

Case Law Update  
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Eleventh Circuit Court of Appeals

[United States v. Bolatete](#), 18-14184 (Sep. 29, 2020)

Bolatete appealed a conviction and sentence for receiving and possessing a firearm silencer. The Eleventh Circuit affirmed and rejected multiple challenges to the constitutionality of the National Firearms Act, 26 U.S.C. ch. 53.

Bolatete first challenged the Act, both facially and as applied, for exceeding Congress’s power to tax. “The National Firearms Act, and the criminal penalty for violating it, are grounded in Congress’ power to tax. . . . The Act creates a comprehensive taxation and registration scheme for certain statutorily defined ‘firearm[s],’ which include silencers. . . . One part of the Act requires that any person who transfers a firearm to someone else must pay a \$200 transfer tax and must register the firearm to the transferee.”

Bolatete argued that the Act was “not a tax but instead a public safety measure thinly disguised as a tax.” This argument was foreclosed by two prior decisions of the Eleventh Circuit, and Bolatete’s efforts to distinguish those decisions were rejected. See United States v. Spoerke, 568 F. 3d 1236 (11<sup>th</sup> Cir. 2009); United States v. Ross, 458 F. 2d 1144 (5<sup>th</sup> Cir. 1972).

The Court also rejected an unpreserved constitutional challenge based on the Supreme Court’s “fee jurisprudence” cases. Those decisions prohibit the imposition of a “charge for the enjoyment of a right granted by the federal constitution.” This unpreserved argument failed to meet the requirements of plain error review, as the Court had never previously decided “whether it is appropriate to apply the fee jurisprudence [decisions] . . . in the context of Second Amendment rights.”

The Court also rejected an unpreserved claim that the Act’s “application to silencers violates the Second Amendment.” “Because there is no on-point precedent of the Supreme Court or this Court supporting Bolatete’s belatedly asserted position,” the failure of the district court to strike the statute down on its own was not plain error.

Finally, Bolatete argued that the district court erred by rejecting his entrapment defense because he rejected a detective's initial offer to sell a silencer to him by his act of criticizing the silencer when it was test-fired. While there were some facts that were favorable to Bolatete regarding entrapment, there were other facts that were not. Bolatete was the first person to bring up the subject of silencers and was knowledgeable regarding them. Upon his arrival in the United States, he immediately began looking for one. In conversations with the detective, Bolatete was the first to mention "unregistered" silencers. That was the critical fact, since owning a silencer is not a crime; owning an unregistered silencer is.

[United States v. Conage](#), 17-13975 (Sep. 30, 2020)

Addressing issues under the Armed Career Criminal Act, the Eleventh Circuit certified questions regarding the interpretation of Florida's cocaine trafficking statute, section 893.135(1)(b)1, Florida Statutes, to the Florida Supreme Court.

One of Conage's three predicate offenses for qualification under the ACCA was a Florida cocaine trafficking conviction. The ACCA includes, as qualifying predicates, "serious drug offense[s]." A "serious drug offense" is defined as an offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." Florida's statute encompasses six alternatives: selling, purchasing, manufacturing, delivering, bringing into the State or knowingly possessing an amount that qualifies as a trafficking quantity. Under federal law, a serious drug offense can be found on the basis of a state statute only if each of the alternatives qualifies as a serious drug offense.

The issue before the Eleventh Circuit was whether "purchasing," under the Florida law, qualified under the ACCA's definition of a serious drug offense. More specifically, the issue was whether purchasing involved possession with intent to distribute. As part of the analysis, the Eleventh Circuit observed that neither Florida's statutes, nor the Standard Jury Instructions, defined "purchase." The Court further noted that discussions of "purchase" in Florida appellate court opinions were sparse.

In view of the foregoing, the Eleventh Circuit certified the following question to the Florida Supreme Court:

How does Florida law define the term "purchase" for purposes of Florida Statutes s. 893.135(1)? More specifically, does a completed purchase for purposes of

conviction under s. 893.135(1) require some form of possession – either actual or constructive – of the drug being purchased?

[United States v. Abreu](#), 18-13965 (Oct. 1, 2020)

In 2015, the Eleventh Circuit overturned a conviction for conspiracy to commit healthcare fraud. Abreu then petitioned the district court for a certificate of innocence, as part of an effort, under 28 U.S.C. ss. 1495 and 2513, to obtain compensation for time previously spent incarcerated. The Eleventh Circuit affirmed the district court’s denial of the certificate of innocence. Although the evidence adduced at trial was not sufficient to establish the guilt of the defendant, that same evidence was not sufficient to establish the innocence of the defendant, as the defendant carried the burden for obtaining the certificate of innocence.

First District Court of Appeal

[Johnson v. State](#), 1D19-2876 (Sep. 30, 2020)

The First District reversed the denial of a motion for jail credit under Rule 3.801.

At a sentencing hearing based on a negotiated plea, both the prosecutor and defense attorney stipulated to an amount of credit for jail time previously served. The defendant subsequently filed a motion for additional credit, which the trial court denied, finding a waiver. The record before the appellate court included only a discussion about the amount of the credit the defendant would have had on a previously scheduled date of a sentencing hearing, when the defendant failed to appear. There was nothing in the record showing that the defendant ever agreed to a specific number of days, and the record did not show that the defendant agreed to the stipulation between the prosecutor and defense counsel.

Second District Court of Appeal

[Coleman v. State](#), 2D18-2143 (Oct. 2, 2020)

Coleman’s convictions were reversed on appeal, and, after a second trial, his conviction for attempted first-degree murder was reduced to attempted second-degree murder.

At his first trial, prior to the reversal of his convictions in a post-conviction, collateral review proceeding, the defendant had been tried for attempted first-degree murder, but found guilty, by the jury, of the lesser offense of attempted second-degree murder. As the first jury had acquitted the defendant on the charged of attempted first-degree murder, it was a double jeopardy violation to present that charge to the jury at the second trial.

[Ferri v. State](#), 2D19-1887 (Oct. 2, 2020)

The Court withdrew its prior per curiam affirmance, granted the appellant's motion for written opinion, and issued a written opinion addressing a restitution issue.

The defendant pled guilty to charges of dealing in stolen property. He was originally arrested for multiple offenses, including grand theft, which was not charged in the information. The arrest affidavit included facts detailing the defendant's theft of a bracelet. While the defendant correctly argued that the bracelet, for purposes of restitution, was beyond the scope of the information, as it was not covered by the charges of dealing in stolen property, restitution was still properly awarded for it. Ferri agreed to pay restitution and stipulated that a hearing would be needed to determine the amount. "Such a stipulation or hearing would be unnecessary if there were no items for which restitution was due."

Even though the theft of the bracelet was beyond the charges in the information, the Court found that "Ferri acknowledged that he engaged in an ongoing criminal episode stealing various items and selling them either to pawnbrokers or to drug dealers to fund his drug habit. And when Ferri entered his stipulation to the factual basis for the plea, he did not restrict his stipulation to only the items underlying the dealing in stolen property charges." Due to the facts in the arrest affidavit, Ferri was on notice that the bracelet could be a compensable item.

Third District Court of Appeal

[Moore v. State](#), 3D20-1094 (Sep. 30, 2020)

The Third District affirmed the summary denial of a Rule 3.850 motion which alleged ineffective assistance of trial counsel. The allegations in the motion were conclusory and therefore not sufficient. Among the allegations, Moore asserted that counsel was totally unprepared, that he was "disloyal," and that there was a total lack

of communication. The trial court properly exercised its discretion to disallow the filing of an amended motion because the motion had already been amended twice.

#### Fourth District Court of Appeal

[Valentine v. State](#), 4D19-1448 (Sep. 30, 2020)

The Court’s opinion, affirming a conviction for first-degree murder, and addressing multiple issues, was withdrawn on November 12, 2020, and this case will be addressed in a subsequent issue of the Case Law Update.

[Sibrun v. State](#), 4D19-1629 (Sep. 30, 2020)

The Fourth District reversed the defendant’s sentence for resentencing before a different judge. The trial court erred at sentencing by considering the defendant’s protestations of innocence and absence of remorse. At sentencing, the court stated that the defendant had “‘not accepted any responsibility’ or shown ‘any type of remorse or acceptance of guilt,’ which ‘matter[ed]’ to the court.”

The Court certified conflict with the First District’s recent decision in [Davis v. State](#), 268 So. 3d 958, 961 (Fla. 1<sup>st</sup> DCA 2019), for which review has been granted in the Supreme Court, on the issue of whether a sentencing court may consider the lack of remorse.

#### Fifth District Court of Appeal

[Hicks v. State](#), 5D19-722 (Oct. 2, 2020)

In a direct appeal, the Fifth District reversed and remanded for further competency proceedings.

Hicks was determined to be incompetent to stand trial. After commitment to a mental health facility, an expert attempted to evaluate him again, but he was uncooperative and the expert could not form any opinion. The court then conducted a competency hearing and found the defendant to be competent. No experts testified, and it did not appear, from the transcript, that the judge relied upon expert reports to make an independent determination of competency.