because he had never possessed a valid driver license and therefore his two predicate DWLS offenses and the instant charge did not qualify him to be convicted under section 322.34(2)(c)."

In State v. Miller, 227 So. 3d 562 (Fla. 2017), the Supreme Court held that under the plain language of section 322.34(5), the offender must have had a license revoked. The trial court denied Woodbury's motion, finding that Woodbury's conviction was under 322.34(2)(c), not 322.34(5). The trial court's analysis, however, ignored the Miller court's discussion of "driving privilege," which language came from section 322.34(2)(c). Dicta in Miller stated that individuals "who drive in Florida without ever having obtained a license or having an exemption to licensure, do not have any 'driving privilege' and 'are guilty of a second-degree misdemeanor violation for violation of section 322.03. . . ." Absent record attachments to the trial court's order, the Second District remanded the case to the trial court for further proceedings in light of its analysis of Miller.

LaMore v. State, 2D20-37 (Sep. 4, 2020)

The Second District reversed the summary denial of a Rule 3.850 motion, in which LaMore claimed the existence of newly discovered evidence, for further proceedings. LaMore had been charged with multiple sex offenses, but was convicted only for two lesser included misdemeanor batteries, and one lewd sexual battery of a child between the ages of 12 and 18 by one in familial or custodial authority.

LaMore maintained at trial that the child fabricated the allegations with assistance from family members. The child was the daughter of LaMore's girlfriend. The alleged newly discovered evidence consisted of an affidavit from an individual who stated that he had lived with both LaMore and LaMore's girlfriend, and that the girlfriend "had the propensity, willingness, and motive to fabricate sexual abuse accusations using her daughter." As to a key date, the affiant stated that LaMore and the girlfriend had been arguing, and that the girlfriend to LaMore to "watch himself

because she knew just what to say to put him in prison for the rest of his life and her girls would swear to anything she told them to say or do."

The trial court rejected the allegations in the affidavit, finding that they would have resulted in inadmissible hearsay at a retrial. That was incorrect. The statements that the girlfriend made in front of the affiant would have been admissible to impeach her as a witness.

On remand, the trial court was permitted to either attach documents to conclusively refute the claim, or otherwise conduct an evidentiary hearing.

Warianek v. State, 2D19-539 (Aug. 26, 2020)

The Second District affirmed a revocation of probation and prison sentence and found that the trial court did not err in rejecting a requested downward departure, as the court "properly considered the Department of Corrections' (DOC) ability to provide Mr. Warianek with specialized treatment."

A defense expert testified that DOC would not be able to provide the specialized treatment required. Although there was no contrary testimony, the judge noted that that was not correct, because the judge knew from experience that DOC did have treatment facilities available.

Although the defendant did not have the burden of proving that DOC could not provide the treatment required, the trial court was still able to consider DOC's ability to provide the treatment. The judge specifically noted the existence of the Phoenix House, a DOC-run program.

DeJesus v. State, 2D19-1747 (Aug. 26, 2020)

The summary denial of a Rule 3.850 motion, which alleged newly discovered evidence, was reversed and remanded for an evidentiary hearing, because the documents attached to the trial court's order did not conclusively refute the claim.

DeJesus was identified as one of the perpetrators of a robbery by the victim. When arrested, a few days later, DeJesus possessed the victim's ATM card and a firearm similar to one that had been used in the robbery. And, a shirt matching the description of one worn by one of the robbers was found in the home of DeJesus's girlfriend, 200 feet from where DeJesus was arrested.

The claim of newly discovered evidence alleged that a new witness came forward, and that she said that a man named Uribe confessed to her that he was person who committed the robbery with Rivera, and that DeJesus was innocent. The only legal issue on appeal was whether this testimony, if presented at trial, would probably have affected the outcome of the trial.

The State argued in the trial court that Uribe's confession would have been inadmissible hearsay at trial. The trial court, however, accepted that it would come into evidence, but found that it would not affect the outcome. The Second District, in concluding that an evidentiary hearing was warranted, emphasized some additional factual allegations: DeJesus alleged that the initial description of the perpetrator matched Uribe, not DeJesus. And, Uribe was a housemate of DeJesus's girlfriend, at whose home the shirt was found. For purposes of the 3.850 motion, prior to any evidentiary hearing, those allegations from DeJesus had to be accepted as true.

Third District Court of Appeal

Foulks v. State, 3D18-2529 (Aug. 31, 2020)

Foulks appealed the imposition of a prisoner releasee reoffender sentence. The Third District addressed a question of first impression: "whether the State's initial waiver of the PRR sentence, pursuant to a negotiated plea, statutorily precludes the State from seeking to impose a PRR sentence upon revocation of probation. The Court concluded that the PRR mandatory minimum sentence was properly imposed.

The Court addressed relevant statutory provisions from both the PRR statute and the probation revocation statute. With respect to the waiver of PRR sentencing at the original, pre-probation sentencing hearing, the Court concluded that after violating the plea agreement, which was a contract, Foulks could not claim that the State remained bound by a waiver that was part of the agreement that he had violated.

Gonzalez v. State, 3D18-980 (Aug. 26, 2020)

Gonzalez appealed convictions for aggravated burglary, armed kidnapping, attempted second-degree murder with a firearm, and possession of a firearm by a convicted felon, which charge was severed from the other three. The Third District found all three claims raised by Gonzalez to be meritorious and reversed and remanded for a new trial.

Gonzalez challenged the admission of photos of a glove found a week after the crime inside a van owned by his sister. This glove took on significance at trial because defense counsel argued the absence of DNA evidence and the State emphasized the glove. There was no evidence that the glove had been used in the crimes. And, any probative value was outweighed by the prejudice for the reason noted above.

After the jury verdicts for the first three charges, the trial court found that both elements of the firearm possession charge had already been established: the defendant stipulated that he was a convicted felon, and the firearm had been an element of the other offenses. The trial court therefore found that there was nothing more to do. The State objected and advised the court that the jury had to make the finding. The defense did not object. Although the claim might not have been preserved by the defense, the error of adjudicating the defendant without the requisite findings by the jury was fundamental error.

At the sentencing hearing, the judge stated that "there's clearly been no sign of remorse or concern for the victim." The prosecutor reminded the judge that the court could not consider any lack of remorse. The Third District agreed that the comment was improper. On remand, the new trial was mandated to be conducted by a new judge.

Smith v. State, 3D19-1029 (Aug. 26, 2020)

In an appeal from an order revoking probation, Smith argued that the trial court's written pronouncements of sentence did not conform to the oral pronouncements. Smith, however, did file a Rule 3.800(b), prior to filing the appellate brief, and the claim was therefore not properly preserved for appellate review. In a separate claim, the Court found that the trial court failed to make written findings that the defendant posed a danger to the community under section 948.06(8)(e)(1). The trial court was directed to do so on remand.

Cherisme v. State, 3D19-1551 (Aug. 26, 2020)

In an appeal from convictions for attempted second-degree murder and aggravated battery, the Third District found that there was no abuse of discretion in denying a motion for mistrial based upon the "victim's single comment . . . in which he described Cherisme's co-defendant as 'the one in jail.'" The comment was not

solicited; it was an isolated comment; it was not referenced again during the trial; and it was accompanied by a curative instruction.

Yearby v. State, 3D20-1051 (Aug. 26, 2020)

The trial court set bond for RICO and drug trafficking charges at $1,010,000. A subsequent motion for reduction did not specify reasons or contain any attachments. The motion was denied without an evidentiary hearing. At that hearing, the argument by defense counsel was related solely to Yearby's alleged lack of financial resources and no evidence was presented. Yearby filed a petition for writ of habeas corpus, alleging that the trial court failed to consider statutorily required factors. The petition was granted by the Third District solely for the purpose of holding an evidentiary hearing on Yearby's financial resources and for consideration of all other appropriate criteria.

Fourth District Court of Appeal

Reyna v. State, 4D19-2306 (Aug. 26, 2020)

The Fourth District reversed convictions for three counts of sexual battery. The "trial court abused its discretion in admitting evidence of a collateral crime."

Although there were some similarities between the charged offenses and the collateral offense, those similarities were outweighed by the differences between the offenses. The noted similarities were: "both cases involved the consumption of alcohol on Clematis Street and an accuser who socialized with the Reynas." The noted differences were: The victim of the charged offenses was a close friend of the Reynas who slept over at their home; the victim of the collateral offense was a casual acquaintance. The charged offenses occurred on a couch in a private living room; the collateral offense on a public bench in an alley. The three charged offenses involved a victim who hovered between consciousness and sleep; the victim of the collateral offense was wide awake. And, there was a gap of four years between the charged offenses and the collateral offense.

One judge dissented.

Tumblin v. State, 4D18-3507 (Sep. 2, 2020)

The Fourth District affirmed a conviction for aggravated stalking. Upon the defense's motion to exclude witnesses from the courtroom, the trial court refused to

do so as to the victim, finding that it would be error to exclude her. The victim was called as the first witness by the State. The victim was present for the State's opening argument.

The purpose of the rule of sequestration is to prevent a witness from coloring testimony after hearing the testimony of another witness. Additionally, under section 90.616(2)(d), Florida Statutes, a witness may not be excluded if the witness is a victim of the crime, unless, upon motion, the court finds that the victim's presence would be prejudicial.

In this case, the victim was present only for the opening argument before testifying. And, the defense never attempted to establish prejudice under section 90.616(2)(d).

Fifth District Court of Appeal

D.I.K. v. State, 5D19-1802 (Sep. 4, 2020)

The trial court erred by imposing costs for investigation, of $1,490, without conducting an evidentiary hearing to determine the specific amount of the costs.

Dean v. State, 5D20-1097 (Sep. 4, 2020)

The Fifth District granted Dean's prohibition petition. A 2019 amendment to section 812.014, Florida Statutes, applied retroactively, and, as a result, Dean's trial court motion to dismiss for lack of jurisdiction should have been granted.

The information alleged theft in the amount of $300 or more. The 2019 statutory amendment changed that from a felony to a misdemeanor. Jurisdiction for the offense as charged therefore belonged in the county court. The State contended that the evidence would show the value of the stolen property to be just over $400. Theft, as a third-degree felony, now applies to the range of $750 - $5,000.

The Fifth District further found that the amended statute became effective prior to Dean's sentencing in the trial court. And, section 775.022(4), clearly evinced a legislative intent that the statutory amendment for theft apply retroactively. Section 775.022(4) states: "If a . . . punishment for a violation of a criminal statute is reduced by a reenactment or an amendment of a criminal statute, the penalty . . . or punishment, if not already imposed, must be imposed according to the statute as amended."

Webb v. State, 5D20-1151 (Sep. 4, 2020)

A rule 3.800(a) motion is the correct motion to use to seek a correction based on a discrepancy between the oral and written pronouncements of the court at sentencing. As the transcripts reflected such a discrepancy as to the amount of time to be awarded as credit for time served, the motion should have been granted by the trial court, and its denial was reversed by the Fifth District.

Qadri v. Rivera-Mercado, 5D20-427, 5D20-429 (Aug. 31, 2020)

Rivera-Mercado filed complaints against two State Attorneys for malicious prosecution. The trial court denied motions to dismiss the complaints and the State Attorneys then sought certiorari review in the Fifth District. The certiorari petitions were granted because the State Attorneys were entitled to absolute immunity from suit.

In one of the cases, the State Attorney secured a material witness warrant and then unsuccessfully argued for the continued detention of one of the plaintiffs. In determining whether immunity is absolute, "courts utilize a functional approach, examining the nature of the function performed rather than the motivation of the person performing the function." The State Attorney's "action in the filing of a motion for a material witness warrant and advocating for her continued detention were done in the course of an ongoing prosecution. Regardless of his motives, he continued to function as an advocate and his actions were not administrative in nature."

Santiago v. State, 5D17-3394 (Aug. 28, 2020)

Santiago was 16 at the time of the second-degree murder for which he was convicted and received a sentence of 35 years in prison. In a postconviction motion, Santiago argued that that sentence was unconstitutional for a juvenile. The trial court agreed and provided for judicial review, but did not grant a full resentencing. The Florida Supreme Court subsequently issued its opinion in Pedroza v. State, pursuant to which the 35-year sentence was not unconstitutional as it was neither a life sentence nor a de facto life sentence. As a result, the Fifth District withdrew its prior opinion in this postconviction litigation and affirmed the trial court's order.

Garcia v. State, 5D19-590 (Aug. 28, 2020)

Garcia sought certiorari review to quash an order directing him to provide the State with the passcode to his smartphone. The Fifth District granted the petition.

The parties conceded that the information contained in Garcia's phone would lead to incriminating evidence against him. The Fifth District further concluded that the passcode itself was a "verbal communication of the contents of one's mind." As such, the compelled disclosure of the passcode was testimonial in nature for purposes of the Fifth Amendment.

The Court then addressed the foregone conclusion exception, under which the passcode might be obtained if the State could "demonstrate with reasonable particularity that, at the time that it sought to compel the act of production, it already knew of the material sought, thereby making any testimonial aspect of the production a foregoing conclusion." The Fifth District, however, found that the foregone conclusion doctrine was not applicable. Previous decisions in which the doctrine had been addressed were in the context of "already known and existing business or financial documents, not to 'compel oral testimony.'" "To compel a defendant, such as Garcia, to disclose the passcode to his smartphone under this exception would, in our view, sound 'the death knell for a constitutional protection against compelled self-incrimination in the digital age.'"

The Court certified conflict with the Second District's decision in Stahl v. State "to the extent that Stahl holds that the oral disclosure of a passcode to a passcode-protected cell phone or smartphone is non-testimonial and therefore not protected under the Fifth Amendment." The Court also certified two questions of great public importance:

> MAY A DEFENDANT BE COMPELLED TO DISCLOSE ORALLY THE MEMORIZED PASSCODE TO HIS OR HER SMARTPHONE OVER THE INVOCATION OF THE PRIVILEGE UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?
>
> IF ORALLY PROVIDING THE PASSCODE TO A PASSCODE-PROTECTED SMARTPHONE IS A "TESTIMONIAL COMMUNICATION" PROTECTED UNDER THE FIFTH AMENDMENT, CAN THE DISCLOSURE OF THE PASSCODE NEVERTHELESS BE COMPELLED UNDER THE FOREGONE

CONCLUSION EXCEPTION OR DOCTRINE WHEN THERE IS NO DISPUTE THAT THE DEFENDANT IS THE OWNER OF THE PASSCODE-PROTECTED PHONE?

Mangine v. State, 5D19-3643 (Aug. 28, 2020)

The Fifth District reversed an order revoking probation. Several violations were found by the trial court, based on arrearages for failing to pay things like court costs or the cost of probationary supervision. The State's case consisted solely of hearsay, and probation may not be revoked based solely on hearsay. Additionally, the failure of the State to establish the defendant's ability to pay – the arrearages for court costs exceeded $90,000 – constituted fundamental error. The trial court was directed to reinstate probation.

J.F.T. v. State, 5D20-907 (Aug. 28, 2020)

After the State filed notice of its intent not to file charges against J.F.T., J.F.T. filed a petition to expunge his non-judicial criminal history records and official court records related to his arrest. Although a trial court has discretion to deny such a petition, that discretion is not unfettered. The trial court denied the petition without providing any rationale. The State maintained in the trial court that the records would be necessary in the event of any future crimes committed by J.F.T. The trial court was directed to provide the reasons and relevant facts on remand.

Julian v. State, 5D20-1022 (Aug. 28, 2020)

A petition alleging ineffective assistance of appellate counsel was granted with respect to one of its claims. Julian and his brother were both convicted second-degree murder with a firearm. The conviction was reclassified based on the firearm. However, there was no testimony as to who fired the shot and the State proceeded under a principal theory. Absent a jury finding that Julian himself had the gun, reclassification was improper.

Hager v. State, 5D20-1426 (Aug. 28, 2020)

Hager sought certiorari review of a trial court order compelling him to disclose his cell phone's passcode to the State. The Court granted the petition on the basis of its decision in Garcia v. State, 5D19-590, which is discussed above at pages 16-17.

The Court similarly certified conflict with the Second District's decision in Stahl and certified the same two questions of great public importance.