

Case Law Update  
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Eleventh Circuit Court of Appeals

[United States v. Rogers](#), 18-13532 (Mar. 9, 2021)

The Eleventh Circuit affirmed convictions and sentences for charges of production and distribution of child pornography. The Court held that the district court properly applied the four-level sentencing enhancement under U.S.S.G. s. 2G2.2(b)(4) for sadism/masochism. The photo at issue depicted Rogers' "hand around the nude minor's throat while she is lying on a bed." The Court relied on dictionary definitions of "sadistic" and "masochistic" and concluded that the district court's conclusion that the photo qualified for the enhancement was not clearly erroneous.

Application of guidelines enhancements under s. 2G2.2(b)5) (pattern of activity involving the sexual abuse or exploitation of a minor) and s. 4B1.5(b)(1) (instant offense of conviction is a covered sex crime "and the defendant engaged in a pattern of activity involving prohibited sexual conduct"), did not constitute impermissible double counting under the Guidelines. The claim was not preserved in the district court and was reviewed under the plain error standard. "Double counting is permitted . . . 'if the Sentencing Commission intended that result and each guideline section in question concerns conceptually separate notions relating to sentencing.' . . . 'We presume that the Sentencing Commission intended separate guidelines sections to apply cumulatively, unless specifically directed otherwise.'" Section 4B1.5(b)(1) included language that reflected the intent for the enhancements to apply cumulatively.

[United States v. Knights](#), 19-10083 (Mar. 10, 2021)

On rehearing, the Court withdrew its prior opinion of August 3, 2020, and issued a new opinion. The Court affirmed a conviction, following a bench trial, for possession of a firearm and ammunition as a felon. An investigatory stop, resulting in the seizure of the firearm and ammunition, was permissible as it was deemed to constitute a consensual encounter.

Two officers approached Knights and another man, sitting in a car outside a residence at 1:00 a.m., as they were concerned about the possible theft of the car. The area was described as a high crime area, known for gang activity, shootings, and drug offenses. Knights, when observed, appeared to be nervous. Knights was in the driver's seat, and, when he opened the door after the officers knocked on the window, the officers smelled a very strong odor of marijuana. After Knights was arrested, they then searched Knights and his backpack, which was in the car, finding a firearm cartridge and ski mask. Two firearms, another cartridge, and marijuana residue were subsequently found in the car.

In support of the conclusion that the encounter was consensual, the Court noted that Knights' companion did, in fact, simply walk away. Knights, in the driver's seat, could have driven away, as the car was not blocked by the officers' vehicle. The officers did not activate any lights or sirens. They did not display weapons or ask for identification.

In the motion for rehearing, Knights argued that the Court should have treated his identity as "a factor that matters" in determining whether he, as a young black man, "would have felt free to drive or walk away from the police." The Court held that "the race of a suspect is never a factor in seizure analysis."

One judge wrote a concurring opinion "to emphasize the perils that ambiguous police interactions can cause and to respectfully suggest that the Supreme Court consider adopting a bright-line rule requiring officers to clearly advise citizens of their right to end a co-called consensual police encounter."

[Granda v. United States](#), 17-15194 (Mar. 11, 2021)

The Eleventh Circuit affirmed the denial of a petition under 28 U.S.C. s. 2255, in which Granda attacked his conviction or conspiracy to possess a firearm in furtherance of a crime of violence or drug-trafficking crime." He argued that the conspiracy to commit Hobbs Act robbery no longer qualified as a valid crime-of-violence predicate after United States v. Davis, 139 S.Ct. 2319 (2019) and Brown v. United States, 942 F. 3d 1069 (11<sup>th</sup> Cir. 2019).

The claim was procedurally barred because it was not argued in the trial court or on direct appeal. The "case law extant at the time of Granda's appeal confirms that he did not then lack the 'building blocks of' a due process vagueness challenge to the s. 924(c) residual clause." The Court's opinion reviews the case law from

which the claim could have been built at the time of the direct appeal, years prior to Davis.

The claim also failed on the merits. Granda had multiple convictions arising from a reverse-sting drug operation. These multiple predicate offenses were inextricably intertwined and, based on the record, “the jury could not have found that Granda conspired to possess a firearm in furtherance of a Hobbs Act conspiracy without also finding that the conspired to possess a firearm in furtherance of his attempted Hobbs Act robbery, as well as in furtherance of conspiring and attempting to possess cocaine with intent to distribute and in furtherance of attempting a carjacking. Each of these crimes remains a lawful predicate for the s. 924(o) conviction. Thus, Granda cannot show actual prejudice or actual innocence to excuse his procedural default,” and the existence of other qualifying predicates rendered any error in jury instructions related to this issue harmless.

### First District Court of Appeal

[Armas v. State](#), 1D19-3265 (Mar. 11, 2021)

The First District affirmed convictions for first-degree murder, grand theft auto, and tampering with physical evidence.

Armas challenged the sufficiency of evidence, arguing that it was wholly circumstantial and that the State “failed to rebut his reasonable hypothesis of innocence.” The special standard of review for wholly circumstantial evidence cases was abandoned in Bush v. State, 295 So. 3d 179 (Fla. 2020). Reviewing the case for substantial, competent evidence, the Court found that multiple witnesses and Armas identified Armas “as the last person to see the victim; several witnesses testified to the appellant’s jailhouse confessions, which were corroborated by the evidence found on and around the appellant’s property.” This included a knife and several cutting tools, along with burn pits on Armas’s property containing car mats and scraps of clothing. Human remains were found near his residence. DNA testing showed a high probability that the remains were the victim’s.

There was no abuse of discretion in permitting the medical examiner to “opine that Brim’s death was by homicidal violence of undetermined type.” The condition of the victim’s remains precluded the medical examiner from performing an autopsy.

The untimeliness of a request to proceed pro se, two-thirds of the way through the trial, was one of several factors relied upon for denying the request for self-

representation. The trial court also conducted an abbreviated Faretta inquiry and considered the severity of the charges, concerns about the defendant's ability to adequately represent himself in a trial of the magnitude of this case, and other factors.

[Shirah v. State](#), 1D20-529 (Mar. 11, 2021)

The trial court erred in denying a motion for the return of property – a television and PlayStation 4, seized by the Sheriff when executing a drug search warrant on the movant's father. The Sheriff's Office "did not establish its ownership, which in turn determines whether Appellant's claim was timely."

"The Sheriff obtains title to seized property 60 days after conclusion of a legal proceeding, but only if the property was 'lawfully seized pursuant to a lawful investigation.'" "The 60-day vesting does not apply, however, if the property was seized for non-investigative or non-evidentiary purposes. Rather, in such cases, a 4-year statute of limitations applies." In the hearing in the trial court, "the Sheriff did not address, and therefore did not prove, whether Appellant's TV and PlayStation were lawfully seized from his bedroom during a search related to his late father's drug charges."

[Fine v. State](#), 1D20-695 (Mar. 11, 2021)

The trial court did not err in denying the defendant's requests for either sentencing as a youthful offender or for a downward departure sentence. Youthful offender sentencing rests within the discretion of the sentencing court and that court declined to impose such sentencing due to the seriousness of the crimes and the "lasting effects of Fine's actions on the victims." There was no abuse of discretion. There was no error in denying the motion for a downward departure. "Only when a trial court misconceives its discretion to impose a departure sentence or when the court has a policy to refuse to impose any downward departure sentences may a defendant obtain appellate review of the trial court's decision. . . . Neither circumstances is present here."

[Wilson v. State](#), 1D20-1765 (Mar. 11, 2021)

The Court reiterated its holding from Williams v. State, 143 So. 3d 423 (Fla. 1<sup>st</sup> DCA 2014), that Florida's Prison Releasee Reoffender statute is not unconstitutional based on the holdings of Alleyne v. United States, 570 U.S. 99 (2013) and Apprendi v. New Jersey, 530 U.S. 466 (2000).

[Jones v. State](#), 1D17-1715 (Mar. 10, 2021)

On remand from the Florida Supreme Court, for reconsideration in light of [Pedroza v. State](#), 291 So. 3d 541 (Fla. 2020), the First District held that Jones' aggregate sentence of 50 years in prison was not a life sentence or the functional equivalent of a life sentence, and it was therefore a permissible sentence for an offender who was a juvenile at the time of the offenses.

[Kramer v. State](#), 1D20-255 (Mar. 10, 2021)

The First District affirmed convictions and sentences for sexual battery, lewd or lascivious molestation, possession of a controlled substance, and possession of drug paraphernalia. This was an appeal from an open plea to all charges. There was no motion to withdraw the plea, and other issues were not reserved for appeal. Counsel was not ineffective for failing to file a motion to withdraw the plea where counsel "attested that he advised Kramer against withdrawing the plea because he thought the State would seek a harsher sentence after trial."

An alleged double jeopardy violation based on two convictions for sexual battery and one for lewd or lascivious molestation failed because no violation appeared on the face of the record.

Kramer could not establish that the trial court's sentencing consideration of a sentence imposed on an offender in another, unrelated case, constituted fundamental error. The "trial court made an isolated remark comparing Kramer's scoresheet with that of a previous defendant. The court did not consider any impermissible factor when imposing Kramer's sentence, and its isolated remark did not amount to error, much less fundamental error."

Second District Court of Appeal

[Chumney v. State](#), 2D19-2603 (Mar. 12, 2021)

Dual convictions for possession of cannabis over 20 grams and possession of cannabis with intent to sell encompassed the "same quantum of marijuana" and therefore constituted a double jeopardy violation.

[State v. Cosby](#), 2D19-4125 (Mar. 12, 2021)

The Second District reversed a downward departure sentence imposed for felony petit theft.

At the sentencing hearing, defense counsel argued “that a downward departure was warranted based on sentences received by other defendants charged with similar crimes and who had similar guidelines scores. Defense counsel also asserted that a downward departure sentence ‘was in line with the sentencing guidelines.’ The trial court never made any explicit oral finding that it was departing on those grounds.” Upon objection by the State as to the need for a specific reason, the judge stated “that because the scoresheet did not list the statute, all that was required was a notation to the statute it was relying on in departing downward.”

In addition to the absence of any written reason for the departure, there was no evidence to support the only arguable basis, comparable sentence to a codefendant. This would have required the trial court to consider the defendant’s lengthy criminal history when comparing it to sentences imposed for similarly situated defendants. It would also require a consideration of comparative levels of culpability. The record did not indicate that the trial court had knowledge of those facts. Additionally, a downward departure based on the court’s belief that the recommended sentence is not commensurate with the seriousness of the crime is not a valid reason to depart.

[Vidana v. State](#), 2D19-4504 (Mar. 10, 2021)

In an appeal from a revocation of probation, the Second District affirmed, but remanded the case to the trial court for an amended order of revocation, indicating which conditions were violated.

The trial court imposed a ten-year minimum mandatory sentence for felon in possession of a firearm. Section 775.087(2)(a)1, Florida Statutes, provides for a three-year minimum mandatory, unless the person convicted for possession of a firearm by a felon “has a previous conviction of committing or attempting to commit a felony listed in s. 775.084(1)(b)1. . . .” The parties agreed that the 10-year minimum applied because Vidana had a prior conviction for possession of a firearm by a convicted felon. That offense, however, is not one of the enumerated offenses in s. 775.084(1)(b)1. Any error was not preserved for appellate review and the affirmance of the sentence was without prejudice to raise the issue in a postconviction motion.

[Johnson v. State](#), 2D20-1125 (Mar. 10, 2021)

The summary denial of a Rule 3.850 motion alleging newly discovered evidence was reversed for an evidentiary hearing. The motion alleged a recantation by a trial witness. The trial court's denial was based on contradictions of the recantation by other evidence at trial. The trial evidence, however, did not conclusively refute the alleged newly discovered evidence, and an evidentiary hearing was therefore required.

Two witnesses at trial testified, one explicitly testifying as to the defendant's guilt. The other provided equivocal testimony, including self-contradictions. This witness allegedly recanted to a third party, whose affidavit served as the basis for the motion alleging newly discovered evidence. The Second District noted that the "alleged recantation would only be admissible for impeachment purposes. . . . And although the evidence as alleged in the affidavit might not be sufficient to warrant a new trial, the court's obligation at this stage is to determine whether an evidentiary hearing is warranted."

Third District Court of Appeal

[Ramirez v. State](#), 3D20-1136 (Mar. 10, 2021)

The Third District affirmed the summary denial of a Rule 3.850 motion. The motion alleged newly discovered evidence that a serologist who testified "exaggerated her educational qualifications." The motion was untimely as "this information, if indeed true, could have been discovered long ago through a diligent request for available records from the relevant educational institution."

[Mays v. State](#), 3D20-1527 (Mar. 10, 2021)

A motion for post-trial release pending direct appeal was denied and that denial was affirmed. Although Mays "satisfied the threshold showing that the appeal was 'taken in good faith, on grounds fairly debatable, and not frivolous,'" such post-trial release is discretionary. The Third District noted that the trial court's written order could have provided greater specificity as to the reasons for the denial of the motion, but that it nevertheless correctly considered and applied the relevant factors, which include the defendant's habits regarding respect for the law, local attachments to the community, the severity of punishment for the offense, and any other relevant

circumstances. Further facts as to the trial court's findings were not detailed in the Third District's opinion.

#### Fourth District Court of Appeal

[State v. Cassidy](#), 4D20-816 (Mar. 10, 2021)

The trial court dismissed the charge of aggravated assault after a pretrial hearing on a Stand Your Ground immunity claim. The trial court found that the defendant made a prima facie claim of entitlement to immunity. The State challenged that finding and the fourth District affirmed.

The Fourth District agreed with the Second District's analysis in [Jefferson v. State](#), 264 So. 3d 1019 (Fla. 2d DCA 2018), in which that Court concluded that the prima facie claim of self-defense need only be "raised" by the defendant in a pretrial written motion under Rule 3.190(b). The defendant has no evidentiary burden with respect to that prima facie claim. Language that may have been to the contrary in the Fourth District's own decision in [Langel v. State](#), 255 So. 3d 359 (Fla. 4<sup>th</sup> DCA 2018), was dicta.

#### Fifth District Court of Appeal

[Lumsden v. State](#), 5D20-523 (Mar. 12, 2021)

The Fifth District reversed a conviction for new trial because the trial court "erred when it determined that the evidence did not support giving the good faith defense instruction to the jury." The opinion does not set forth any facts.

[Callahan v. State](#), 5D20-1241, 5D20-1243 (Mar. 12, 2021)

The defendant entered into a negotiated plea and subsequently filed a motion for postconviction relief. The State agreed that on the basis of [Dean v. State](#), 303 So. 3d 257 (Fla. 5<sup>th</sup> DCA 2020), the October 1, 2019 amendment to section 812.014, Florida Statutes, "applied retroactively to [this] case based on this court's decision interpreting section 775.022(4), Florida Statutes." The case was remanded for resentencing unless the State elected to withdraw from the plea agreement.

[Watson v. State](#), 5D20-1928 (Mar. 12, 2021)

The Fifth District affirmed a conviction and sentence and rejected Watson’s argument that the trial court erred in denying a motion for a downward departure sentence. Watson argued that “the trial court failed to consider the victim as a willing participant.” Watson entered a plea to the charge of child abuse by impregnation. He was 25 at the time of a sexual relationship with his 15-year old stepsister.

When assessing the appropriateness of a downward departure, the trial court must first determine if there is a “valid legal and factual basis” and second, “whether the case is appropriate for a departure sentence.” The Fifth District urged trial courts to “make finding as to each of the two prongs,” in part, to avoid ambiguity in remarks during the sentencing hearing.

Ultimately, the “trial court fully understood the acknowledgment of a fifteen-year-old child that she willingly participated in the sexual relationship with her twenty-five-year-old step-brother. Nonetheless, the court went on to find that Watson’s taking advantage of the victim’s consent was not appropriate under the circumstances of the case. Accordingly, even if the court did not recognize its authority to depart, the remarks make it clear that it would not have exercised its discretion to depart under the facts of this case.”