

Case Law Update
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Supreme Court of Florida

[Bogle v. State](#), SC20-1054 (May 27, 2021)

The Florida Supreme Court affirmed the summary denial of a successive motion for postconviction relief. The motion set forth a claim of newly discovered evidence based on a 2017 letter from the United States Senate Judiciary Committee requesting information from the FBI regarding trial testimony from an FBI forensic expert regarding hair analysis. On the basis of this, Bogle claimed Brady and Giglio violations. “The 2017 letter referenced two internal FBI memoranda from 1991 and a third memorandum from 1997, but overall the 2017 letter contained the same claims about Malone’s testimony that were the subject of Bogle’s previous postconviction motion regarding [a] 2013 letter.” The Supreme Court agreed with the trial court’s conclusion “that the information surrounding the reliability of Malone’s testimony has already been ‘litigated, denied, and affirmed on appeal.’” “Because Bogle fails to allege new or different grounds for relief, his claim is procedurally barred as successive. . . .” Alternatively, the alleged newly discovered evidence was not “of such a nature that it would likely produce an acquittal on retrial. First, the hair evidence was not the only evidence supporting a conviction in the present case.” “Moreover, ‘Bogle’s DNA profile was the sole match to the semen found on the vaginal swabs [from the victim]. . . .’” “Finally, mitochondrial DNA testing conducted after the trial has now confirmed that the pubic hair found on Bogle’s pants was consistent with the victim’s profile.”

Eleventh Circuit Court of Appeals

[United States v. Estepa](#), 19-12272 (May 25, 2021)

The Eleventh Circuit affirmed convictions and sentences for conspiracy to commit wire fraud and wire fraud.

The two defendants challenged the sufficiency of the evidence as to both offenses. “First, they assert that there was insufficient evidence of a scheme to defraud because the County did not suffer a financial loss. Second, the Estepas contend that the government presented insufficient evidence of the requisite *mens rea* for the crimes for which they were convicted.” Sufficient evidence existed to

show that “(1) the Estepas engaged in a scheme to defraud by intentionally making material misrepresentations to the County that it intended to comply with the Davis-Bacon requirements and to not use the subcontractors on the RPQ’s [Requests for Price Quotes] in order to receive federal funds associated with the RPQs from the County; and (2) the Estepas knowingly and voluntarily agreed to commit the scheme to defraud and pursued overt acts in furtherance of that agreement.”

The defendants were brothers, and one owned a contracting business which worked for Miami-Dade County “to perform repair work in public housing units that were partially funded by the federal government.” The company won bids on three RPQs, and received almost \$4,000,000 over a 2 ½ year period. Projects involving more than \$2,000 in federal funds must comply with the David-Bacon act, “which requires contractors and subcontractors to pay mechanics and laborers the prevailing local wage for their work, as determined by the United States Secretary of Labor.” Key evidence to support the convictions was detailed by the Eleventh Circuit:

. . . When the Estepas bid on those three RPQs, they knowingly and materially misrepresented their intent to pay wages required by the Act, as well as their intention to use subcontractors on the paperwork they submitted. Despite the Estepas representations that Aaron Construction would not use subcontractors, federal agents found a large number of subcontractor agreements at the Aaron construction office during their execution of the search warrant. Additionally, after winning the bids from the County and performing work, the Estepas submitted payment packets to the County, in which the Estepas again represented that Aaron Construction was not using subcontractors. The payment packets included false certified payroll documents, which listed employees who either did not work on the specified jobs or were mislabeled as Aaron Construction employees when they were in fact subcontractors. Indeed, Guzman, who was listed on several of Aaron Construction’s payroll documents, had never worked for Aaron Construction and was in fact out of the country during several of the pay periods at issue. Rather, Sandoval, using Guzman’s personal information, was performing subcontracting work for Aaron Construction, and Sandoval testified that the Estepas were aware of this arrangement. And several

of the individuals who did subcontracting work for Aaron Construction and were listed as “employees” – e.g., Jimenez, Segura, and Blanco – testified at trial that they were *not* employees of Aaron Construction and had never seen the payroll documents that listed them as such.

The Estepas argued that the evidence was insufficient because the “County did not suffer a financial loss from their conduct” – that the County got what it bargained for – “high-quality, low-cost work.” Thus, the Estepas argued that misrepresentations regarding the use of subcontractors were not “material.” The Eleventh Circuit rejected a comparable argument in an earlier decision, which found that “financial loss is not at the core of these mail and wire frauds.” Rather, the penal statutes “also seek to punish the intent to obtain money or property from a victim by means of fraud and deceit.” “Under federal law, the County could not have lawfully granted Aaron Construction the contracts at issue had the Estepas not certified that they would comply with the Act.” Aaron Construction therefore received “money that it otherwise would not have.” Moreover, the “misrepresentations were not isolated mistakes based on their misunderstanding of the paperwork associated with the RPQs. Rather, the Estepas engaged in a pervasive pattern of deceit before, during, and after bidding on the three RPQs enumerated in the indictment.”

[United States v. Cook](#), 20-13293 (May 27, 2021)

The Eleventh Circuit reversed the denial of a motion for “compassionate release” because the district court “abused its discretion by failing to explain its reasoning and consider certain statutory factors.”

The motion was filed under 19 U.S.C. s. 3582(c)(1)(A)(i) and it alleged that Cook suffered from hypertension, latent tuberculosis, and obesity, and that those “conditions create a high risk he will fall seriously ill or die should he contract COVID-19. . . .” The order denying the motion stated only that “the defendant’s age (47 years) and ailments (hypertension, obesity, and Latent Tuberculosis) are not extraordinary and compelling circumstances for a reduction to ‘time served.’”

Section 3582(c)(1)(A)(i) permits a reduction of sentence after considering the factors set forth in section 3553(a). Those factors include: the nature of the offense; criminal history of the defendant; the need for the sentence imposed; the kinds of sentences available; the sentencing range under the Sentencing Guidelines; avoidance of unwarranted disparities among defendant with similar records who have been found guilty of similar conduct; and other factors.

[United States v. Roberson](#), 18-14654 (May 27, 2021)

Roberson and a codefendant, Gilbert, appealed convictions for charges including bribery under 18 U.S.C. s. 666(a)(2). The Eleventh Circuit affirmed. The case involved “concealed payments of hundreds of thousands of dollars to an Alabama Representative through his charitable foundation in exchange for ‘advocacy’ and ‘community outreach’ intended to undermine the Environmental Protection Agency’s (‘EPA’) efforts to clean up a Superfund site.”

The defendants argued that 18 U.S.C. s. 666(a)(2) requires that acts be taken “as an agent of Alabama in connection with ‘business’ of the State.” The defendants argued that the actions taken by Alabama Representative Robinson “to promote Drummond’s position on the EPA issue do not constitute ‘official acts,’” and that the evidence was therefore insufficient. The phrase “official act” is not included in section 666 and the Court refused to read such a requirement into the statute, even though the term appeared in a different bribery statute, 18 U.S.C. s. 201.

The statute does require that a person act with corrupt intent. Although Gilbert testified that he did not enter into a contract with Representative Robinson corruptly, the jury heard evidence from which it could infer such corrupt intent, and this was an issue of credibility, where the jury was “free to disbelieve Gilbert’s testimony.” The timing of payments, and the rush to issue a check just days before a significant meeting when a contract was signed, permitted the inference “that Appellants’ intention was not primarily to enlist the Representative’s community outreach services, but that he was engaged for his ability to use his position to influence other decisionmakers.” Payments were structured to go through a law firm, thus hiding the relationship of key parties. Secret meetings and nondisclosures of payments, and the withholding of information from the EPA, all supported “the inference that the payments were made with a corrupt state of mind.”

Section 666(a)(2) required that the person being bribed be an agent of the government. The defendants argued that Representative Robinson “was only an agent of the Alabama Legislature and not the State as a whole.” The Eleventh Circuit joined the First and Third Circuits in rejecting this argument.

The jury also had to find that the defendants intended Representative Robinson to act “in connection with any business, transaction, or series of transactions” of the Alabama government. The charged incidents included, inter alia, the expansion of a Superfund site and the proposed addition of that site to the

National Priorities List, “which would allow access to additional federal funds for the cleanup.” The jury could conclude from the evidence that “Representative Robinson went to the EPA . . . meetings with the intention of influencing these decisions.” The Court also looked at email correspondence from Gilbert referencing how he could influence the Alabama Department of Environmental Management’s “position.” “Whether Representative Robinson impacted the ultimate decisions” of government agencies was “immaterial.” It was enough that the defendants “intended” that he act “in connection with any business” of the State of Alabama.

Consistent with the Court’s conclusion that an “official act” was not an element of section 666, the district court was found not to have erred by failing to instruct the jury on a requirement of an official act. The defendants also wanted language instructing the jury that “expressing support” for, or opposition to, policies or various actions was not sufficient proof of guilt under the statute, “without more.” The Court concluded that the instruction, as given, was sufficient, without that language.

Roberson argued that his trial should have been severed from Gilbert’s and that the failure to sever rendered him “unable to properly present a reliance of the advice-of-counsel defense.” Gilbert, the codefendant, was an attorney. Evidence of a conversation between Roberson and an FBI agent, in which Roberson referenced a conversation with Gilbert about ethics considerations had been excluded from the joint trial. The Court disagreed with Roberson’s argument because “Gilbert and others testified consistently with Roberson’s advice-of-counsel defense.” The exclusion of a redacted portion of the statement was not consequential because of other evidence presented, and it was essentially cumulative. The statement in question was also deemed to have little probative value because of its self-serving nature, having been made “after the conduct at issue took place,” and it did not “clearly demonstrate that Roberson asked about the legality of his actions before the conduct had occurred.”

[United States v. Cody](#), 19-11915 (May 28, 2021)

Cody obtained relief through a motion under 28 U.S.C. s. 2255, but appealed “the decision to correct only the illegal sentence instead of performing a full resentencing.” The Eleventh Circuit held “that a certificate of appealability is required to challenge the choice of remedy under section 2255.” Absent a COA, the government’s motion to dismiss was granted for lack of jurisdiction.

Cody had filed the section 2255 motion, arguing that his predicate state court conviction was not a valid predicate under the Armed Career Criminal Act. While the district court agreed, rather than vacate the criminal judgment for the felon-in-possession charge, the district court only removed the ACCA enhancement. The district court's "choice between correcting a sentence and performing a full resentencing [was] a part of the proceeding under" section 2255. As such, a COA was required to challenge the district court's decision regarding the remedy.

First District Court of Appeal

[Holton v. State](#), 1D19-2808, et al. (May 24, 2021)

In an appeal from a revocation of probation, the First District dismissed the appeal with respect to the denial of a motion for a downward departure, as the Court lacked jurisdiction for that part of the appeal, and affirmed the probation revocation, finding that all other issues raised on appeal were not preserved for appellate review.

The issues that were not preserved for review included the arguments that 1) the "trial court erred by failing to make written findings to explain why [defendant] posed a danger to the community under the violent felony offender of special concern statute;" 2) the failure of the trial court "to enter a written order of revocation of probation in one of his cases;" and 3) the orders revocation probation erroneously stated that Holton admitted to the violation.

The erroneous reference to the admission of violation of probation was only a scrivener's error, as the trial court had made an oral finding, at the conclusion of the evidentiary hearing, that Holton had violated probation on the basis of the evidence. As to the failure to enter a written order in one of the cases, the First District concluded that the claim could have and should have been raised in a rule 3.800(b) motion pending the appeal from the probation revocation.

Second District Court of Appeal

[Howard v. State](#), 2D20-2179 (May 28, 2021)

The summary denial of a Rule 3.850 motion was affirmed in part and reversed in part. Two claims were found to be facially insufficient, but the trial court failed to grant the defendant leave to amend those claims.

The trial court’s order erroneously stated that it “had provided Howard with the opportunity to amend his facially insufficient claims.”

Howard had filed a motion for leave to amend his motion. The trial court delayed ruling on that motion, and then issued simultaneous orders granting the requested extension for the amended motion and directing the State to respond to the original motion. At no time until the entry of the final order in the case did the defendant ever become aware that the claims were deemed insufficient.

[Howard v. State](#), 2D19-3299 (May 26, 2021) (en banc)

In the 1980’s, Howard was sentenced to life with parole eligibility after 25 years for a murder committed while he was a juvenile. In a prior appeal, the case was remanded to the trial court for resentencing on the basis of then-existing decisions of the Florida Supreme Court. On remand, the trial court reversed the sentence and ordered a new sentencing hearing. The Florida Supreme Court then issued its opinions in Franklin v. State and State v. Michel, receding from its prior decisions regarding juvenile sentences of life with parole eligibility after 25 years. As a result, the trial court granted the State’s motion to deny resentencing. Howard appealed, and argued that the trial court failed to comply with the Second District’s prior mandate for a new sentencing hearing.

The Second District held that once its final judgment and mandate remanding the case to the trial court for resentencing was issued and final, the trial court was obligated to comply with it, notwithstanding the Florida Supreme Court’s changes in decisional law regarding juvenile life sentences. In so holding, the Court receded from its prior decision in Marshall v. State, 44 Fla. L. Weekly D2561 (Fla. 2d DCA Oct. 18, 2019)

The Court noted, however, that Howard “‘may have won a pyrrhic victory because ‘the decisional law effective at the time of the resentencing applies.’ Hence, upon resentencing, Mr. [Howard] may yet receive the same sentence.’”

Fourth District Court of Appeal

[Raines v. State](#), 4D19-3089 (May 26, 2021)

The imposition of a sentence of 30 years and one day in prison for the offense of carrying a concealed weapon by a convicted felon, as an habitual felony offender,

exceeded the statutory maximum. “The maximum penalty for a second-degree felon as a HFO cannot exceed thirty years.”

[Jones v. State](#), 4D19-3691 (May 26, 2021)

The Fourth District affirmed a conviction for first-degree murder.

The trial court did not abuse its discretion in admitting statements of the victim to her friends as excited utterances. About six weeks prior to the murder, the victim had told friends that the defendant had choked and threatened her. Some of the statements were overheard during a loud argument between the victim and defendant, which a neighbor overheard, and the neighbor then called 911. Police arrived to investigate the disturbance and the victim left the residence with the officers; she asked them not to go anywhere while she gathered her things. A friend of the victim received a call from the victim shortly before the officers arrived to investigate, and the victim was crying hysterically at the time. The victim arrived at the bar where the friend worked shortly afterwards and had swollen eyes, a red face, and a runny nose; the victim as hyperventilating. She related that the defendant had choked her. The statements were found to have been made during a “startling event or condition.” This included the “victim’s physical altercation with appellant, where she was strangled, but her interaction with the police in the intimidating presence of appellant, a collective situation that would cause ‘stress of excitement.’ The victim’s statements at the bar were made within 30 to 40 minutes of the police arriving at appellant’s home to investigate the domestic disturbance and while the victim was in her pajamas, crying hysterically, and hyperventilating.”

There “was evidence that the victim’s statements at the bar were made without time for reflective thought or, alternatively, that the victim did not in fact engage in a reflective thought process before making those statements.” The victim’s initial denials of domestic violence were made while still at the defendant’s home, after the defendant told her to be quiet and that he would “handle the cops.” This implied that those statements were a “product of intimidation or fear of retaliation, rather than a reflective thought process.” The victim further suggested that something was wrong by begging the officers to stay “while she gathered her things to leave.” After getting away from the defendant, “the victim became increasingly upset due tot eh stress of the fight with appellant.”

The trial court did not abuse its discretion in admitting the evidence of the prior incident of domestic violence. “Evidence of a volatile relationship between

the defendant and the victim – including evidence of prior incidents of domestic violence – is relevant to the issues of motive, intent, and premeditation.”

The evidence was sufficient to prove premeditation for first-degree murder. “The evidence in this case showed that: (1) appellant and the victim had a volatile romantic relationship (2) two months before the murder, appellant strangled the victim and threatened to kill her; (3) the victim died of manual strangulation and had defensive wounds consistent with a struggle; and (4) the strangulation would have taken four to six minutes to kill the victim. In short, the evidence in this case demonstrated a murder by strangulation with signs of a struggle, coupled with a prior domestic violence incident in which appellant threatened to kill the victim.”

[Bartolone v. State](#), 4D19-3920 (May 26, 2021)

The Fourth District affirmed a conviction for possession with intent to sell, manufacture, or deliver THC and more than 20 grams of cannabis; the Court reversed orders regarding unrequested investigative costs, costs of prosecution, discretionary court costs, and fees for the Drug Abuse Trust Fund.

With respect to the sufficiency of the evidence as to possession, the defendant argued that “there was no evidence that he knew of and intentionally exercised control over the narcotics,” and that “he could not enter the residence where the drugs were found on his own, and he did not have sole possession of the house.” The Fourth District disagreed: “Here, the State introduced evidence that while surveilling the property over the course of months, officers observed Appellant outside the property multiple times. They discovered Appellant’s fingerprints on various items throughout the house – namely, a box of paraphernalia, a grinder used to grind cannabis into smaller pieces, five separate THC vape cartridges, and a trash bag containing vacuum sealed baggies of cannabis residue. Appellant also possessed a key to the residence.”

Investigative costs may be imposed only if requested by the State. Prosecution costs in excess of \$200 may be assessed only upon evidentiary proof from the State, and that was not done. The State was not entitled to “another opportunity” to present such proof on remand. Court costs in excess of \$100 could be assessed only with appropriate factual findings by the court, which findings had not been made. The Drug Trust Fund assessment required a finding of the ability of the defendant to pay.

[State v. Tavenese](#), 4D21-57 (May 26, 2021)

The Fourth District granted the State’s certiorari petition. The trial court had denied the State’s “motion for authorization to execute a subpoena to obtain emergency room records and toxicology reports.”

The defendant was charged with DUI, causing property damage or injury. At the scene of the accident, he admitted to having consumed alcohol earlier in the evening and exhibited signs of intoxication. He also sustained a head injury and was transported to a hospital. At the hospital, he consented to a blood draw, and the test showed a BAC level of 0.16. The State sought the medical records including toxicology reports, admissions as to consumption of alcohol or controlled substances, and records with descriptions of his physical appearance or impaired “physical/mental state.”

The State “met its burden of showing a compelling State interest by demonstrating a reasonable founded suspicion that the medical records contained information relevant to the ongoing criminal investigation.” The trial court, in ruling on the subpoena for medical records, may rely on both the State’s argument and the accident report or probable cause affidavit. The probable cause affidavit in this case included the admission to earlier consumption of alcohol, plus observed signs of intoxication, and the defendant’s need for assistance to walk to the ambulance, “coupled with the fact that he collided with another car before crashing into a concrete pole.” The “relevancy of the records [was] obvious.”

Fifth District Court of Appeal

[Marquez-Gonzalez v. State](#), 5D19-3427 (May 28, 2021)

The defendant’s convictions were affirmed on appeal, but the sentence was reversed for a new hearing. There were six convictions, including second-degree murder, four counts of attempted second-degree murder, and shooting into a building.

The trial court read the 10-20-Life statute, section 775.087(2)(d) “to require that Appellant be sentenced to serve his prison terms consecutively rather than concurrently.” The trial court granted the defendant’s motion to correct this in a Rule 3.800(b) motion, but the trial court granted this order more than 60 days after the motion to correct sentence was filed. The trial court’s order correcting the sentence was therefore entered in an untimely manner and was void.

On appeal, the Fifth District, upon the State's concession, agreed that resentencing was required on five counts because those "charges arose from Appellant's contemporaneous acts at the bar." The trial court erroneously believed that the consecutive mandatory minimum sentences were required rather than permissible.