Case Law Update
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Supreme Court of the United States

Alaska v. Wright, 20-940 (Apr. 26, 2021)

In 2009, Wright was convicted in state court in Alaska for sexual abuse of a minor. Over seven years later, after his release, he pled guilty to the federal charge of failing to register as a sex offender. In a subsequent federal habeas corpus petition under 28 U.S.C. s. 2254, Wright challenged his Alaska state court conviction. The Supreme Court, in a per curiam opinion, held that the fact that the state court conviction served as a predicate for Wright's current federal conviction did not satisfy the "in custody" requirement of section 2254. As a result, he was no longer in custody on the state court conviction and counsel not challenge it through a federal habeas corpus petition.

Supreme Court of Florida

Martin v. State, SC18-896 (May 6, 2021)

The Florida Supreme Court affirmed the denial of a Rule 3.851 motion.

Martin argued that he was denied a fair and impartial jury as a result of one juror's failure to disclose a prior DUI conviction and a juvenile delinquency adjudication for sexual battery. The same juror also did not disclose that his grandfather was murdered by other family members when he was a child. Although the claim was not filed within the one-year time limit for a Rule 3.851 motion, neither the juvenile adjudication nor the grandfather's murder could have been discovered by trial counsel absent voluntary disclosure by either the State or the juror himself. As a result, the claim fell within the exception to the one-year time limit.

On the merits of the claim, the Supreme Court clarified language in its prior decisions. "We now clarify that, in postconviction cases raising standalone juror misconduct claims like the one here, an evidentiary hearing will sometimes be needed to determine whether a juror was intentionally dishonest, and, if so, whether the defendant can prove actual bias." Additionally, the standards for a juror misconduct claim that were set forth in De La Rosa v. Zequeira, 659 So. 2d 239 (Fla.

1995), applied only on direct appeal, not in a postconviction proceeding. In that case, the Court had held that the complaining party on appeal had to establish that the concealed information was relevant and material to jury service and that the failure to disclose was not attributable to the complaining party's lack of diligence. Rather, the "actual bias" test was applicable. The Court also rejected the application of the general test for a claim of newly discovered evidence – i.e., whether the new evidence would probably have affected the outcome of the trial.

In finding that the defendant did not establish actual bias, the Court emphasized the following. Although there was an evidentiary hearing in the trial court, no evidence showed that the nondisclosure "was motivated by partiality or a bias-in-fact against Martin. . . . Juror Smith admitted at the evidentiary hearing that he failed to disclose his criminal history and his grandfather's murder in response to relevant voir dire questions, but Smith also swore that his prior criminal history was not on his mind and did not impact in any way his ability to give Martin a fair trial. Smith further swore that his grandfather's murder did not have any impact on his decision to vote to convict Martin." The prior incidents all occurred more than 25 years earlier. As to a voir dire question regarding having spent an entire night in jail, Smith said that he did not think he had ever spent a night in jail.

Trial counsel was not ineffective for failing to seek the suppression of Martin's confession. Counsel did move to suppress the confession and argued that it was the produce of undue psychological coercion on the then 20-year old Martin. Martin argued in the Rule 3.851 motion that counsel should have presented testimony from a false confession expert, a toxicologist, a psychologist and various lay witnesses regarding Martin's psychological condition at the time of the confession. Summary denial of this claim was proper because "the unpresented testimony does not show that counsel so failed to supply the trial court with the circumstances of the confession that Martin was deprived of his right to counsel." The trial court was made aware of Martin's age and the interrogating detective's awareness of mental health and drug issues, as well as Martin's fatigue.

Nor was counsel ineffective for failing to call a false confession expert. Martin testified at trial and explained that he had falsely confessed because his drug dealer, the actual murderer, had threatened to hurt Martin's mother and girlfriend if Martin told anyone.

Trial counsel was not ineffective for failing to challenge the admission of the State's cell phone tracking evidence. A federal district court decision from Illinois, and three articles, regarding the tenuous and unreliable nature of the tracking

evidence were not binding on the trial court and were published a year after the trial and were not even available to trial counsel. Nor would the exclusion of the evidence have had a probably affect on the outcome of the trial. Martin admitted to being present during the trial when he testified, and he stated that he traveled south by car afterwards, consistent with the tracking evidence.

The failure to call several witnesses at trial was not ineffective assistance. The witnesses in question all allegedly knew Martin and "the alleged testimony only indicates that Martin was acquainted with a generally unsavory individual who lived a few miles where Jacey's body was recovered, and that this same individual saw Martin's mother in a public place and asked her how her son's case was going. Nothing about that evidence inculpates another party. . . ."

Deviney v. State, SC17-2231 (May 6, 2021)

The Supreme Court affirmed a sentence of death imposed at a second penalty-phase proceeding.

Cause challenges against two jurors were properly denied. While some of juror Sutherland's responses reflected a predisposition to imposing the death sentence for premeditated murder, subsequent questioning eliminated that as a concern. She stated that she could follow the instructions regarding the death penalty, that she would weigh the aggravating and mitigating factors, and that she understood that death was not automatic. She stated that she could vote for life, depending on the circumstances. Based on the "great discretion" that a trial court has for deciding whether a cause challenge exists, the court did not abuse its discretion in denying the cause challenge.

Juror Henderson similarly expressed a predisposition for the death sentence for premeditated murder, but subsequent questioning again sufficed to enable the court to deny a cause challenge. Henderson stated that he could follow the law and that he could impose the death sentence in "an appropriate case." He, too, understood that the sentence of death was not automatic and that he would weigh the aggravators and mitigators.

Deviney argued that the trial court erred "by failing to instruct the jury that it must determine beyond a reasonable doubt whether the aggravators were sufficient to impose death and whether those aggravators outweighed the mitigators in his case." There was no objection and there was no error, let alone fundamental error.

The Court has repeatedly held that those determinations are not subject to the beyond-a-reasonable-doubt standard.

Deviney was almost 19 years old at the time of the murder and argued, based on his age, that the sentence of death was unconstitutional. The Florida Supreme Court refused to expand the Roper decision of the United States Supreme Court to defendants older than 18.

A claim that the court improperly instructed the jury on the PVV aggravator (particularly vulnerable victim, based on age), absent objection, did not constitute error, let alone fundamental error. There was sufficient evidence to support the giving of the instruction. The victim was 65 years old, had suffered from MS for more than five years, and had resulting physical and balance problems.

As Deviney agreed to the HAC instruction being given, his argument on appeal contesting it was not properly preserved for review. Again, it, too, was supported by the evidence. There was testimony that the victim lived for up to two minutes after the fatal slash wound to the neck. Defensive wounds reflected a struggle between the defendant and the victim. Other wounds were inflicted while the victim was still alive.

One justice, in a concurring opinion, urged the Court to recede from its decision in Trotter v. State, 576 So. 2d 691 (Fla. 1990), in which the Court held that the wrongful denial of a cause challenge constitutes per se reversible error. Justice Lawson would replace the per se error rule with a harmless error test. Two other justices concurred.

Eleventh Circuit Court of Appeals

United States v. Jackson, 19-11955 (May 3, 2021)

The Court denied a motion for rehearing en banc with respect to its previous decision clarifying the meaning of section 404 of the First Step Act of 2018. In denying the motion for rehearing en banc, Judge Pryor, the author of the Court's prior panel opinion, wrote in support of the denial of rehearing in order to respond to dissenting opinions regarding the proper reading of section 404. Judge Pryor, and the Court's original panel opinion, read the application of section 404, in support of reduced sentences on crack-cocaine offenders, more restrictively than the dissenting judges.

The limits, as set forth by Judge Pryor, are that the "district court may not grant a reduction if the trafficker already received the lowest statutory penalty that would be available to him under the Fair Sentencing Act." And, "the district court is bound by a previous finding of drug quantity that [was] used to determine the [trafficker's] statutory penalty at the time of sentencing."

The dissent, authored by Judge Martin, and joined by Judge Rosenbaum, concluded that the panel decision created a limit on the First Step Act that is not found in the statutory language, and that the Court's previous Jones decision "drastically curtails the reach of the First Step Act in our Circuit and creates a troubling disparity between defendants sentenced before and after Apprendi v. New Jersey, . . ."

Foster v. United States, 19-14771 (May 5, 2021)

Foster was convicted of multiple offenses, including conspiring to use and using a firearm during a crime of violence or a drug offense. In a section 2255 motion, he argued that the only possible predicate offense for the crime of violence, Hobbs Act robbery, was not actually a crime of violence. The Eleventh Circuit affirmed. Even though conspiracy to commit Hobbs Act robbery is not a crime of violence, the district court instructed the jury that it could predicate the challenged convictions on two related drug trafficking offenses, attempt and conspiracy to possess cocaine with intent to distribute. "Given the facts and circumstances presented at trial, the jury could not have relied on the invalid Hobbs Act conspiracy predicate without also relying on the drug trafficking offenses, each of which remain valid predicates."

The Court on appeal first concluded that the government's argument, that the claim was procedurally barred, was waived, where the government did not assert it in the district court in a manner such that defense counsel could respond to it. The government referenced it in the district court only in passing, indirectly referring to an argument raised in a different case.

On the merits, the Hobbs Act conspiracy and the drug offenses were interrelated: "The jury could not have found that Foster's gun use or possession or his gun conspiracy was connected to his conspiracy to rob the stash house without also finding at the same time that they were connected to his conspiracy and attempt to possess with intent to distribute the cocaine he planned to rob from the same stash house."

United States v. Brown, 17-15470 (May 6, 2021)

A three-judge panel previously affirmed Brown's convictions. The Court granted en banc rehearing, withdrew the prior opinion, and, on rehearing, the en banc court vacated Brown's convictions.

The issue addressed was whether "a district judge abused his discretion by removing a juror who expressed, after the start of deliberations, that the Holy Spirit told him that the defendant, Corinne Brown, was not guilty on all charges. The juror also repeatedly assured the district judge that he was following the jury instructions and basing his decision on the evidence admitted at trial, and the judge found him to be sincere and credible. But the judge concluded that the juror's statements about receiving divine guidance were categorically disqualifying. Because the record establishes a substantial possibility that the juror was rendering proper jury service, the district judge abused his discretion by dismissing the juror. The removal violated Brown's right under the Sixth Amendment to a unanimous jury verdict."

The situation arose during the second day of deliberations by the jury when one juror reported to the bailiff that another juror was talking about "higher beings." Both of those jurors were colloquied regarding what was actually said and heard. Juror No. 13 was then replaced with an alternate and Brown was convicted on all charges.

A juror may be dismissed for good cause. This is subjected to "a tough legal standard," and dismissal should ensue only "when no 'substantial possibility' exists that [the juror] is basing her decision on the sufficiency of the evidence." On appeal, the reviewing court examines the record "to ensure that '*no* substantial possibility' existed that the dismissed juror was rendering proper jury service." Juror 13 "expressed a clear understanding of proper jury service." He never gave any indication that he was "refusing to consider the evidence or follow the law." He did not express a "lack of faith" in the legal system. The initial juror reported only a vague concern that Juror 13's beliefs "might later interfere" with the ability to deliberate.

"Religious beliefs may provide the basis for removal when those beliefs do not permit jurors to complete their jury service." Juror 13, however, expressly disavowed that his religious beliefs were interfering with his ability to decide the case; and, more importantly, he stated that he followed all of the court's instructions and that his religious beliefs were "going by the testimonies of people given here." "Juror 13's vernacular that the Holy Spirit 'told' him Brown was 'not guilty on all

charges' was no more disqualifying by itself than a secular juror's statement that his conscience or gut 'told' him the same."

There are multiple concurring and dissenting opinions.

United States v. Bryant, 19-14267 (May 6, 2021)

Bryant was sentenced for running drugs and guns. The Eleventh Circuit affirmed the denial of his motion for sentence reduction under 18 U.S.C. s. 3582(c)(1)(A).

The Court addressed the relationship of section 3582(c)(1)(A) and Guideline 1B1.13, which is the Sentencing Commission's policy statement. "The policy statement repeats . . . statutory language and, in its application notes, lists several circumstances that are 'extraordinary and compelling reasons' that justify a sentence reduction." The policy statutory language directing the Commission to publish such a policy statement was enacted at a time when the motions for reduction of sentence were filed by the Bureau of Prisons. The statutory language was subsequently amended to permit defendants to file motions for reduction, in addition to the BOP. As a result, some federal appellate courts held that 1B1.13 was not an "applicable policy statement" for motions filed by defendants. The Eleventh Circuit disagreed with the courts that held that the "policy statement is not an 'applicable policy statement' that binds judicial discretion as to defendant-filed motions."

After concluding that 1B1.13 was an applicable policy statement, the Court addressed "how district courts should apply that statement to motions filed under Section 3582(c)(1)(A)." The issue was whether the district court was still limited by the statutory language that permitted the granting of a motion for reduction if "the Director of the Bureau of Prisons" "determined . . . there exists in the defendant's case an extraordinary and compelling reason . . . ." The Eleventh Circuit rejected the defendant's argument that the statutory language predicated on the determination of the Director of the BOP should be replaced by language "as determined by the court." The Eleventh Circuit declined to do that. Engaging in construction of interrelated provisions of the statutes and guidelines, the Court concluded that "[t]here is no inherent incompatibility between a defendant filing a Section 3582(c)(1)(A) motion and the BOP determining which reasons outside of those explicitly delineated by the Commission are extraordinary and compelling. Because Bryant's motion does not fall within any of the reasons that 1B1.13 identifies as 'extraordinary and compelling,' the district court correctly denied his motion for a reduction of his sentence."

One judge dissented, noting that the Eleventh Circuit was the only circuit to take this position, and that the "result reinstates the exact problem the First Step Act was intended to remedy: compassionate release decisions had been left under the control of a government agency that showed no interest in properly administering it."

Broadnax v. Commissioner, Alabama Department of Corrections, 20-12600 (May 7, 2021)

The Eleventh Circuit affirmed the denial of a habeas corpus petition challenging a state court conviction. Broadnax was convicted in state court on four counts of capital murder and received a death sentence.

Broadnax argued that guilt phase counsel was ineffective for failing to investigate and present evidence that he was at a correctional facility work release center at 9:00 p.m. on the evening of the murders. Although this argument about a possible alibi seemed "persuasive at first glance, it ultimately fails because Mr. Broadnax has offered no evidence to show counsel should have investigated an alibi that contradicted the alibi Broadnax told the police and counsel in the beginning." Although Broadnax was granted a state court evidentiary hearing after asserting this claim, trial counsel were not called as witnesses and were therefore never asked about their investigation into this alibi.

While the state court record suggested that any trial-level investigation was very limited, Broadnax did "not mention" "he was at the work release center at the time of the murders," and counsel were not ineffective for failing to investigate that theory when he did not mention it.

With respect to the prejudice prong of the claim of ineffective assistance of counsel, the Eleventh Circuit noted that most of the affidavits that Broadnax relied upon in the state court proceeding were never actually admitted into evidence, and he was not arguing that the state courts erred by not considering those affidavits. Furthermore, on the basis of witness testimony, the state court was able to weigh inconsistencies in testimony and could conclude that witness testimony supported the conclusion that no one saw Broadnax at the work-release facility at 9:00 p.m.

At a state court evidentiary hearing, a doctor was prohibited from "testifying about statements from Broadnax and Broadnax's family." The doctor was testifying about intellectual disability tests he administered; the testimony in question was

excluded as hearsay. The exclusion of the evidence under the state rules of evidence did not deprive Broadnax of a fair postconviction proceeding, where he could have called the other witnesses "to testify firsthand about the information Dr. Benedict learned." The Eleventh Circuit rejected Broadnax's broad reading of two Supreme Court decisions for the proposition that reliable hearsay must be admitted where there are "substantial reasons" to assume its reliability.

Broadnax challenged comments by the prosecutor in closing argument as burden-shifting comments. The prosecutor asked the jury whether the defense attorneys were "giving me another reasonable explanation for all of this? Are they explaining this in a reasonable way? Does it make sense . . . . Look at whether they provide you with a reasonable explanation." While these comments were "perhaps improper," they "did not shift the burden of proof to Mr. Broadnax." "Rather, the prosecutor's comments 'appeared to concern the failure of the defense to counter the evidence presented by the government,' not Mr. Broadnax's failure to show evidence of his innocence."

All of the issues addressed by the Court were addressed under the highly deferential standards of review that apply when a federal habeas court reviews claims that the state court adjudicated under the merits. The state court's conclusions were neither unreasonable nor contrary to clearly established federal law.

First District Court of Appeal

Devenish v. State, 1D19-1407 (May 6, 2021)

A conviction for grand theft was reversed because the evidence was insufficient to prove that the value was $300 or more. "Although the State introduced evidence of what the owner paid for the items and photographs documenting the visual condition of the property – two wristwatches along with various electronic equipment including headphones, a video game system, a laptop computer, and a camera – there was no evidence establishing the amount of depreciation in value since the owner purchased the property."

Rizkkhalil v. State, 1D20-2161 (May 6, 2021)

The First District affirmed the summary denial of a Rule 3.850 motion which asserted claims of ineffective assistance of counsel as to convictions for grand theft in three separate cases.

Counsel was not ineffective for failing to object to the consolidation of the three separate cases. The cases involved "a pattern of similar thefts involving similar victims over a short period of time." "Rizkkhalil used various aliases to target unmarried immigrant women, lured them into a romantic relationship, enticed them into giving him money, and absconded with the funds." There was no basis for counsel to object to the consolidation. Nor could prejudice be shown. Even if the cases had been tried separately, the trial court had ruled, prior to trial, that the evidence of each offense would be admissible as Williams rule evidence for all of the cases.

Counsel was not ineffective for failing to object to alleged hearsay evidence. An investigator testified that he had a source who informed him that the defendant did not have a security clearance to work at the Port of Jacksonville. The defense was arguing that the defendant was a legitimate exporter/importer. There was no prejudice from the failure to object because there was already substantial other testimony that undermined the defense's claim that the defendant was an exporter/importer.

Counsel was not ineffective for failing to advise the defendant not to testify. The defendant voluntarily agreed not to testify. When the judge inquired if he was going to testify, there was a break during which the defendant conferred with counsel. After the break, the defendant, under oath, stated that he did not want to testify. He understood that it was his decision and he stated that he made the decision freely and voluntarily. And, the appellate court could not say "that no reasonable attorney would have discouraged Rizkkhalil from taking the stand. All three victims and a similar fact victim testified about a common pattern of deception by Rizkkhalil." Furthermore, Rizkkhalil did not assert that he would have disputed the testimony of the victims and did not show how any testimony on his part would probably have affected the outcome of the trial.

S.S. v. State, 2D19-2572 (May 7, 2021)

The evidence was insufficient to support an adjudication for criminal mischief.

A church's bicycle ministry was burglarized. S.S.'s fingerprints were found on the door, and the door had sustained damage. A surveillance video showing S.S. was suppressed, as was other incriminating evidence. As the location of the fingerprints was one that was accessible to the public, it was insufficient, without more, to establish the identity of the perpetrator of the criminal mischief.

Peruchi v. State, 2D19-3535 (May 7, 2021)

A conviction for second-degree murder was reversed. The jury instruction on the justifiable use of deadly force constituted fundamental error.

The defendant was charged with first-degree murder under alternative theories of premeditation and felony murder. The killing occurred during a meeting between the defendant and a drug dealer, following a dispute regarding money owed by Peruchi. Peruchi brought a knife to the meeting. The felony murder theory was based on an alleged robbery or the carrying of a concealed firearm, or an attempt to purchase drugs, but no independent felonies were charged. The claim of self-defense was based on prior animosity between the defendant and victim and the defendant's belief that the victim was reaching for a gun during their altercation. The State argued that the defendant was not entitled to claim self-defense because the defendant was committing a crime at the time – either attempting to purchase drugs or carrying a concealed weapon.

The forcible felony portion of the instructions stated that deadly force was not justified if the jury found that the defendant "was attempting to commit, committing, or escaping after the commission of a robbery, purchase or attempted purchase of cocaine, or unlicensed carrying of a concealed weapon." The offenses of possession of cocaine and carrying a concealed weapon do not constitute forcible felonies and therefore should not have been included in that portion of the instruction. The State was using those two offenses for the legal point that if the defendant was engaged in them, he had a duty to retreat. The instruction, as given, however, used those two offenses to establish an absolute bar to a claim of self-defense.

State v. Coleman, 2D19-4481 (May 7, 2021)

The Second District reversed a suppression order. Coleman was observed by a police officer with an open can of an alcoholic beverage, in violation of Sarasota's "open container" ordinance. Although section 901.15(1), Florida Statutes, authorizes an officer to make a warrantless arrest for a violation of a local ordinance when the violation is committed in an officer's presence, the Florida Supreme Court, in Thomas v. State, 614 So. 2d 468 (Fla. 1993), held that a full custodial arrest and search incident to that arrest violates the Fourth Amendment if the municipal ordinance in question regulates conduct that is noncriminal in nature.

The Second District therefore addressed the issue of whether the Sarasota open container ordinance was criminal in nature. Section 316.1936, Florida Statutes, prohibits open containers in motor vehicles, but did not criminalize the conduct. That, however, did not preempt the Sarasota ordinance from regulating conduct elsewhere. The Sarasota ordinance authorizes a possible penalty of 60-days imprisonment, and is therefore criminal in nature. The arrest and search incident to that arrest, during which drugs and drug paraphernalia were discovered, was therefore permissible under both section 901.15(1) and the Fourth Amendment.

Lamberson v. State, 2D20-2805 (May 7, 2021)

Appellate counsel from a prior direct appeal was found to have been ineffective and Lamberson was therefore granted a new direct appeal.

Lamberson's sentencing scoresheet showed a total of 18 points. As the total was less than 22, a prison sentence could not be imposed absent written findings that he presented a danger to the public. The judge did not make such findings, and prior appellate counsel did not pursue a 3.800(b) motion during the pendency of the direct appeal in order to have that issue preserved for review on direct appeal.

The question of whether Lamberson was actually entitled to relief, however, hinged on the question of whether the decision of Brown v. State, 260 So. 3d 147 (Fla. 2018), applied retroactively. The Supreme Court held, in Brown, that the written findings required by section 775.082(1) must be made by a jury. Lamberson would be entitled to relief only if Brown applied retroactively. As that issue has not yet been decided by either the Second District or the Florida Supreme Court, a new appeal, with representation by appellate counsel, was granted.

Third District Court of Appeal

Orfelia v. Junior, 3D21-1052 (May 7, 2021)

The Third District granted a pretrial habeas corpus petition. While released on bail with electronic monitoring for house arrest, Orfelia was returned to custody after an affidavit was filed, alleging violations of the house arrest schedule. The court revoked pretrial release and denied the request for a new bond. There was no allegation of the commission of a new criminal offense while on release. As the State did not file a motion for pretrial detention, even though the State objected to a new bond being set, Orfelia was entitled to have conditions of release determined by

the trial court. The granting of the habeas corpus petition authorized the State to file a motion for pretrial detention within three business days.

Murphy v. State, 3D20-0477 (May 5, 2021)

The Third District affirmed a conviction for sexual battery.

The trial court did not violation Murphy's right of confrontation "by prohibiting him from introducing evidence of prior sexual assault allegations by the complainant." The victim had a prior sexual relationship with a cafeteria worker at her middle school. When a law enforcement officer informed her father, he beat the victim. When she then ran away from home and subsequently returned, a further investigation into the cafeteria worker ensued, and the victim, when interrogated, "sought to deflect the focus of the inquiry by disclosing" an alleged gas station assault; the gas station in question was where the victim fled to when she left her home after her father beat her. The defense wanted to use this prior incident to "establish the victim fabricated the gas station incident in order to evade discipline at the hands of her father." It was argued that this was relevant to the theory of defense, "which was that the victim had consensual sex with [the defendant] and then manufactured rape charges to avoid possible repercussions from her boyfriend."

Under Florida's rape shield law, the prior incident could not be presented to the jury without referring to the prior sexual relationship with the school employee. The evidence was therefore inadmissible "as it constituted a specific instance of prior sexual activity between he victim and another and failed to qualify for any statutory exception." Nor was the prior incident independently admissible under Confrontation Clause analysis. The first problem was that the factual proffer did not fully support the defendant's claim of fabrication, as the victim, in the record before the court, "steadfastly maintained that the prior assault had indeed occurred. . . . Extrinsic impeachment was not adduced at the deposition or otherwise placed in the record." And, even accepting the proffer, "there was no nexus or similarity between the two reported crimes." The "two allegations involved different men and disparate circumstances, temporally separated from one another. In the former allegation, the victim accused a stranger of groping her in a public restroom. In contrast, the evidence at trial in the instant case established that an acquaintance vaginally penetrated her in a private residence. The victim was thirteen years old when she filed the initial report and nineteen at [the] time of the instant rape."

"Given these marked dissimilarities and the lack of logical connection, the only value in admitting the proffered evidence, would have been to establish that

because the victim lied previously, she was more likely to have lied in the instant case." This, in turn, would be an impermissible use of the prior incident.

Fourth District Court of Appeal

Greene v. State, 4D19-2856 (May 5, 2021)

The Fourth District affirmed convictions for false imprisonment and battery. The trial court did not err by having the defendant "appear for identification before the jury while surrounded by officers and while wearing jail clothes and restraints."

Prior to trial, the defendant had been uncooperative in the courtroom. He would not put on "trial clothes," and he would not sit down when ordered to. He was removed from the courtroom, but his presence was required for an in-court identification by a witness for the State. The defendant was asked if he wanted to change into trial clothes to avoid being seen by the jury in prison clothes and shackles; he turned away from the judge and refused to answer questions. Before the in-court identification, alternatives were considered and the court gave the defendant the option of an identification outside the presence of the jury, "if Appellant agreed to stipulate that the victim had identified him as the perpetrator." Defense counsel advised the defendant to agree, but the defendant refused to do so.

Before the in-court identification, the defendant was again given the opportunity to change out of his jail clothes. Absent cooperation by the defendant, the deputies in court were permitted to use necessary physical force to have the defendant face the witness stand. An in-court identification was first done outside the presence of the jury, with the defendant in jail uniform, handcuffs and waist chain; he still refused to cooperate. Another identification was then done in the presence of the jury.

Based on the alternatives the defendant was given, and his own lack of cooperation and refusal to communicate with the court, "any potential prejudice was a result of Appellant's own actions. As such, this is the '*extraordinary circumstance . . . where the defendant himself is responsible for the absence of civilian attire.*'"

Fifth District Court of Appeal

Jerry v. State, 5D20-1447 (May 7, 2021)

A habitual felony offender sentence was affirmed in a direct appeal. The relevant statute at Jerry's sentencing was the 1997 version of the HFO provisions. Under that version of the law, for a prior predicate felony to be counted, it "must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony." While two of Jerry's three prior felonies were simultaneous convictions, even if one of those did not qualify, he still had one of those two which did, plus the third prior felony, for a total of two lawful predicate convictions.

McNeill v. State, 5D19-1528 (May 6, 2021)

In a direct appeal, the Fifth District reversed and remanded for two separate nunc pro tunc competency determinations, if possible. At a 2018 competency hearing, counsel notified the judge that an expert found the defendant competent. The report was not filed with the court and the court did not inquire of the defendant, simply finding the defendant competent to proceed. The report was filed later that day. As the judge did not have the report before the court, the judge's conclusion could not have been based on the report, and the court therefore did not make the required "independent finding" prior to trial.

Prior to sentencing, the defense requested further evaluation, and the judge appointed another expert, who filed a report finding the defendant competent. There was nothing in the record reflecting a finding of competence by the judge.