

Case Law Update  
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Prepared by  
Richard L. Polin

Eleventh Circuit Court of Appeals

[United States v. Thomas](#), 19-11670 (April 25, 2022)

The Eleventh Circuit affirmed Thomas’s 120-month sentence for conspiracy to possess with intent to distribute 50 grams or more of actual methamphetamine and one kilogram of heroin. The district court applied a downward variance, but Thomas challenged the calculation of the guideline range based on the application of a two-level enhancement under U.S.S.G. s. 2D1.1(b)(12) and the failure to apply to safety valve of s. 5C1.2.

The two-level enhancement applies if the defendant “maintained a premises for the purpose of manufacturing or distributing a controlled substance,” which includes “storage of a controlled substance for the purpose of distribution.” The government maintained that the premises in question were a “stash house.” While Thomas admitted “the house was maintained for the principal purpose of distributing drugs,” he argued that the government had to show that he, himself, “maintained the stash house” and that the government failed to “show that he had lived in the home when drugs were distributed.”

At the sentencing hearing, defense counsel initially stated that Thomas did not live at the house, but later, counsel “did not object when the Government stated that there was not ‘any dispute that [Thomas] was living [at the residence] for a good portion of the conspiracy.’” Defense counsel asserted that the defendant did not reside there for the “entire conspiracy.” Upon questioning by the court, defense counsel then conceded that it was enough if the defendant lived there just “for a small part.” Counsel then withdrew an objection to the PSR’s finding that Thomas lived there during the conspiracy “and effectively admitted that fact for sentencing purposes.” Thomas “merely needed to” “maintain the premises for the purposes of distributing drugs” “for a portion of the conspiracy.”

The safety valve provision “provides for a sentence crafted without regard to an otherwise-applicable statutory minimum if the defendant meets certain criteria,” and the defendant has the burden of satisfying all of the criteria by a preponderance of the evidence. Thomas was correct that the district court erred in concluding that

the two-level firearm enhancement automatically disqualified him from relief under the safety valve. However, he was still not eligible for safety valve relief.

One of the criteria that Thomas had to establish was that “not later than the time of the sentencing hearing,” he “provided truthful and complete information ‘concerning the offense’ for which he was charged.” Thomas did not make such a showing. His counsel admitted at the sentencing hearing that “Thomas refused to share any information regarding the drug operation with the Government.”

[United States v. Clark](#), 20-10672 (April 28, 2022)

The Eleventh Circuit affirmed Clark’s convictions and sentence for possessing a firearm as a convicted felon, possessing methamphetamine with intent to distribute, and possessing a firearm in furtherance of a drug trafficking crime.

A probation officer, Culp, testified at the second phase of the proceedings, the trial for the felon-in-possession charge. He testified as to conditions of probation, and also, as an expert witness, “about the interstate nexus and gun identification,” stating that the gun had been manufactured in Arizona and that it was a firearm. Two months after the trial and prior to sentencing, the Government disclosed Brady material that it had been unaware of at the time of trial: “Culp had failed to disclose in his *Giglio* interview that he had been disciplined in 2016 by the Bureau of Alcohol, Tobacco, Firearms and Explosives for mishandling evidence in a case involving an individual who was charged with distributing narcotics and being a felon in possession of a firearm. That case was dismissed prior to trial because of Culp’s destruction of the evidence.” In Clark’s case, when questioned by the Government if Culp “had been disciplined in the past as part of his *Giglio* interview,” Culp said no.

The Eleventh Circuit rejected Clark’s Brady claim because it was “not clear that the failure to disclose his prior mishandling of evidence would serve to render this trial unfair.” There was no dispute that the gun was manufactured in Arizona and there was no challenge on appeal to the admission of the firearm into evidence. “Even if there would have been impeachment value for his prior discipline, there is not a reasonable probability that it would have affected the jury’s conclusion that the firearm was manufactured in Arizona, where the marking on the barrel clearly displayed ‘Prescott, AZ.’”

Culp further argued on the basis of the Brady disclosure that “he would have forgone a bifurcated trial and attacked the credibility of all the Government’s

witnesses had he known about Culp's past misconduct." However, "Culp had nothing to do with the evidence in this case," and "his lack of credibility would tell the jury nothing about the credibility of the other officers, who did handle evidence in this case." And, if Culp's discipline had been discovered earlier by the Government, Culp was a replaceable witness and someone else could have been used in his place.

The district court did not err in denying a motion to suppress evidence seized as a result of a traffic stop and subsequent arrest. An officer had probable cause to stop the vehicle. In bodycam footage and in trial testimony, the officer said that he "turned on his patrol lights to stop Clark because he noticed a car weaving in and out of lanes," a violation of Georgia law. Clark's argument on appeal focused on the officer's lack of memory of details, but the Eleventh Circuit stated that Clark "seeks to impermissibly heighten the probable cause standard to require officers to have perfect memory as to why they stopped an individual. We decline his implied invitation to raise the standard for probable cause."

As to the subsequent arrest and search incident to arrest, after Clark was pulled over, he "did not immediately comply with Ragland's command to get out of the car." While Clark posited an innocent explanation, that he was waiting to get to a well-lit area between 2:00 and 3:00 a.m., that was not relevant to the question of the existence of probable cause, which is based on facts and circumstances known to the officer.

The district court erred in failing to instruct the jury to apply the beyond-a-reasonable-doubt standard to a special verdict question regarding the weight of the methamphetamine. However, Clark was not entitled to relief because the erroneous instruction was based on an invited error. When the district court inquired as to any objections to the proposed instructions, and further suggested the revised language that caused the problem, the judge asked if defense counsel saw any problem, and counsel responded "I do not."

To prove that Clark was a convicted felon for the felon-in-possession charge, the government introduced eight prior felony convictions, including one with a probation order that further included a lengthy history of arrests going back almost 30 years. Clark argued on appeal that just one of those prior felony convictions would have sufficed. The Eleventh Circuit held that "[a]s a general matter, though, we think it imprudent to hamstring the Government in the case where ad defendant refuses to stipulate to felony status." As to the history of arrests that did not result in convictions, Clark did not object or request redaction. Clark, on appeal, could not

demonstrate that any error constituted plain error. The evidence of his knowledge of his status as a felon was “overwhelming,” with eight prior felony convictions, including one for being a felon in possession.

[Johnson v. State of Florida](#), 20-13301 (Apr. 28, 2022)

Johnson filed a pretrial habeas corpus petition in federal court under 28 U.S.C. s. 2241, claiming that the State’s “temporary measures suspending criminal jury trials in response to the COVID-19 pandemic” resulted in a Sixth Amendment speedy trial violation. As the Sixth amendment argument was not raised in state court, the dismissal of the federal petition was upheld. The dismissal of the federal petition was based on the requirement that federal constitutional claims first be fully exhausted in state court.

Although Johnson requested a speedy trial, his request and argument were based solely on the speedy trial rule set forth in the Florida Rules of Criminal Procedure. Neither the United States Constitution nor the Sixth Amendment were cited. In one pro se motion, Johnson referenced the Sixth Amendment as a speedy trial issue. That, however, was asserted in a motion to proceed pro se, not in the speedy trial filings.

Johnson argued that he should not have to go back and exhaust the constitutional claim in state court because it would be futile to do so. The Eleventh Circuit disagreed. The Court noted that the Florida Supreme Court, in its administrative order regarding remote proceedings, specified that presiding judges in all cases “must consider the constitutional rights of . . . criminal defendants.”

The federal petition was also barred under the abstention doctrine of Younger v. Harris, under which “a federal court should not interfere with ongoing state criminal proceedings where the state court conviction and/or sentence is not yet final.” While special circumstances may justify pretrial interference by federal courts, the challenge to the denial of a constitutional speedy trial was not deemed to be such a justification.

## Supreme Court of Florida

[Pittman v. State](#), SC21-1185 (Apr. 28, 2022)

The Florida Supreme Court affirmed the denial of a successive motion for postconviction relief under Fla.R.Crim.P. 3.851 and a motion to correct illegal sentence under Rule 3.800(a).

A claim regarding intellectual disability was untimely. The Florida Supreme Court previously held that Hall v. Florida, 572 U.S. 701 (2014), did not apply retroactively. As a result, the decision of Atkins v. Virginia, 536 U.S. 304 (2002), was the controlling law and, under Rule 3.203 as it existed post-Atkins, the intellectual disability claim had to be raised no later than 60 days after October 1, 2004. Additionally, a claim that an IQ score of 70 from 2015 was newly discovered evidence was also untimely, as it was not filed within one year of the date on which the claim became discoverable through due diligence.

## First District Court of Appeal

[Toyens v. State](#), 1D21-2754 (Apr. 27, 2022)

In a one sentence opinion, the Court cited its prior decision of Feliciano v. State, 937 So. 2d 818 (Fla. 1<sup>st</sup> DCA 2006), for the holding that “statutory rape is a strict liability offense that does not require the State to prove the defendant knew the minor’s age or allow an affirmative defense based on lack of knowledge.”

[Jackson v. State](#), 1D22-0007 (Apr. 27, 2022)

A habeas petition in the First District was dismissed based on the general rule that a “defendant cannot proceed pro se on an original petition while represented by counsel in the lower tribunal.”

## Second District Court of Appeal,

[Zetrouer v. State](#), 2D21-1693 (Apr. 29, 2022)

A conviction for multiple marijuana possession was reversed on direct appeal. The evidence was insufficient for possession of marijuana “because the State did not introduce evidence of the marijuana that he allegedly possessed or evidence that the

marijuana was legitimately unavailable.” The State conceded as to this issue and the facts of the case were not set forth in the opinion.

[Edmonds v. State](#), 2D20-448 (Apr. 27, 2022)

Convictions for multiple counts of sexual battery by physical force, kidnapping, burglary and simple battery were affirmed. The sentence for simple battery was reversed because the oral pronouncement was insufficient.

At the time of sentencing, the trial court orally pronounced concurrent life sentences for the six felonies but did not reference the simple battery conviction. On the written sentence, the court sentenced Edmonds to 11 months and 29 days, with credit for 368 days time served, and committed Edmonds to the county sheriff, with directions to serve the jail sentence with a credit of time served of “TBD days.” During the pendency of the direct appeal, Edmonds sought to correct that sentence because, based on the credit for time served, the sentence had already been served.

The failure to reference the battery conviction in the oral pronouncement required that the sentence for that offense be remanded for further proceedings.

[A.S. v. State](#), 2D21-460 (Apr. 27, 2022)

Pursuant to the Second District’s prior decision in [T.H. V. State](#), 47 Fla.L. Weekly D681 (Fla. 2d DCA Mar. 18, 2022), the Court held that the trial court “erred by holding his adjudicatory hearing via Zoom, a virtual teleconferencing platform, without a case-specific finding of necessity.” Such a finding is required before the court “limits a juvenile’s constitutional right to confrontation.” The adjudicatory hearing in this case was held after in-person criminal jury trials had resumed “notwithstanding the COVID-19 pandemic.”

Third District Court of Appeal

[Milian v. State](#), 3D21-2003 (Apr. 27, 2022)

The trial court entered an order denying six of nine claims in a Rule 3.850 motion and gave Milian time to file an amended motion as to the remaining claims. The trial court gave him 21 days to file the amended motion, which he filed in 23 days. The trial court was required to give 60 days for the filing of an amended motion. When the trial court failed to rule on the amended motion, Milian filed an appeal. The Third District remanded for further proceedings on the remaining

claims and noted that the order denying six of the nine claims was a non-final and nonappealable order.

#### Fourth District Court of Appeal

[Sikich v. State](#), 4D21-1704 (Apr. 27, 2022)

An assessment of \$100 for prosecution costs was reversed where the State did not request costs in excess of \$50 and the State presented to evidence to support the higher amount.

The condition of probation requiring payment of \$50 a month for costs of supervision was not announced at sentencing. It constituted a special condition of probation, as the trial court was authorized by statute to impose only a \$40 a month charge, and it was therefore reversed and remanded with directions to reduce it to \$40.

#### Fifth District Court of Appeal

[Harrell v. State](#), 5D21-674 (Apr. 29, 2022)

The summary denial of several claims from a Rule 3.850 motion was reversed and remanded for further proceedings.

Attachments to the trial court's order did not conclusively refute a claim of newly discovered evidence. Harrell was convicted by a jury of aggravated battery and aggravated assault, both with a firearm. The motion relied on affidavits from two neighbors, alleged to have been eyewitnesses, and the affidavits "directly refute and contradict both the victim's trial testimony and that of her sister that Harrell was the aggressor that evening and that he was in possession of and used a firearm during the alleged commission of these crimes. More particularly, both affiants affirmatively stated that the victim struck Harrell several times before Harrell hit back one time in self-defense." Harrell also alleged that counsel did not know about the affiants and could not have known about them. Absent an evidentiary hearing, those allegations had to be accepted as true if not conclusively refuted by the record.

Another claim alleged that Harrell chose not to testify at trial due to counsel misleading him by saying that if he testified "the State would be able to cross-examine him not only as to the number of his prior felony convictions, but also as to the specific nature of his prior felonies." Attachments to the court's order – the

colloquy as to whether the defendant would testify, and direct examination of the victim, in which the State inquired solely as to the number of the victim's prior convictions, and not the specifics, did not "show that Harrell had been advised by counsel, or the trial court, that, on cross-examination, the State could not inquire into the specifics of Harrell's prior felony convictions." Nor did the examination of the victim suffice to inform Harrell that the State could not inquire about the specifics.

Another claim alleged that although defense counsel presented opening and closing argument for the jury to consider that the victim had three pending felonies and was thus lacking in credibility, defense counsel failed to present the actual evidence of those pending felonies. As a result, the court, in closing argument, sustained the State's objection to the comments as they were not supported by evidence. Although the jury heard the State's evidence about the victim's six prior convictions, this claim was still facially sufficient and was not refuted by the record attachments.

Harrell also alleged that although defense counsel conveyed the State's pretrial offer of 30 months in prison, which he rejected, counsel failed to fully advise him of the State's evidence prior to the rejection of the plea offer. His motion specifically referenced photographic evidence of the victim's injuries. He further asserted that counsel erroneously told him that he could not be convicted on either charge if the State did not first admit the actual weapon into evidence. The trial court's order referenced Harrell's presence in court when a pretrial motion to exclude the photos had been denied. That motion hearing was held after the plea offer had been conveyed and rejected.