

Case Law Update  
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Supreme Court of Florida

[Wright v. State](#), SC19-2123 (Jan. 7, 2021)

The Supreme Court affirmed the denial of a successive motion for postconviction relief in a capital case. Wright asserted that the Florida Supreme Court's decision in Hurst v. State, regarding unanimous verdicts, applied retroactively because the Hurst decision established a new offense, capital first-degree murder. He further argued that the jury failed to find all of the elements of this newly-established offense.

The Supreme Court reiterated its previous holding from Foster v. State, to the effect that there was no independent crime of "capital first-degree murder." First-degree murder is a statutory offense, by definition a capital offense, and Hurst did not change the elements of the offense.

[In re: Amendments to Florida Rule of Appellate Procedure 9.142\(a\)](#), SC20-1653 (Jan. 14, 2021)

The Supreme Court, on its own, pursuant to its recent decision in Lawrence v. State, amended Rule 9.142(a) to remove any reference to comparative proportionality review. In Lawrence, the Court had held that the conformity clause of the Florida Constitution forbids the Court from "analyzing death sentences for comparative proportionality in the absence of a statute establishing that review."

Eleventh Circuit Court of Appeals

[Williams v. United States](#), 19-10308 (Jan. 13, 2021)

The Eleventh Circuit affirmed the denial of a motion to vacate a sentence pursuant to 28 U.S.C. s. 2255. Williams sought retroactive application of the Supreme Court's decision in Johnson v. United States, which held the residual clause of the Armed Career Criminals Act to be unconstitutionally vague.

Williams' enhanced sentence under the ACCA was based on three predicate offenses as qualifying violent felonies – Kentucky first-degree robbery, Georgia armed robbery, and federal kidnapping. In the section 2255 motion, Williams challenged only the federal kidnapping predicate offense. A PSI report at the time of sentencing included facts regarding the use of a firearm during the kidnapping.

Williams did not present “case-specific evidence” that the residual clause affected his sentence; he argued that based on case law existing at the time of his sentence, it was “more likely than not the sentencing court relied on the residual clause.” Williams had the burden of demonstrating that the sentencing court did, in fact, rely on the residual clause and he did not satisfy that burden. In 1998, at the time of the sentencing in this case, federal appellate court case law existed from which it could have been concluded that the federal kidnapping offense, by virtue of its statutory elements, was a “violent” felony. The legal landscape on the question of whether federal kidnapping was violent felony based on its elements, in 1998, was described as “uncertain” in the current Court’s opinion.

One judge dissented, concluding from the record that it was clear that the sentencing judge did rely solely on the residual clause, as opposed to the statutory elements of the offense, when finding that federal kidnapping was a violent offense.

#### First District Court of Appeal

[Parker v. State](#), 1D19-4028 (Jan. 15, 2021)

The First District affirmed convictions for bank fraud and uttering a forged instrument. Parker argued that the lower court’s determination of competency prior to trial was based on stale reports from experts. This issue was not preserved for appellate review by objection and did not arise to the level of fundamental error. Similarly, the failure of the trial court to enter a written order of competency after finding Parker competent was not preserved for review and did not constitute fundamental error.

[Massey v. State](#), 1D19-4281 (Jan. 15, 2021)

The First District reiterated its holding from [Owens v. State](#), 303 So. 3d 993 (Fla. 1<sup>st</sup> DCA 2020), that “regardless of whether section 948.06(2) applies to a defendant who committed an offense before the statute was amended, when imposing sentence for violation of probation, a trial court is limited under subsection 948.06(2)(f)1. to modifying or continuing probation or imposing a sentence of up

to ninety days in county jail only when a defendant ‘compl[ies] with all four conditions of subsection 948.06(2)(f)1.’”

[Owens v. State](#), 1D19-4346 (Jan. 15, 2021)

The imposition of a 20-year mandatory minimum sentence in the written sentence without prior oral pronouncement at the sentencing hearing was reversed and remanded for a new sentencing hearing “at which the court must orally impose the required sentence. Appellant must be present.”

[Mills v. State](#), 1D20-798 (Jan. 13, 2021)

The First District reversed the summary denial of one of two claims of ineffective assistance of counsel in a Rule 3.850 motion for further proceedings.

Mills was charged with possession of a firearm or ammunition by a convicted felon. He alleged that counsel was ineffective when conveying a plea offer for failing to advise him that the charge could be supported by the mere possession of ammunition. He further alleged that counsel failed to tell him that the maximum possible sentence was 15 years. He alleged that he turned down an offer of 36 months and later accepted a sentence of 48 months.

The trial court’s denial of the motion was based on the finding that Mills failed to establish in his motion that the State would not have withdrawn the 36-month plea offer. The First District held that, if true, the allegations in the motion established that counsel was deficient. With respect to prejudice, the trial court relied on a portion of the record showing that Mills “acknowledged” that the 36-month offer was contingent upon expeditious acceptance and that it would be withdrawn if not timely accepted. This “acknowledgment” by Mills did not conclusively refute Mills’ claim.

Second District Court of Appeal

[Davis v. State](#), 2D18-2613 (Jan. 15, 2021)

Davis appealed convictions for battery and delivery of marijuana to a minor. He was originally charged with lewd or lascivious battery and delivery of Xanax to a minor. The State was permitted to amend the information and add the charge of delivery of marijuana to a minor. The Second District reversed the conviction for that charge because the trial court denied the defense motion for a continuance to

prepare a defense. The information had been amended just before jury selection commenced. Although the defense was aware of the additional charge from the outset of the arrest, that did not mean that the defense was prepared to proceed to trial on the charge without time for preparation after the amendment to the information.

The Second District also addressed comments by the prosecutor during closing argument. The prosecutor was arguing that a witness for the prosecution handled a difficult cross-examination well. The witness did not “crumble,” “[n]ot even when Fred Davis [Appellant] is over there making gestures at her did she change her story.” The defense objected on the basis of facts not being in evidence. The judge refused to give a curative instruction, finding that the jury must have seen Davis’s behavior. Davis had previously been admonished by the court for gestures. The prosecutor later referred to Davis as being bored to tears and sleeping during testimony.

It was improper for the prosecutor to comment on Davis’s demeanor off the witness stand. The comments, however, did not require reversal of the remaining conviction. The Second District concluded that the jury was aware of these observations. The victim, during her testimony, had made reference to the gestures. And, at a later point, Davis was snoring so loudly that the court had to admonish him.

[Bell v. State](#), 2D19-1591 (Jan. 15, 2021)

The Second District reversed an order modifying conditions of community control. The modification was “an enhancement that was improperly imposed in the absence of a violation of Bell’s community control.”

Bell was charged with violating community control for missing an anger management class, in violation of condition 16. Condition 16 of community control required Bell to remain at his residence except for one half hour before and after any activities approved by his community control officer.

Bell had missed the class because he could not find child care for his son and had to stay home. He subsequently made up the class. The judge increased community control from Community Control 1 to Community Control 2.

The Second District reversed because even though Bell failed to attend the class, that did not constitute a violation of the terms of condition 16. And, the State

did not allege a violation of any condition that would have required attendance at the class.

[Nichols v. State](#), 2D19-1721 (Jan. 15, 2021)

The Second District reversed convictions for killing, possessing, or capturing alligators or crocodiles or eggs because the jury instructions were “incomplete, misleading, and confusing.”

The State charged violations of section 379.409, Florida Statutes, and the information included language that stated “unless authorized by the rules of the Fish and Wildlife Conservation Commission.” The allegations were that Nichols three times had alligators on his farm with no record of where or when he captured them; Nichols once captured an alligator without a license; and he once killed an alligator and distributed its meat without “preparing and maintain the proper harvest documentation.”

The defense at trial was that Nichols was licensed, but that he had some minor paperwork issues.

The jury instructions included the text of relevant provisions of the Florida Administrative Code regarding the “unless authorized” language of the charges. However, the instructions “did not include any explanation of how the jurors were to consider or apply those provisions. Instead, any such guidance was left solely to Nichols to provide in his closing argument.” “The instructions were also misleading in that they omitted a relevant exception to the statute, making it appear that any killing, injuring, possessing, or capturing of an alligator was illegal regardless of a license holder’s compliance with the Administrative Code provisions. Finally, the instructions were patently confusing because the court simply read several pages of the Administrative Code provisions to the jury without offering any explanation as to whether those provisions constituted a potential defense to the State’s charges.”

[Gibson v. State](#), 2D18-4349 (Jan. 13, 2021)

Gibson was charged with possession of a firearm by a convicted felon, illegal taking of deer, armed trespass, and other charges. The Second District reversed the firearm conviction, which was heard by the jury as the second trial in a bifurcated proceeding.

The trial court overruled Gibson’s objection to a peremptory challenge against an African-American by the State. The prospective juror, Ms. Stubbs, was alleged, by the prosecution, to have said that “she did not like public speaking, in reference to the defendant potentially not speaking, and I would say that that’s not necessarily the best reason to find someone not guilty.” When the defense objected and the court conducted its inquiry, the argument focused on the juror not saying that she would find the defendant not guilty if he did not testify. “The trial court seemed to recognize that this was not a legitimate basis for a strike, as it entirely ignored this ground and noted that ‘[Stubbs’] lack of involvement is the basis for the challenge.’” The Second District agreed that this reason was not a sufficient basis for the peremptory strike.

The second reason for the strike was Stubbs’ alleged lack of interest in the jury-selection process. The prosecutors relied on Stubbs being very quiet when she was addressed, and a portion of the jury questionnaire form on which Stubbs indicated an interest level of 3 out of 10 for being there. The court had inquired of the prosecution as to why no questions were asked of Stubbs, and the prosecutor responded that during group questions, when some were nodding in agreement or disagreement, Stubbs was not “interacting in any way.”

The Second District found that this reason was not valid. While a lack of interest can be a race-neutral and genuine reason, the prosecution accepted another juror who noted her interest in being there as “one.” And, the prosecutor’s observations of Stubbs’ lack of interest were disputed by the defense and were not otherwise supported by the record on appeal. While observations of jurors may provide a valid basis for a peremptory challenge, a record, through the judge’s noting of the same conduct, needs to be established.

The prosecutor’s final reason, a “lack of rapport” with Stubbs, failed for the same reason.

[Kegler v. State](#), 2D19-3479 (Jan. 13, 2021)

The Second District reversed a revocation of community control. The State failed to prove that Kegler willfully and substantially violated community control conditions by “being away from his approve residence without the permission of his supervising officer.”

A community control officer testified that at 5:37 a.m., he knocked on Kegler’s apartment door several times and got no response, and that his partner

called Kegler's cell phone and there was no answer. Kegler's wife testified that she got in her car at 5:31 a.m. to go to work and her husband walked her outside at that time and went back in. He was on medication for mental health issue and the medication could make him groggy. Although he had not taken the medication the prior night, he was groggy when he got up. He had been up the prior two nights in fear that he would receive a visit from the officer. Bedrooms were in the back of their townhome and a doorbell was installed due to problems hearing in the back of the townhouse. Kegler testified that he went back in, to a bedroom in the back of the house, and fell asleep. The trial court judge did not believe Kegler's testimony.

The Second District, in reversing, emphasized that the State failed to present evidence as to how many times the officer knocked on the door, or how hard he knocked. There was no testimony as to efforts to go to other parts of the residence to attract attention. The State's evidence was subject to differing inferences – Kegler may not have been home; Kegler may have been sleeping. Also, the trial court did not make any finding that Mrs. Kegler was not a credible witness.

One judge dissented.

### Third District Court of Appeal

[Posey v. State](#), 3D18-1432 (Jan. 13, 2021)

The Third District reversed convictions for second-degree murder and kidnapping. The trial court erred by excluding “reverse Williams rule evidence that Posey sought to introduce in order to show that another person had a motive to kill the victim.”

The State's theory of the case was that Posey abducted victim Wallace from in front of a convenience store and took him to a nearby field and killed him. The defense sought to introduce evidence that Wallace sold drugs in front of that convenience store and that another drug-seller, Stokes, was aware of this and was upset that Wallace was stealing Stokes' customers. A witness, in a pretrial deposition, had referenced a confrontation between Stokes and Wallace regarding this drug-turf feud.

The defense sought to introduce this testimony not to prove the bad character of either Stokes or Wallace, but to prove the motive for killing. It was therefore relevant and admissible.

[State v. Yero](#), 3D19-192 (Jan. 13, 2021) (on rehearing)

The State appealed the trial court's order that vacated Yero's sentence and ordered a future resentencing hearing. The Third District dismissed the appeal as such orders were not included in the list of authorized appeals by the State in a criminal case. The State had sought relief because the Florida Supreme Court's case law regarding juvenile life sentences had changed after the Third District's prior mandate.

On rehearing, the State requested that the Third District treat the unauthorized appeal as a petition for writ of certiorari. The Third District declined to do so for two reasons. First, the State might suffer no harm if the trial court resentences Yero to the original sentence. Second, if the trial court imposed a lesser sentence, the State could then seek an appeal from the new sentence.

[McFarlane v. State](#), 3D19-1855 (Jan. 13, 2021)

The Third District affirmed the denial of a Rule 3.850 motion after an evidentiary hearing. McFarlane presented numerous claims of ineffective assistance of trial counsel.

The failure to call a defense expert regarding DNA evidence in a case involving sexual battery was a strategic decision. Defense counsel consulted an expert and that expert would have testified that there was a DNA match to McFarlane. The defense theory therefore was that McFarlane had consensual sex with the victim and that the sexual battery was committed by someone else.

Counsel was not ineffective for failing to seat a jury of McFarlane's contemporaries – males between the ages of 40 and 65. Defendants “are not entitled to a particular jury composition.”

Fourth District Court of Appeal

[Metellus v. State](#), 4D19-1107 (Jan. 13, 2021) (on rehearing)

A double jeopardy violation occurred when a written order of probation imposed a special condition for the payment or urinalysis and drug testing that was not orally pronounced at sentencing. Special conditions must be orally pronounced at sentencing and, although urine and drug testing were general conditions, payment was a special condition.

[O.L. v. State](#), 4D19-3411 (Jan. 13, 2021)

The trial court was not required to make findings before sentencing O.L. to non-secure commitment because it “followed the restrictiveness level recommended by DJJ.” Although the trial court made an oral finding of competency after reviewing reports, it did not enter a written order with that finding. Absent any objection, fundamental error did not exist and the trial court was not required to enter a written order on remand.

Fifth District Court of Appeal

[Ball v. State](#), 5D19-3536 (Jan. 15, 2021)

In an appeal from a judgment and sentence after a plea of no contest, the Fifth District dismissed the part of the appeal as to the no contest plea because jurisdiction was lacking where there was no motion to withdraw the plea. The Court noted that the Fourth District now permits such appeals when the trial court had reasonable grounds to believe the defendant was not competent. The Fifth District disagreed with the Fourth District on that issue.

In another part of the appeal, the Fifth District remanded the case to the trial court as to three other counts because the trial court failed to make an independent determination of competency. Ball had gone to trial on these three counts.