Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Tinker, 20-14474 (Sept. 28, 2021)

The Eleventh Circuit affirmed the denial of a motion for compassionate release under 18 U.S.C. s. 3582(c)(1)(A). The motion alleged that Tinker had an increased risk of serious illness in the event he contracted Covid-19 as a result of obesity, hypertension, mental illness and a congenitally narrowed spinal canal.

Section 3582(c)(1)(A) permits a reduction of sentence if the court considers relevant factors and finds "extraordinary and compelling reasons warrant such a reduction" and that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

The Eleventh Circuit first held, based on statutory construction, that the district court did not err by assuming that extraordinary and compelling reasons existed on the basis of the alleged medical conditions. The district court need not address the two prongs of the statute in any particular order.

In weighing the relevant factors, the district court emphasized Tinker's "extensive criminal history and the need to protect the public," and this was within the court's discretion.

Somers v. United States, 19-11484 (Sept. 28, 2021) (on rehearing)

In the Court's original opinion in 2020, it affirmed the denial of a motion to vacate under 28 U.S.C. s. 2255, and held that an aggravated assault conviction under Fla. Stat. s. 784.021, qualified as a violent felony under the Armed Career Criminal Act's elements clause. The rehearing opinion revisited this issue in light of the Supreme Court's subsequent opinion in Borden v. United States, 141 S.Ct. 1817 (2021).

On rehearing, the Eleventh Circuit vacated its prior opinion and certified two questions to the Supreme Court of Florida. The Borden decision held that the statutory phrase "use . . . against the person of another" "sets out a mens rea

requirement – of purposeful or knowing conduct." The question therefore became whether Florida's aggravated assault statute required such a mens rea of "specific intent to use, attempt to sue, or threaten to use physical force against the person of another." The Eleventh Circuit concluded that the Florida Supreme Court had not yet decided that issue or anything comparable. The Eleventh Circuit noted conflicting opinions of Florida district courts of appeal.

As a result of the split of authorities among Florida appellate courts and the absence of a dispositive opinion by the Florida Supreme Court, the Eleventh Circuit certified the following two questions to the Florida Supreme Court:

> 1.Does the first element of assault as defined in Fla. Stat. s. 784.011(1) – "an intentional, unlawful threat by word or act to do violence to the person of another" – require specific intent?
>
> 2. If not, what is the mens rea required to prove the element of the statute?

The Florida Supreme Court has set up a briefing schedule on the certified questions in case no. SC21-1407.

United States v. Perry, 16-11358 (Sept. 29, 2021)

The Eleventh Circuit affirmed convictions for multiple drug offenses for both Perry and a codefendant, Ragin. The offenses arose out of a large-scale drug distribution operation and issues on appeal revolved around the admission of intercepted phone calls in which conspirators used coded language to refer to drugs – "coke jewel," "powder," and something "for the nose."

The Court first concluded that a federal agent, Lee, qualified as an expert for interpreting drug codes and jargon. He had worked in law enforcement for 19 years and was involved in thousands of narcotics investigations, many of which included wiretaps, and he had reviewed thousands of recorded conversations.

Lee's testimony did not invade the province of the jury by going beyond his expert knowledge. "[D]eciphering of coded language is helpful to the jury and therefore permissible." "Throughout his testimony, agent Lee offered an opinion on a variety of terms that were code words for drugs, including 'lulu,' 'teenager,' 'best girl in town,' 'biscuit head,' 'something for the nose,' 'gator,' 'zip,' and 'zone.' He

also testified about the meaning of terms that referred to the quantity of drugs and their price, such as 'subs,' 'a G,' 'a little two-dollar lick,' 'a cookie,' and a 'ticket,' as well as terms that referred to a drug's quality, such as 'loud,' 'French fries,' and 'straight,' and even terms related to drug sales, such as 'coke jewel.' This testimony was well within the scope of his expertise and was properly admitted."

There were some occasions where the agent "crossed the line from interpreting coded drug language to opining about plain language, speculating, summarizing the evidence of telling the jury what inferences to draw from the conversations," for example, when he "erroneously translated what 'real crazy' and 'making no money' meant, offering opinions and summarizing the evidence in the case, instead of allowing the jury to interpret these plain-English phrases on its own." Absent a proper objection to this, however, this issue was reviewed for plain error and the Court concluded that any testimony that crossed that line did not affect the defendant's substantial rights. One hundred calls, which formed the heart of the prosecution, were all there for the jury to consider and the jury could readily "infer from these conversations that Perry was engaged in one or more illicit drug transactions." Many of the calls were also tied to "extrinsic evidence seized during three separate drug transactions." The jury was also able to consider Perry's "earlier involvement in a multi-year drug distribution scheme."

Perry challenged the admission of some recorded statements as hearsay. In one, another individual, who did not testify at trial, Young, told Perry that "he's having problems washing his dogs." Perry's own statements were admissible as admissions; those of Young were admissible to enable the jury "to fully understand Perry's statements." And, "'an out-of-court statement admitted to show its effect on the hearer is not hearsay.'"

Challenges to 50 other such comments were not preserved for review. The objection and ruling as to the first such comment did not suffice to preserve issues related to subsequent conversations. "Perry was required to raise specific objections to specific questions and specific answers as they were offered." When review for plain error, the Court concluded that such pain error did not exist.

Perry's not guilty plea in this drug conspiracy case opened the door to admission of prior drug-related offenses as evidence of intent. The Court rejected Perry's argument that the instant case was different because of the quantity of drugs involved and the length of time. In addition to the evidence being relevant, the district court gave repeated limiting instructions "about the proper way to consider 404(b) evidence, which further reduced the risk of undue prejudice."

Codefendant Ragin argued that his sentence should have received a sua sponte downward adjustment because he was merely a courier. The Court disagreed. The district court "excluded from consideration any cocaine delivered by the other conspirators. Although Ragin points to the broader criminal scheme between Perry and Ross and the others, that alone is insufficient to justify a downward adjustment when the district court determined his sentence by zeroing in on his actual conduct alone. Nor is it clear that Ragin was 'less culpable' that the average participant in this conspiracy, given his role as a courier of drugs and money for Perry and Ross."

First District Court of Appeal

Trappman v. State, 1D19-1883 (Sept. 29, 2021)

On motion for rehearing and certification of conflict, the First District certified conflict with Olivard v. State, 831 So. 2d 823 (Fla. 4th DCA 2002). In the original opinion, the First District held that two acts, shoving and instigating a dog attack, "were upon the same victim, occurred at the same location, and occurred over the course of approximately one minute." As a result, "the two acts were part of a single criminal episode." However, the two acts were deemed distinct acts and dual convictions for aggravated battery and simple battery were upheld in the face of a double jeopardy challenge. Olivard had barred dual convictions for aggravated battery and simple battery where the two acts occurred in the same location, within seconds of one another, against a single victim, within one continuous episode.

Garcia v. State, 1D19-4005 (Sept. 29, 2021)

The First District affirmed convictions for first-degree murder and conspiracy to commit murder.

Garcia's attorney was informed by counsel for the codefendant, about two weeks prior to the trial, that the State's expert had changed an opinion about the height of the shooter after reviewing additional documentation, subsequent to his deposition. The prosecutor advised the expert to notify Garcia's defense counsel. Defense counsel did not raise any issue about this prior to the trial, and waited until the expert, the State's seventh witness at trial, testified. The prosecutor stated that she was unaware that the expert did not notify Garcia about the change of the opinion. After a Richardson hearing, the trial court refused to exclude the new opinion. On appeal, the First District held that defense counsel did not bring the discovery violation to the trial court's attention in a timely manner.

A challenge to the court's response to a question from the jury was not preserved for review. During deliberations, the jury submitted the following question, which the court deemed confusing: "According to the law [a]re there any exceptions/exemptions to an individual being a principal to a criminal act → Re: Instructions Instructions page 5: Principals, ¶ 1 'commit a crime' → ¶ 1 → that the criminal act be done ie – Principal to Any act?" After the judge proposed instructing the jury that a full definition of principals had been given, that there were no exceptions/exemptions, and that the court was not clear about the rest of the question and wanted clarification, defense counsel stated that the court should just answer the question in the negative. Counsel then agreed with the court seeking clarification, stating, "Let's clarify," and "That's fine, Judge." There was never any objection to the court's proposed response.

Lauwerreins v. State, 1D20-239 (Sept. 29, 2021)

The First District affirmed convictions for second-degree murder and shooting deadly missiles.

Appellant shot his father. Afterwards, he texted two friends and called his grandparents. His mother returned home and learned of the shooting and testified that Appellant called 911 after she told him to call the police. On cross-examination, defense counsel sought to elicit that the victim/father taught the family never to call the police. The court sustained the State's hearsay objection.

On appeal, the First District held that the alleged effect of the victim's purported "no police" policy on Appellant's actions was speculative and outside the scope of the mother's testimony on direct examination. "Appellant could not use cross-examination as a vehicle for presenting defensive evidence."

The defendant testified and presented the same testimony at that time. At that time, the defendant "might have had grounds to call his mother as a defense witness to corroborate his testimony regarding the victim's policy never to call the police." Although he did call his mother to testify as a defense witness, he did not attempt to elicit this corroborative testimony from her. In view of the foregoing, the limit on cross-examination during the State's case was not an abuse of discretion.

Alternatively, any error was harmless. Appellant argued that the testimony from the mother would have been more persuasive than his own, as it would come from a disinterested witness. First District rejected the characterization of the

mother as a disinterested witness. And, the mother's testimony would have lost credibility in light of her instruction that the Appellant call 911.

Washington v. State, 1D20-762 (Sept. 29, 2021)

The First District affirmed a conviction for sexual battery on a victim between the ages of 12 and 18, but reversed the sentence.

The original information alleged that the offense occurred between January 1, 2012 and December 31, 2014. The day prior to the trial, the State amended the information to allege that the offense occurred between January 1, 2011 and August 15, 2014. The victim turned 12 on August 16, 2014. At trial, the State did not establish the exact date of the offense. The victim testified that it occurred while she was in the sixth grade, but could not say whether she was 11 or 12 years old at the time. The jury was instructed on capital sexual battery and sexual battery on a victim between 12 and 18 as a lesser included offense.

The trial court erred in treating the offense as a first-degree felony for sentencing purposes, as a result of a statutory amendment which became effective in 2014, as the retroactive application of the statutory amendment constituted an ex post facto violation.

Washington challenged the instruction on the lesser included offense. Absent objection in the trial court, the issue was reviewed for fundamental error. An erroneous instruction on a lesser included offense is not necessarily fundamental. A conviction under an erroneous lesser included offense is not fundamental if the offense is lesser in degree and penalty than the charged offense or defense counsel requested the improper instruction or relied on the lesser offense in argument to the jury or through other affirmative action. The instruction in this case was lesser in both degree and penalty. The First District rejected Washington's argument that the foregoing fundamental error analysis was inapplicable because the offense based on a victim being between 12 and 18 could never be a lesser included offense of capital sexual battery, the charged offense. The fundamental error analysis noted above does not make any distinction "between erroneously instructed lesser included offenses that could *never* be classified as permissive or necessary lesser included offenses and those that *could*."

Farrior v. State, 1D20-2195 (Sept. 29, 2021)

When a convicted offender files a habeas corpus petition that would otherwise be an untimely or procedurally barred Rule 3.850 motion, the trial court may dismiss it, rather than transfer it, to the court which imposed the conviction and sentence.

Griner v. Inch, 1D20-2432 (Sept. 29, 2021)

To the same effect as Farrior, "a circuit court lacks jurisdiction to review the legality of a conviction entered in another judicial circuit."

Hanks v. State, 1D20-2527 (Sept. 29, 2021)

The First District affirmed the denial of a Rule 3.800(a) motion to correct illegal sentence. Hanks argued that he was a juvenile at the time of the commission of the offenses and was entitled to resentencing under Miller v. Alabama and Atwell v. State.

In a post-conviction proceeding in 2017, the State conceded that Hanks was entitled to a resentencing as to both a murder conviction and an armed robbery conviction. Prior to resentencing, in 2018, the Florida Supreme Court receded from Atwell and held that "juvenile offenders with sentences of life with the possibility of parole after twenty-five years had no right to resentencing and that such sentences did not violate *Miller* or *Graham*." As a result, the Rule 3.800 motion was denied. The State then moved for the trial court to rescind its order for resentencing, which the trial court denied. The State appealed, but the appeal was dismissed. The First District, in a subsequent decision, Rogers v. State, receded from its own earlier decisions and held that "an order granting resentencing under rule 3.800(a) is **not** a final, appealable order." As a result, the trial court retained "inherent authority to reconsider a ruling on a rule 3.800(a) motion any time before it has resentenced the defendant." After Rogers, the State again moved to rescind the order granting a resentencing, which resentencing had not yet transpired. The trial court granted the motion and the First District affirmed the trial court's order.

The sole issue addressed in this latest appeal was whether the trial court could reconsider its earlier ruling on the 3.800(a) motion after the mandate from the 2018-19 appeal, which had been dismissed. The First District held that the law of the case doctrine applies only to questions that were actually decided on appeal. The prior appeal had been dismissed because the order in question was not an appealable order

and the First District "never addressed whether the trial court erred when it" granted the resentencing or whether resentencing was, in fact, required.

Berg v. State, 1D20-2965 (Sept. 29, 2021)

The First District affirmed the revocation of probation but ordered the striking of one technical violation from the revocation order.

One of the grounds for the revocation was for changing residence without the consent of the probation officer. At the revocation hearing, the officer testified that she went to the listed residence and was told by Berg's father than Berg was not at the house and did not know his whereabouts; that there was a trespass injunction against him; and that he was not allowed to come back. A probation revocation may not be based solely on hearsay. Although there was also testimony that the officer subsequently spoke to Berg, the officer "did not testify that Appellant admitted changing his residence."

Tuten v. State, 1D20-3671 (Sept. 29, 2021)

The First District affirmed the denial of a Rule 3.850 motion and addressed several claims. An evidentiary hearing had been held on some of the claims. Tuten was convicted of multiple sex offenses.

At the evidentiary hearing, counsel testified that he spoke to the defendant about the decision of whether to testify and that the defendant agreed with the recommendation. Based on the testimony at the evidentiary hearing, the First District concluded that Tuten was not entitled to relief because he agreed with the decision and because there were strategic reasons to support counsel's decision.

The failure of counsel to impeach a victim with cellphone records was not prejudicial as another victim presented testimony as to the same sexual encounter. Based on that, and a partial confession from the defendant, and incriminating statements in letters written by the defendant, the defendant failed to establish a probability that the outcome of the trial would have been different had counsel used the cellphone records for impeachment.

Trial counsel was not ineffective for failing to object to comments by the prosecutor in closing argument. In one statement, the prosecutor asserted that a victim's version of events was more accurate. The "prosecutor was clearly attempting to address any inconsistency between he testimony of W.F. and A.F. and

to provide an explanation of why his version of events was likely more accurate." Challenges to statements that the defendant molested his children and was guilty of the charged offenses were not objectionable because they were based on the evidence, and were "not merely the prosecutor's opinion."

Liffick v. State, 1D20-3791 (Sept. 29, 2021)

The summary denial of a Rule 3.850 motion was affirmed. Two claims that were not asserted in the trial court motion could not be asserted on appeal.

The failure of counsel to seek suppression of the defendant's statements based on the failure to administer Miranda warnings was without merit because the defendant was not subjected to custodial interrogation at the time of the statement and was not entitled to Miranda warnings. Officers overheard the defendant's statement to his mother. This occurred in the jail and there were also signs regarding audio and video surveillance at the jail.

The failure of counsel to object to the mother's testimony that the defendant confessed was not ineffective assistance. Even if the testimony was objectionable hearsay, prejudice was not demonstrated as the officers also overheard the defendant confess to the crime and they were able to testify to the defendant's admission as a hearsay exception.

Second District Court of Appeal

Dibelka v. State, 2d19-4085 (Oct. 1, 2021)

On rehearing, the Second District withdrew its prior opinion and affirmed a conviction and sentence for petit theft but reversed an order imposing costs and fines.

For seven mandatory cost entries totaling $318, the eight statutes and ordinances cited authorized a maximum of $255 in mandatory costs. One of the statutes cited, section 938.27(8), provided discretion to order a higher amount and that may have accounted for the difference, but, regardless, the $318 exceeded the mandatory costs under the relevant authorities. There may also have been confusion with the court citing section 938.15 when it meant 939.185, which authorized a greater mandatory amount.

Several other discrepancies for assessments of $2 and $3 may have been appropriate, but the errors noted in the preceding paragraph had to be determined by the trial court on remand before this could be determined.

A $100 charge for "additional SAO costs" was not supported by any record evidence. Based on recent case law from the Florida Supreme Court, the statutory minimum of $100 for the public defender's fee was upheld even though the defendant argued that she was not given notice of her right to contest the fee.

Fesh v. State, 2D19-4087 (Sept. 29, 2021)

The Second District reversed convictions for sexual activity with a child and lewd or lascivious molestation for a new trial. The trial court erred in admitting Williams rule evidence "without the accompanying procedural safeguards."

Fesh was charged with five sex crimes, all involving the same victim, his teenage stepdaughter. The first trial ended in a mistrial; the second resulted in the two convictions being appealed, as well as acquittals on three charges.

Fesh "sought to exclude testimony by Mr. Fesh's daughter M.B. regarding an event she testified had taken place approximately four years prior to the charged acts. She "recalled walking in on Mr. Fesh on top of M.R.B., holding her down. He appeared to be engaging in sexual contact with M.R.B. while she begged M.B. for help." The trial court, prior to the first trial, concluded the evidence was admissible. After the mistrial, but prior to the second trial, a new judge abided by the prior ruling. At the second trial, M.B. testified to this incident, stating that it definitely occurred years before the charged conduct and "definitely" did not occur during the time alleged in the information. M.R.B. testified at the second trial and denied any recollection of the incident. The State also emphasized this incident in its closing argument.

A "relaxed standard" applies when determining admissibility of collateral offense evidence for cases of child molestation in a family setting, certain procedural safeguards exist. Typically, the State is required to provide "pretrial, particularized written notice of the acts at issue." The trial court must then find that the prior acts were proved by clear and convincing evidence. And, the court must weight the probative value of the evidence against the danger of unfair prejudice, and consider whether the evidence will result in juror confusion or become a feature of the trial.

Although the State filed a Williams rule notice, this incident was not asserted in that written notice, and the defense complained about this prior to both trials. As a result, the other procedural requirements noted above were not adhered to. The incident at issue was not inextricably intertwined with the charged offenses. One witness testified that it occurred years earlier. And, the perils from erroneously admitting collateral offense evidence are even greater when the collateral offense was more serious than the ones for which the defendant was on trial. Thus, the State's argument, on appeal, that the prior incident would have qualified as capital sexual battery highlighted the degree of the prejudice.

The State did not sustain its burden of demonstrating that the error in admitting the testimony was harmless beyond a reasonable doubt. The Second District emphasized the State's reliance on this testimony in its closing argument. Additionally, the "State's failure to adhere to the required procedure also prevented the jury from receiving the *Williams* rule instruction explaining the limited relevance of this testimony." Thus, even if the evidence met the relaxed standard for collateral acts of child molestation in the familial setting – which the Court did not decide – the absence of the limiting instruction was still erroneous and that error was not harmless.

Hanna v. State, 2D20-2945 (Sept. 29, 2021)

The Second District reversed the dismissal of a Rule 3.850 motion. The motion alleged ineffective assistance of counsel at a resentencing hearing. The trial court found the motion to be untimely.

The trial court based its calculation of the two-year time limit on the finality of the underlying conviction, which had occurred more that two years prior to the Rule 3.850 motion. However, the resentencing was a new proceeding, and with respect to challenges directed solely to the resentencing hearing, the two-year period for filing the Rule 3.850 motion commenced with the finality of the resentencing order.

Hall v. State, 2D21-262 (Sept. 29, 2021)

The Second District reversed a conviction for direct criminal contempt, which was based on Hall's "use of foul curses and epithets during a court proceeding." The trial court "did not provide Mr. Hall a meaningful opportunity to introduce evidence of mitigating circumstances and the contempt judgment contains no factual findings."

After the defendant uttered a barrage of profanity directed to the judge, the court inquired of Hall if there was any reason why Hall should not be held in contempt. Hall did not answer and Hall mistakenly believed that his attorney was not present. Hall then accused the judge and/or prosecutor of taking a bribe. Defense counsel then requested a referral to mental health court. The judge recessed until the next day.

When the case resumed the next day, the judge asked if Hall had anything to say in mitigation, and Hall was silent. Defense counsel stated that Hall "suffered from a mental illness but did not proffer or introduce evidence of such condition." Hall was then held in contempt of court and sentenced to 120 days in jail.

Two weeks later, after the filing of a motion to correct, reduce or modify the sentence, a hearing was held and Hall apologized and attempted to explain his history of mental illness. Counsel sought to introduce testimony from a mental health counselor, but the court refused to entertain the evidence; the sentence was reduced to 60 days, however.

While the trial court asked if Hall had anything to say in mitigation, and paid lip service to the requirement of providing a meaningful opportunity to present mitigating evidence, the trial court's request was insufficient: "Mr. Hall and defense counsel were told only moments before that the court was hosting a contempt proceeding '*at that point*' – leaving defense counsel no meaningful chance to gather mitigating evidence." And, when counsel had time to obtain the evidence, the judge refused to hear it. The issue of the meaningful opportunity to present mitigating evidence was not raised in Hall's brief on appeal, but it was treated by the appellate court as fundamental error that was apparent on the face of the record, and the court was "obligated to correct it."

As to the merits of the contempt finding, intent was critical to a contempt judgment, and, due to the absence of factual findings by the trial court and the failure of the court to consider Hall's mental condition, the appellate court could not evaluate the merits of Hall's defense.

One judge dissented and would have found that the trial court did not deny any "meaningful request for additional time to prepare a defense or for an opportunity to present additional evidence."

Sims v. Wells, Sheriff of Manatee County, 2D21-1675 (Sept. 29, 2021)

The Second District granted a habeas corpus petition challenging an order of pretrial detention.

Three cases were filed in adult court, and bond was set. A fourth case was in juvenile court and transferred to adult court and bond was set. The court subsequently granted the State's motion for pretrial detention in only one of the four cases, finding that the "transfer of Sims' juvenile case to criminal court increased Sims' overall potential sentence and was a sufficient change in circumstances to provide good cause to revoke and impose pretrial detention."

The Second District agreed with Sims that the facts of this case did not present any "substantial change in circumstances after [the] first appearance in criminal court." Once "the State direct filed three of his cases in criminal court, it was required to file the juvenile allegations in his fourth case as felony charges in criminal court." Juvenile court was no longer an option for the fourth case and sentencing exposure never changed. As there was no change in circumstances that would provide good cause to revoke bond and issue a pretrial detention order, there was no basis for the motion for pretrial detention.

The Second District certified a question of great public importance to the Supreme Court of Florida:

> WHEN THE STATE DIRECT FILES CHARGES AGAINST A JUVENILE UNDER SECTION 985.557(1), FLORIDA STATUTES (2020), AND BOND IS SET ON THE CHARGES, DOES THE STATE'S SUBSEQUENT TRANSFER UNDER SECTION 985.557(2) OF ADDITIONAL ALLEGATIONS AGAINST THE JUVENILE FILED IN A SEPARATE JUVENILE CASE, POTENTIALLY EXPOSING THE JUVENILE TO ADULT SANCTIONS IN THAT CASE, MEET THE REQUIREMENT UNDER *BUSH V. STATE*, 74 SO. 3D 130 (FLA. 1ST DCA 2011), OF A CHANGE IN CIRCUMSTANCES SUFFICIENT TO ESTABLISH GOOD CAUSE FOR MODIFICATION OF BOND OR THE CONDITIONS OF RELEASE?

Third District Court of Appeal

Jackson v. State, 3D20938 (Sept. 29, 2021)

Appellate counsel on direct appeal was not ineffective for failing to present a double jeopardy argument.

Jackson was convicted at trial of home-invasion robbery while carrying a firearm and aggravated assault with a firearm. Jackson argued "that his conviction for aggravated assault with a firearm should be vacated because he was convicted of this crime only as the lesser included offense of burglary with an assault or battery with a firearm. Indeed, had Jackson been convicted of armed burglary with an assault or battery, such conviction may have been subsumed into the home-invasion robbery conviction. Nevertheless, . . . a double jeopardy analysis focuses on the statutory elements of the crime for which the defendant was convicted."

The Court compared the elements of the two offenses for which Jackson was convicted, and found that each included an element that was not included in the other. While home-invasion robbery required carrying a firearm, it did not require the use of the firearm. Aggravated assault with a deadly weapon requires more than carrying the weapon, as an assault must be made with the weapon; the weapon must be used.

Irizarry v. State, 3d21-1191 (Sept. 29, 2021)

A habeas corpus petition challenging an Eleventh Judicial Circuit conviction could not be filed in different judicial circuit based on the existence of custody in that circuit. Any postconviction challenge to the conviction had to be made in the circuit in which the conviction occurred.

Hodges v. State, 3D21-1725 (Sept. 29, 2021)

The Third District denied a petition for writ of prohibition which sought to "prevent the assigned trial judge from presiding over his criminal case and habeas corpus challenging the legality of his pretrial detention." The prohibition petition could not be used to seek disqualification on the basis of Hodges' discontent with adverse rulings.

The trial court granted the State's motion for pretrial detention. Hodges had been arrested for DUI and related charges. After an initial release on bond, he was

arrested again and charged with multiple offenses, including boating under the influence manslaughter and vessel homicide. The court then granted the State's motion for pretrial detention. Hodges was subsequently acquitted by a jury on the original charges and his renewed challenge to the pretrial detention order was denied, resulting in the proceedings in the Third District.

Hodges' arguments were based on the alleged insufficiency of the evidence for pretrial detention in the aftermath of the acquittal on the original charges. "Here, the trial court did not purport to predicate its finding upon the conduct for which Hodges was acquitted. Instead, the gravamen of the pretrial detention order was that Hodges, having been previously convicted of a DUI-related offense, violated the conditions of his release by engaging in crimes demonstrating a disregard for the safety of the community. Consequently, the acquittal does not operate to nullify the basis for ordering detention."

Fifth District Court of Appeal

Grant v. State, 5D20-1700 (Oct. 1, 2021)

The summary denial of a Rule 3.850 motion alleging ineffective assistance of counsel for failure to call an alibi witness was reversed for further proceedings because the record that the trial court relied upon – a limited statement by trial counsel during the trial – was not sufficient to conclusively refute the claim. The Court's opinion provides no further details. A concurring opinion includes additional facts regarding what transpired. During jury deliberations, the defendant complained that trial counsel did not call his brother as an alibi witness. Grant did not state what the brother would say. Defense counsel responded on the record that the defendant never requested that he interview or list the brother as a trial witness. Counsel refused to say anything further based on the attorney-client privilege.

The concurring opinion noted that mid-trial colloquies may avoid postconviction litigation, but such colloquies "are ill-suited to resolve credibility determinations between defendants and their lawyers."

McCullough v. State, 5D20-2650 (Oct. 1, 2021)

The Fifth District reversed the denial of a Rule 3.850 motion and ordered a new trial.

McCullough shot victim Nelson twice, but claimed that it was self-defense. He was found guilty of aggravated battery with great bodily harm. He "alleged his trial counsel was ineffective by consenting to the forcible felony self-defense instruction when it did not apply to its case."

The forcible felony instruction "precludes an assertion of self-defense when a defendant 'is attempting to commit, committing, or escaping after the commission of a forcible felony.'" The instruction "should be given only "when the State charges an independent forcible felony *other* than the one a defendant claims to have committed in self-defense."

In this case, the giving of the instruction negated the sole defense. Counsel was deficient for consenting to the instruction. As the instruction negated the sole defense, counsel's consent to the instruction was prejudicial. Self-defense was the sole trial strategy and the jury heard conflicting versions of the incident.

Maltese v. State, 5D21-927 (Oct. 1, 2021)

The trial court summarily denied a pro se Rule 3.850 motion as being insufficient, but failed to provide an opportunity to amend. The motion alleged that counsel was ineffective for failing to present a viable defense, but did not allege what that viable defense was. Maltese was entitled to leave to amend the claim.