

Case Law Update  
April 26, 2021  
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Supreme Court of the United States

[Jones v. Mississippi](#), 18-1259 (Apr. 22, 2021)

Jones was 15 years old when he committed the murder for which he was convicted. He was originally sentenced to life without parole. After the Supreme Court's decision in Miller v. Alabama, he was resentenced. The sentencing judge acknowledged that he had the discretion to sentence Jones to a lesser term of imprisonment, but concluded that life without parole remained the appropriate sentence.

Jones sought review, arguing that under Miller and Montgomery v. Louisiana, the sentencer was required to “make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible.” The Supreme Court, construing those earlier decisions, held that they “squarely rejected such a requirement.” “*Miller* mandated ‘only that a sentencer follow a certain process – considering an offender’s youth and attendant characteristics – before imposing’ a life-without-parole sentence.” Additionally, the Supreme Court, in the current case, declined to adopt such a requirement.

The Court described its majority opinion as “a good-faith disagreement with the dissent over how to interpret *Miller* and *Montgomery*.”

Supreme Court of Florida

[Smith v. State](#), SC18-822 (Apr. 22, 2021)

The Florida Supreme Court affirmed a conviction and sentence of death.

The murder for which Smith was tried received extensive media coverage in Florida and elsewhere, including local broadcasts highlighting Smith's numerous prior sex crime convictions. Although Smith moved for a change of venue, the judge, prior to trial, reserved ruling until the parties attempted to seat a jury. At the beginning of jury selection, the court again deferred ruling on a renewed motion.

After jury selection was completed, counsel stated that there were no further objections; nor was any objection to venue renewed when the jury was sworn. Absent a ruling on the motion, the issue was not preserved for appellate review. Reviewing the issue under the fundamental error standard, the Supreme Court rejected the argument and emphasized the absence of any “specific allegations of prejudice,” and the absence of “evidence that the media exposure actually tainted Smith’s trial.” The Court further emphasized the overwhelming evidence of guilt, the autopsy photos that the jury saw, the presence of Smith’s DNA on the victim’s body, and surveillance footage. Additionally, the pretrial publicity occurred five years prior to jury selection and a jury questionnaire was used to “screen potential jurors for concerns arising from exposure to media reports.” Four jurors selected never heard of the case; seven had seen some coverage but had minimal knowledge of the case; the last knew about Smith and the victims, but nothing of their pasts, and said she could serve “impartially because she saw Smith as a human being.”

The medical examiner requested a break in the testimony when discussing the victim’s injuries. The defense sought a mistrial, arguing that the doctor’s reaction was the equivalent of breakdown in front of the jury. The Supreme Court disagreed. “The jury saw no outburst of emotion. From its vantage point, which was closer to Dr. Rao’s reaction than ours, the trial court determined that a recess was appropriate, and a mistrial was not.”

The admission of 26 photos showing the victim’s injuries, including pictures of an exposed skull and trachea, was not an abuse of discretion. The test for admissibility is relevancy, not necessity, and Smith’s argument based on the lack of necessity due to other overwhelming evidence of guilt was therefore rejected. The “photos were relevant to the brutality of [the victim’s] rape and the premeditation of her murder, as well as the heinous, atrocious, and cruel nature of the crime.” One example was a picture “showing the manner in which the skin had been stripped from [the victim’s] throat,” which was relevant to the cause of death being by strangulation, a factor which is relevant to premeditation.

Smith challenged two comments of the prosecutor as being improper golden rule arguments. The first, in the opening statement, referenced “every mother’s darkest nightmare.” There was an objection to this comment, and, although it was “dramatic,” it was “not untrue” and it was not “a mischaracterization of the evidence that would soon be presented to the jury.” The prosecutor, at the time, knew that the mother was expected to testify and that a 911 recording “would attest to the terror she felt when she realized” her daughter was missing. The prosecutor “was previewing” what the mother “would soon explain.”

A second comment, from closing argument, “from the grave she’s crying out to you, Donald Smith raped me,” was reviewed for fundamental error absent any objection. “Comments that ‘invi[t] the jury to imagine the victim’s final pain, terror and defenselessness’ are prohibited. . . . Yet a prosecutor’s words may, indeed sometimes must, elicit an emotional response from the jury. That fact of life, particularly in matters of life and death, is not a basis for reversal. Here, by the time of closing argument, the State had put forth evidence that Smith raped and sodomized [the victim], and that he strangled her to death. The prosecutor’s comments did more purposefully to elicit an emotional reaction than is advisable, but they were moving in substantial measure because of how they characterized the disturbing facts in evidence.”

### Eleventh Circuit Court of Appeals

#### [United States v. Osorto](#), 19-11408 (Apr. 20, 2021)

Osorto pled guilty to illegal reentry following a prior conviction for an aggravated felony. On appeal, he raised sentencing issues regarding the higher maximum penalties imposed under 18 U.S.C. s. 1326(b) for those who unlawfully reenter the United States “if they do so after they were deported following certain types of convictions.” The Eleventh Circuit affirmed.

In 2016, the Sentencing Guidelines were amended to decrease the maximum enhancement in illegal reentry cases. They also added a new enhancement “for a post-first-deportation conviction incurred before the immediate illegal-reentry offense.” Osorto was convicted after the 2016 Guidelines went into effect. He had committed other offenses “both before his original deportation and after it, but before his current illegal-reentry offense.” As a result, he received offense-level increases. He challenged the application of the guidelines as violating his equal-protection rights, contending that the guidelines, “which apply to only illegal-reentry offenses, discriminate against noncitizens by counting their prior convictions twice – once in the offense level and a second time in the Guidelines’ criminal-history calculation.” He further argued that “citizens cannot illegally reenter the United States, and generally, no guidelines for other offenses count prior convictions in both the offense-level and criminal-history calculations.”

The Court’s rejection of Osorto’s arguments was based, in part, on the Court’s prior decision in United States v. Adeleke, 968 F. 2d 1159 (11<sup>th</sup> Cir. 1992), which addressed an earlier version of the guidelines at issue, and concluded that

“enhancements for pre-deportation convictions do not violate equal protection.” The Court alternatively came to the same conclusion regardless of Adeleke, emphasizing the Congressional enactment of an amendment to 8 U.S.C. s. 1326(b), which showed that Congress had “approved of the national interest that [Guidelines] subsections 2L1.2(b)(2) and (3) promote.” The Court emphasized the interest of deterrence. The Court further reemphasized the Sentencing Commission’s reliance on the findings of a 2015 study it conducted, which analyzed “sentencings for illegal-reentry offenses.”

One judge dissented in part. The dissent agreed that the Court was bound by the Adeleke decision regarding the equal protection challenge to s. 2L1.2(b)(2). The dissent focuses on a second provision that was its issue, s. 2L1.2(b)(3), which provided for “tougher sentences for defendants who commit a designated offense after reentering the United States without authorization.” The designated offenses do not include the offense of unauthorized reentry itself. “Meanwhile, a defendant is already punished for both the unauthorized reentry and any other offense that leads to the increased punishment imposed by s. 2L1.2(b)(3) on account of the calculation of a defendant’s criminal history under the Sentencing Guidelines. See USSG s. 4A1.1(b). The result is that any offense committed after unauthorized reentry is double-counted for noncitizens in their Guideline calculation based on little more than their immigration statutes. Sentencing Guideline s. 2L1.2(b)(3) therefore subjects noncitizen defendant to more severe punishment than citizens who commit the same crime.” The dissent agreed with Osorto that this violated the Fifth Amendment right to equal protection of the laws.”

[United States v. Pendergrass](#), 19-13681 (Apr. 22, 2021)

The Eleventh Circuit affirmed convictions for five armed robberies.

There was no abuse of discretion in denying a motion for continuance. The reason proffered for the request was defense counsel’s need for time to prepare for anticipated K-9 evidence that the government intended to use at trial. The court, however, excluded that evidence, thereby eliminating the need for the continuance. Defense counsel conceded, in the district court, that “the other late-produced items would not keep the defense from being ready. . . .”

The district court did not err in denying a motion to excuse Juror 20 for cause. Pendergrass based this argument on 28 U.S.C. s. 1863, which bars members of state police departments from jury service. Juror 20 worked for the Georgia Department of Community Supervision. The Court disagreed. Under section 1863, “a person

must *in function* be a police officer, not a member of any organization could fall under the broad umbrella of law enforcement.” “Significantly, the Georgia statute that lists the duties assigned to Juror 20 omits quintessential functions of police officers, as that term is commonly understood: the prevention and detection of crime and maintenance of peace and order.”

Prior to trial, the court granted a motion to suppress a cell phone that had been seized and its contents. The court, however, did not suppress Google geo-location data derived from the Google username that was linked to the phone. On appeal, the Court did not address the merits of the argument that this data should have been suppressed as the fruit of the poisonous tree; the Court held, instead, that “any error was harmless in the shadow of the overwhelming evidence against Pendergrass with respect to the three robberies in which the government presented geo-location data.” The evidence included: DNA of Pendergrass found at the scene in blood droplets; cell-tower data, which was distinct from the Google geo-location data; shell casings that were linked to the same gun used in other robberies; video surveillance evidence; a gun found at Pendergrass’s residence which matched the description of a gun used by one of the robbers.

Pendergrass challenged the sufficiency of evidence as to three of the robberies. The Court disagreed, as the “evidence of all the robberies establishes a modus operandi and a pattern that support Pendergrass’s convictions for each robbery.” The Court noted multiple similarities that were found in the robberies. All five robberies occurred at closing or late night; involved Mom-and-Pop-type shops; involved a taller robber who was left-handed and who brandished a silver-and-black pistol; who covered his face. Other factors appeared in three or four of the robberies: a robber who wore red under-or outer-shirt layer; and a single-strap, cross-body backpack; and white gloves; one or more shots being fired; casings recovered from a Smith & Wesson .40-caliber gun; casings matching those recovered from other charged robberies; cell-tower data linked to a phone associated with Pendergrass.

Testimony from Special Agent Winn was challenged as hearsay, as a Confrontation Clause violation, and as improper opinion testimony. Absent any objections, this claim was reviewed under the plain error standard. Most of the statements were not hearsay, as they were not admitted to prove the truth of the matter asserted. Three of the four categories of evidence involved were admitted to show “why Winn focused his investigation on Pendergrass and excluded other potential suspects during his investigation.” This included: contents of tower-dump records; “others’ statements about potential suspect Quintarious Luke;” and “the

statements of those who said surveillance video was not available.” Only one item was hearsay – “statements of Pendergrass’s girlfriend and her mother that Pendergrass lived in the basement of their home.” The same information was established through other means and it had “no reasonable probability of chang[ing] the outcome of trial.”

The related challenge under the Confrontation Clause failed because the statements at issue were not “testimonial.” This followed from the conclusion that the statements were not hearsay, as the requirement, under the Confrontation Clause, that statements be testimonial is limited to “testimonial hearsay.” Once again, there was no plain error because there was “no reasonable probability . . . that any error had a substantial effect on the jury’s verdict.”

The final challenge was to Winn’s testimony “as a summary witness to review evidence and draw inferences for the jury.” Winn was not presented as an expert witness. Thus, “no danger of confusion between factual and expert-opinion testimony existed. Winn also did not purport to have expert knowledge of the subtext of entire conversations consisting of everyday language.” He “simply reviewed the evidence presented, explaining to the jury how he linked Pendergrass to the robberies. His testimony identified the overlapping evidence between the robberies and the robbers’ overall modus operandi. And significantly, Winn’s testimony was supported by surveillance videos, still pictures, tangible evidence found at Pendergrass’s home, ballistics, cell-site data, and other witness testimony.”

#### First District Court of Appeal

[Brown v. State](#), 1D18-4888 (Apr. 23, 2021)

A 40-year term of imprisonment imposed on a defendant who was 16-years old at the time of the offense committed was not an unconstitutional life sentence as it was “not the functional equivalent of a life sentence.”

[Phillips v. State](#), 1D19-470 (Apr. 23, 2021)

Phillips appealed convictions for multiple offenses. One conviction was reversed because a violation of the right of confrontation constituted fundamental error; the other convictions were affirmed. The six convictions were all sex offenses; the victim was the defendant’s daughter.

The Confrontation Clause evidence was a video of a forensic interview of the child by a child protection service interviewer. The interviewer “testified that there were a number of observants in a room adjacent to the interview room during the interview.” One of the observants was a detective. The interviewer also “testified that she went into the observation room after her initial questioning of the victim to determine whether any of the observants wanted her to conduct follow-up questioning of the victim.” These circumstances made it “clear that Detective Leach could have directed a line of questioning during the interview if he felt it necessary . . . regardless of his lack of a real-time connection. Whether he actually did so is immaterial. . . .”

Out-of-court statements must be “testimonial” in nature in order to implicate the Confrontation Clause; they must be made for the primary purpose of establishing “past events potentially relevant to later criminal prosecution.” The above circumstances established the testimonial nature of the forensic interview. Those circumstances were corroborated by others: the nature of the interview itself, in which the interviewer stressed “the importance that only truthful statements be made.” The interviewer’s method was also similar to the detective’s description of his own interrogation method – i.e., starting out by “building a rapport” with the subject, “before moving to more focused questioning regarding allegations.”

The Court noted the “ongoing emergency” exception, under which statements are not testimonial. While the sexual abuse of a child is an emergency, the record in this case did “not support that there was such an immediate threat at the time of the victim’s interview,” and, even if the initial purpose of the interview “was treatment-oriented, its purpose of ended as an evidence gathering mission.”

The Court’s ultimate conclusion that the admission of the interview was fundamental error as to one conviction but not the others was based on an assessment of the totality of the evidence as to each of the convictions; the conviction for the one charge that was reversed was based on the conclusion that it was not supported by record evidence other than the forensic interview.

The Court rejected the argument that the sexual battery charges constituted capital felonies for which the defendant was entitled to a 12-person jury. The Florida Supreme Court previously rejected that argument because the defendant could not be sentenced to death for the offense of sexual battery on a child, even though Florida statutes continue to reference such sexual battery as a capital felony.

One judge, in a concurring opinion, noted the recent decision of the United States Supreme Court, in Ramos v. Louisiana, addressing the Sixth Amendment need for unanimous verdicts. Based on Ramos, the concurring opinion suggested that “the issue of jury size under the Sixth Amendment may be ripe for re-evaluation.”

[Miller v. State](#), 1D20-768 (Apr. 23, 2021)

The First District affirmed Miller’s revocation of probation and found that the State presented sufficient proof that Miller committed two new law offenses. Without setting forth the facts of the case, the Court cited prior decisions for the point that violations of probation may be established by a combination of hearsay and nonhearsay testimony, but a revocation may not be based solely upon hearsay.

[Taylor v. State](#), 1D18-5294 (Apr. 20, 2021)

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

In light of the Florida Supreme Court’s decision in Bush v. State, 295 So. 3d 179 (Fla. 2020), the First District did not apply the abandoned special standard of review for circumstantial evidence cases. Applying the current standard – i.e., the existence of competent, substantial evidence to support the verdict – the Court found sufficient evidence of premeditation. In a recorded interview, “Taylor stated that after shooting the victim once, the victim stated, ‘just kill me,’ at which point he shot the victim several more times. This fact alone would likely constitute competent, substantial evidence of premeditation.” Additionally, on the day of the shooting, “the victim had refused to cover Taylor’s debt to his drug dealers, which was due that day. That same day, at some point before the shooting, Taylor removed her .38 revolver from its usual location in her Jeep, unloaded it, and placed the bullets in his jacket pocket. In the moments before the shooting, Taylor and the victim were arguing and the victim repeatedly sought to jump out of the moving vehicle. During the argument, Taylor inserted a magazine into his 9-mm firearm, placed the weapon on his lap, and ultimately shot the victim six times in the abdomen at point-blank range.”

A request for a special jury instruction on the “heat of passion” defense was properly denied. The evidence “did not suggest that [Taylor] killed the victim in the heat of passion, or that he did not know what he was doing, or that he was so moved by any emotion that he killed the deceased. Instead, Taylor suggested he shot the

victim accidentally, and he shot the firearm consciously to protect himself from the victim. Taylor testified that he was ‘a little overwhelmed’ and ‘perturbed’ when the situation escalated as far as it did. He stated he fired the firearm, not out of blind, unreasonable fury or intoxicating passion, but because the victim was pointing a firearm at him and he wanted her ‘to snap out of it’ and ‘relinquish her possession of the [firearm].’” In finding that the evidence did not support the requested instruction, the Court noted that the defenses of heat of passion and self-defense are not necessarily mutually exclusive.

A motion to suppress statements was properly denied. Taylor argued his statement was involuntary due to his own intoxication. While intoxication, to the “degree of mania” or inability “to understand the meaning of the statements” is one factor for a court to consider, other factors in the record supported the finding that Taylor was not “impaired or intoxicated to the point of being unable to comprehend what he was doing.” He did not “appear hindered in his ability to communicate with coherence and rationality.” The record reflected that he was “alert, coherent, and aware of his surroundings. . . . He answered the officers’ questions responsively and with little vacillation and spoke with clarity and specificity to matters about his personal life, including the relationship with the victim. Taylor not only confessed to shooting the victim, but thoroughly explained the shooting and the events leading up to the shooting. He provided this with minimal leading questions from law enforcement. Though Taylor did manifest emotions during the interview with law enforcement, these were commensurate with the gravity of the situation.”

[Maestas v. State](#), 1D19-1767 (Apr. 20, 2021)

Maestas was a juvenile when convicted for the kidnapping and murder of the victim in 2020. He received consecutive life sentences. After [Graham v. Florida](#), the life sentence for the kidnapping was reduced to 30 years, consecutive to the life sentence. After [Miller v. Alabama](#), Maestas received a new sentencing hearing. Maestas sought judicial review at a later date as part of the resentencing.

With respect to the murder, the court concluded that Maestas would be entitled to judicial review after serving 15 years; and, as he had served 15 years between 2000 and 2015, such a sentencing review on that count was now unnecessary. On appeal, Maestas argued that the lower court erred in denying the judicial review because Maestas had already served the 15 years and had the benefit of a resentencing hearing. The First District agreed. It was an error to conflate the resentencing hearing under section 921.1401, Florida Statutes, with the distinct judicial review of a previously imposed sentence pursuant to section 921.1402.

### Third District Court of Appeal

[Penoyer v. State](#), 3D21-243 (Apr. 21, 2021)

A trial court in the Eleventh Judicial Circuit did not have jurisdiction to entertain a petition for writ of habeas corpus challenging a conviction from the Sixth Judicial Circuit. The court in the Eleventh Judicial Circuit should have dismissed the petition rather than deny it.

### Fourth District Court of Appeal

[Perry v. State](#), 4D20-278 (Apr. 21, 2021)

In a direct appeal, the Fourth District agreed that sentencing scoresheet contained errors. As the record did not “conclusively show that the trial court would have imposed the same sentence using a corrected scoresheet,” the case was reversed and remanded for the trial court “to resolve this matter at resentencing.”

[Allen v. State](#), 4D20-1553 (Apr. 21, 2021)

The Fourth District reversed a conviction for grand theft over \$20,000 for a new trial. The trial court erred in prohibiting evidence which was “relevant to the defense’s effort to establish a motive for the purported victim to fabricate her testimony against Appellant.”

The State charged the defendant with “routinely overcharge[ing] the credit card of the purported victim, who was a client at Appellant’s hair salon.” The Appellant, who was also a friend of the victim, testified that, in addition to the charges for the services at the salon, the Appellant also acquired drugs for the victim, and the drug purchases would be covered by means of charges for the salon services. The defendant was prohibited from testifying “that concealment of the purported victim’s drug purchases and use was necessary, as this drug use created friction between the purported victim and her husband and ultimately caused the purported victim’s divorce.” The excluded testimony “regarding the purported victim’s marriage and divorce was integral to Appellant’s defense strategy of explaining the purported victim’s motive to lie to her husband (and in turn to law enforcement and the jury) – to cover up her drug purchases.” The State compounded the erroneous exclusion of this evidence when the State, in closing argument, argued that the defendant “just got up here and said drugs caused the divorce of this marriage.

That’s not a fact in evidence. It’s made up. You didn’t hear that from the stand.” When the evidence in question was excluded, the defense proffered that the defendant had overheard an argument between the defendant and her then-husband regarding drug purchases and marital problems related to the defendant’s drug use.

[Scofield v. State](#), 4D20-1678 (Apr. 21, 2021)

Upon a revocation of probation, the trial court erroneously entered a duplicative judgment of conviction for the offense for which the defendant had originally been placed on probation. The court had entered the judgement of conviction when the defendant was first placed on probation, and another judgment of conviction should therefore not have been entered at the time of the revocation of probation.

Fifth District Court of Appeal

[Robinson v. State](#), 5D20-2337 (Apr. 23, 2021)

In 2015, Robinson was sentenced for the offense of trafficking in oxycodone; the sentence included a term of probation. Upon revocation of probation in 2020, Robinson was sentenced to 30 years in prison. Robinson argued that the sentence was excessive, as the court should have treated the underlying offense for which he was convicted as a third-degree felony, based on an amendment to the trafficking statute that occurred after the date of the offense, but prior to the date of probation revocation. The Fifth District disagreed.

Section 775.022(4), Florida Statute, provide that if a statutory punishment is reduced by statutory amendment, the punishment, “if not already imposed, must be imposed according to the statute as amended.” When Robinson was originally sentenced, his offense was a first-degree felony. “Because Robinson’s judgment and sentence were already imposed prior to both the amendment to section 893.135 and section 775.022, he cannot take advantage of section 775.022(4).

[Thrasher v. State](#), 5D21-279 (Apr. 23, 2021)

In a Rule 3.800(a) motion, Thrasher challenged the sentencing scoresheet calculations regarding his prior out-of-state convictions. Relief through a Rule 3.800(a) motion requires a defendant to show “an error on the face of the record.” “Here, the lower court would have had to examine the out-of-state charging document in order to have determined whether Thrasher’s out-of-state convictions

were analogous to a Florida offense,” in order to determine the proper scoring. As this would entail an evidentiary hearing, the claim was beyond the scope of a Rule 3.800(a) motion.