FLW Summaries for June 2024

Prepared by Laurel Cornell Niles*

Florida Supreme Court

Sparre v. State, SC2023-0163 (Fla. June 13, 2024): Review of summary denial of Appellant's successive 3.851 motion, which alleged that there is new evidence of inaccuracies or incompleteness in his PSI. Because the PSI has been available since 2012, he cannot demonstrate why trial or postconviction counsel could not have discovered the alleged deficiencies years earlier with the exercise of due diligence. Further, he raised numerous issues related to the PSI in prior appeals, which were rejected on the merits. The claims are both untimely and otherwise procedurally barred. Affirmed.

First DCA

Goldsby v. State, 1D2022-3133 (Fla. 1st DCA June 5, 2024): Appellant challenges the trial court's decision not to instruct the jury on the affirmative defense of lack of knowledge of the illicit nature of a controlled substance. Knowledge of the illicit nature of a controlled substance is not an element of trafficking in methamphetamine or heroin. It is, instead, an affirmative defense. A defendant is entitled to this affirmative defense instruction when he contends his "admittedly illegal conduct should not be punished." The jury instruction must be given if any evidence supports the theory. The defense theory in this case, however, was that he did not know he *possessed* the substance, not that he did not know of the illicit nature of the substance. He was therefore not entitled to the instruction. Affirmed.

Roberts v. State, 1D2023-0464 (Fla. 1st DCA, June 12, 2024): Roberts argues that the trial court erred by imposing a $100 cost of prosecution sua sponte. Pursuant to *Parks v. State*, 371 So. 3d 392 (Fla 1st DCA 2023), the $100 cost for the state attorney is a minimum cost that is

mandated by subsection (8) and not an investigative cost incurred by an agency, which can only be imposed if requested by the agency. Affirmed.

Boyd v. State, 1D2022-0351 (Fla. 1st DCA June 5, 2024): Boyd pled no contest to lewd or lascivious molestation, and was sentenced to probation. Probation was revoked on his second VOP. He filed a motion to correct sentencing error, arguing that Count 2 was erroneously listed, and that the scoresheet contained an error of 0.15 months, which increased his lowest permissible sentence from 24 months to 24.15 months. The court thoroughly reviewed the scoresheet and found multiple other errors which favored Boyd. Specifically, the court found that Boyd's lowest permissible sentence should have been 11.25 years higher. The court reversed the trial court's denial of his motion to correct sentencing error, remanded to remove Count 2, and "express[ed] no view on whether the trial court may correct the errors in the scoresheet and resentence Boyd accordingly."

Whipple v. State, 1D2022-4117 (Fla. 1st DCA June 12, 2024): Discrepancy between oral pronouncement of jail credit at sentencing, and the written sentencing documents. The trial court sentenced Ms. Whipple on 100 counts of bad-check-related offenses. The court sentenced her to 5 years in prison for each count, with the first four counts to run consecutively and counts 4-99 [sic] to run concurrently. The court orally pronounced that "you'll get credit for 129 days on each of those counts." The written judgment and sentence reflected 129 days of jail credit on the first count. The announcement was a proper sentence: it both clearly pronounced an award of jail credit and permissibly applied credit to "each" of the counts. It was error for the trial court to deny the motion to correct sentencing error. Reversed and remanded for the court to correct the sentencing documents to comport with the oral pronouncement.

State v. Denson, 1D2023-0919 (Fla. 1st DCA June 12, 2024): State appeal of an order granting a motion to suppress a murder confession. During a police interview, Appellee softly uttered "I just don't want to say nothing." He argued that he had invoked his right to remain silent and the trial court agreed. The federal Constitution requires the police to stop a custodial interview after the suspect has waived *Miranda* rights if the defendant invokes his right to an *attorney*, and Florida law requires the police also to cease an interrogation if the suspect unequivocally invokes

any of the *Miranda* rights. The question presented in this case is whether Mr. Denson *unequivocally* invoked his right to remain silent. The DCA says he did not—his statement was equivocal under the circumstances. A defendant only unequivocally invokes his right to remain silent when the statements and context are clear. Courts find statements to be equivocal when their context lends ambiguity. Here, Mr. Denson "made a one-off statement during the interrogation that did not clearly suggest that he wished to discontinue the entire interview." He "sandwiched the soft-spoken statement 'I just don't want to say nothing' in between expressing that he did not want to be tricked, and that he felt stuck with the consequences of the incident." He mumbled his statement and then continued talking. This was not a blanket invocation of the right to remain silent, and it was therefore equivocal. Reversed and remanded.

Atkins v. State, 1D2023-1007 (Fla. 1st DCA June 12, 2024): Appellant was convicted of first-degree murder and leaving the scene of an accident involving death. He argues that the trial court abused its discretion by denying his motion to present testimony from a neighbor about Appellant's general reputation for peacefulness. Appellant did not argue self-defense, and conceded that he was guilty of manslaughter. Appellant threatened to kill the victim, admitted to the act itself, and what lead up to it. Multiple witnesses saw the event. On these facts, "'general reputation' was worthless as a defense against guilt; and even if it had been error to exclude the evidence, it would be harmless." Affirmed.

Camel v. State, 1D2022-2267 (Fla. 1st DCA June 12, 2024): Appellant was sentenced to prison following the revocation of his probation. He argues that the trial court should not have considered a victim impact statement from the underlying offenses because Marsy's Law does not apply to probation violation proceedings; while it was appropriate to consider the victim's statement when he was originally sentenced, it should not be considered in post-adjudicatory proceedings like a VOP hearing. Marsy's law gives victims the right to be heard in any public proceeding involving sentencing and any proceeding during which a right of the victim is implicated. It also gives victims the right to be informed of all postconviction processes and procedures, to participate in such processes and procedures, and to provide information to the release authority to be considered before any release decision is made. "In sum,

if the defendant is facing legal consequences for his criminal conduct, then the victim has the right to be heard when a court or other authority decides what those consequences will be." The amendment does not create an exhaustive list of every possible proceeding involving the defendant's criminal conduct, nor does it list exclusions. Appellant asks the court to read Marsy's law as applying only at an initial sentencing proceeding, but that would add words that are not in the text while ignoring words that are in the text. The law specifically includes sentencing, and "sentencing after a revocation of probation is simply a deferred sentencing proceeding." In conclusion, Marsy's law applies at probation violation proceedings. Affirmed.

K.R. v. State, 1D2023-1257 (Fla. 1st DCA June 12, 2024) and *N.C.D. v State*, 1D2023-1255 (Fla. 1st DCA June 12, 2024): Appellants appeal a restitution order holding them jointly and severally liable for restitution to a burglary victim. It was error to award lost-wages restitution to the victim corresponding to the loss of work from an illegal cosmetology practice. Reversed the portion of the order awarding $3,650 restitution for lost wages.

Melton v. State, 1D2022-0574 (Fla. 1st DCA June 12, 2024): Appellant attempted to use Rule 3.800(b) to attack the merits of an underlying criminal conviction. Specifically, Appellant argued that burglary of an occupied structure is a "sentencing enhancement" to the crime of burglary of a structure. It's not a sentencing enhancement because the burglary statute does not merely provide a method to reclassify the available penalty for a crime, but the felony level of burglary specifically depends on the existence of certain facts as set forth in the statute (such as whether a structure was occupied.) Any alleged error regarding the existence or propriety of one of the elements of burglary is not an alleged "sentencing error" pursuant to Rule 3.800(b).

Heath v. State, 1D2022-4126 (Fla. 1st DCA June 19, 2024): Appellant appeals his convictions for first-degree murder and attempted first-degree murder with a firearm. He argues that the trial court improperly denied his motion to continue and allowed the admission of testimony about prior incidents of domestic violence. The DCA applied the *McKay* factors and found that the court properly considered them and properly denied the continuance. The testimony about prior incidents of domestic

violence was dissimilar fact evidence but was inextricably intertwined with the charged crimes, and helped to establish the relevant context in which the charged criminal acts occurred. Further the probative value of the evidence outweighed any prejudice to Heath. Affirmed.

Simmons v. State, 1D2022-3059 (Fla. 1st DCA June 19, 2024): Appellant was convicted of three counts of capital sexual battery. On appeal he argues that the trial court erred in admitted *Williams Rule* evidence from another child victim whose case was nol prossed. Specifically, Appellant argues that the *Williams Rule* evidence should not have been admitted because (1) the State did not present clear and convincing evidence that the prior acts occurred; (2) the State had nolle prossed the prior charges against Simmons involving the other victim; and (3) the other child victim's testimony was not credible as to the frequency of the abuse and was unduly prejudicial. Even though the other child victim's testimony consisted of "yes" responses, the record shows that the other child victim distinctly remembered the prior acts and described them. The State presented C&C evidence that Simmon committed the prior acts. Additionally, even when the State dismisses charges, the facts supporting the dismissed charges may be admissible because the State's decision to dismiss charges is not necessarily attached to the strength of the State's case. Finally, the other child victim's testimony at the evidentiary that the abuse occurred "every day for four years" was limited for trial—that is, the State was prohibited from eliciting testimony about the number of sex acts. Simmons was not restricted from impeaching as to that point, even though he would have opened the door, but instead chose not to cross-examine the witness on that issue. Affirmed.

Smith v. State, 1D2022-3034 (Fla. 1st DCA June 19, 2024): Petition for Writ of Prohibition after circuit court denied self-defense immunity under section 776.012(2). After an evidentiary hearing, the circuit court found that Smith's belief that the use of deadly force was required to prevent death or great bodily harm was reasonable, but denied Smith's claim of immunity because "he was engaged in criminal activity at the time he used deadly force" and because "he was in a place he did not have a right to be at the time he used deadly force." The trial court misapprehended the law. Under the circumstances where Smith was engaged in criminal activity or was in a place he did not have the right to be, Smith could still

be entitled to self-defense immunity, even if he were not entitled to *not* retreat before using deadly force. But Smith did retreat, as the trial court found. He "exhausted all reasonable means of escape." Further, even though Smith was the initial aggressor, he is not foreclosed from entitlement to self-defense immunity—he just needed to retreat first, which he did. Because Smith presented a prima facie case and the State did not overcome his entitlement to immunity, the petition is granted. The court may not proceed further and the charge should be dismissed. Smith must be immediately released from detention.

Richardson v. State, 1D2022-0617 (Fla. 1st DCA June 19, 2024): Appellant was convicted of both detainee battery and felony battery by a prior battery conviction, for throwing a single punch at a fellow detainee. He was sentenced to consecutive five-year prison sentences. The DCA reversed, holding that battery on a detainee and battery following a prior battery conviction are "degrees of the same offense" of battery, and the courts may not impose cumulative punishments for the two "offenses" because it violates the constitutional protection against double jeopardy. The conviction for detainee battery was affirmed, and the conviction for felony battery was vacated. Remanded for resentencing on detainee battery count.

Ford v. State, 1D2022-0102 (Fla. 1st DCA June 19, 2024): Appellant challenged his conviction for aggravated stalking after an injunction, and argues that JOA should have been granted because the State did not prove that he harassed the victim, as there was no evidence that the phone calls he made to the victim from prison caused her substantial emotional distress. The DCA agrees. Substantial emotional distress requires a showing that a "reasonable person" would have been in fear, and it must be greater than an ordinary feeling of distress. Reasonable people do not suffer substantial emotional distress easily. Appellant called the victim from prison, but she did not answer any of the calls and he did not leave a message. A police officer testified that the victim was "worried" about the calls, but the victim herself did not testify about her emotional state. While background information regarding the circumstances that led to the injunction came out at sentencing, it was not presented to the jury. The State failed to prove harassment and

establish a prima facie case of aggravated stalking. Reversed and remanded.

Jackson v. State, 1D2023-0065 (Fla. 1st DCA June 26, 2024): The issue of the denial of a request to replace appointed counsel following a *Nelson* hearing is not cognizable on direct appeal, absent a motion to withdraw plea that alleges the plea was not knowing and voluntary due to ineffective assistance of counsel. Affirmed.

Wodford v. State, 1D2022-3949 (Fla. 1st DCA June 26, 2024): Appellant challenges convictions and sentences for five counts of child abuse, arguing that the jury verdict was legally inconsistent because he was acquitted of shooting into a building, but convicted of the lesser included offense of assault on the charge of aggravated assault (of two adults) with a firearm. The verdicts are not legally inconsistent. The child abuse offenses did not depend on the jury's finding that he shot into the home or committed aggravated assault with a firearm on either of the adults. In a true inconsistent verdict, an acquittal on one count negates a necessary element for conviction on another count. Affirmed.

Second DCA

George v. State, 2D2024-0384 (Fla. 2d DCA June 7, 2024): Appellant filed a motion "to correct sentence," alleging that the trial court had orally pronounced a 120 days jail sentence but that the written documents reflected 220 days in jail. She cited no rule in the motion. The trial court treated her motion as filed pursuant to Rule 3.800(a), and denied it because the claim is not cognizable in a motion pursuant to 3.800(a). The DCA held that Appellant pleaded a claim cognizable in a rule 3.850 motion, and remanded for the court to treat the motion as such, and grant her sixty days to file an amended motion.

State v. Jenkins, 2D2022-3623 (Fla. 2d DCA June 12, 2024): State appeal of a motion granting postconviction relief for ineffective assistance of counsel, where, at a murder trial, a witness testified that the defendant had previously been in prison and defense counsel did not move for a mistrial. The postconviction court granted the motion, finding that had a

motion for mistrial been made, it would have been granted because Jenkins did not testify at trial and the jury would not have otherwise known about his time in prison. The DCA held that the postconviction court did not evaluate counsel's conduct from counsel's perspective at trial. Trial counsel believed that the trial had been going well for the defendant, and that a mistrial would not have benefitted his client. Accordingly, Appellee failed to establish that no competent counsel would have proceeded with the case rather than move for a mistrial. It is also not apparent that had such motion been made, that the trial court would have granted it. The postconviction court erred in finding that counsel performed deficiently. Reversed/remanded.

Islaam v. State, 2D2023-0419 (Fla. 2d DCA June 14, 2024): The trial court entered an order modifying Appellant's judgment and sentence to add a $500,000 fine, over one year after his sentence had begun, on motion of the State asking the court to "correct" a sentence that the State described as "incomplete." According to the State, the fine was mandatory. The State did not cite any provision of rule 3.800—or any legal authority at all—in its motion or at the hearing that followed. The correction the State sought would not have fixed a scrivener's error nor benefitted the Appellant, so rule 3.800(b) was inapplicable. Additionally, rule 3.800(c) was also inapplicable because the modification was not sought within 60 days. Rule 3.800(a) would have been the only authority under which the State could have brought its motion, but it would have required a finding that the sentence was "illegal." The DCA explains that this is a high bar—"the sentence must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." The State argues that no judge could have imposed the original sentence (omitting the $500,000 fine) because the statute mandated that his sentence include the fine. DCA does statutory interpretation pm section 893.20(s) next: "punishable… by a fine of $500,000" does not mean that one *must* be punished by $500,000 in every case. Contrast with "shall be ordered to pay" language found in drug trafficking statute, which is mandatory. Because section 893.20(2) does not mandate imposition of the $500,000 fine, the original sentence was not illegal for lacking it, and the trial court lacked authority to modify the sentence over a year after it was imposed. Reversed and remanded.

Carter v. State, 2D2022-3275 (Fla. 2d DCA June 21, 2024): Appeal from a judgment and sentence imposed after a plea which reserved the right to appeal the denial of Appellant's dispositive motion to suppress. The charges resulted from a *Terry* stop for which law enforcement had no reasonable suspicion to seize him. The trial court found reasonable suspicion existed based on three facts: (1) the officers saw what they believed to be a concealed firearm in Mr. Carter's waistband; (2) Mr. Carter was in a high crime area; and (3) Mr. Carter declined to answer the officer's question about whether or not he possessed a permit for the gun, and continued walking along the path he was taking. The DCA analyzed each factor and held that "each factor the trial court expressly relied upon has repeatedly been determined to be insufficient to support a reasonable suspicion of criminal activity that would permit officers to detain an individual." The question in this case, then, the DCA explained, is whether the three factors, taken together, would be sufficient to conduct a *Terry* stop. The DCA found Appellant's argument to be especially persuasive: "If law enforcement could use your refusal to answer their questions as a means to get the ball over the line for a reasonable suspicion determination, then what choice do you really have but to answer their questions? No reasonable person would decline to answer their questions if they knew that refusing to do so could arouse suspicion that would subject them to a *Terry* stop. And if no reasonable person would feel free to decline to answer, then aren't they actually seized at the very moment the officer asks the question?" Under the facts of this case, there was no reasonable suspicion to justify the stop and subsequent search. Reversed/remanded for discharge.

D.W. v. State, 2D2022-3494 (Fla. 2d DCA June 21, 2024): Appeal from an order adjudicating the defendant delinquent for armed possession of cocaine, possession of a firearm while committing a felon, and possession of a firearm as a minor. The State committed a discovery violation at the adjudicatory hearing. The State noticed a report that mentioned, but did not contain or attach, photographs that the State later admitted at trial. The trial court found that the photographs had been disclosed but that defense counsel had chosen not to look at them. This was not supported by the record. Further, the trial court's *Richardson* inquiry was inadequate because it declined to ask the most important issue, "what effect [the violation] had on the defendant's ability to prepare for trial."

On the facts of this case, there was a reasonable probability that his trial preparation or strategy would have been materially different had he known that the State intended to introduce at trial photographs of his fingerprints on the weapon. Reversed/ remanded.

Zuniga-Mejia v. State, 2D2023-1001 (Fla. 2d DCA June 21, 2024): The trial court dismissed Appellant's 3.850 motion, with prejudice, for failing to respond to an order for him to acknowledge that the State was not obligated to renew or extend any previous plea offers if his motion was unsuccessful, that there was a possibility that could receive a harsher sentence if his conviction was set aside, that he had no legal right to gain time while in county jail, and that the postconviction court could impose sanctions for prohibited conduct under 3.850 (n)(3). The order gave him 30 days to acknowledge the warnings and provide written verification that he still wished to proceed with his motion. He did not acknowledge or verify. The DCA says that it is "mindful of the postconviction court's intent to warn Mr. Zuniga-Mejia of the potential unintended consequences that attend the filing of a postconviction motion" but "the rule simply does not allow dismissal, let alone dismissal with prejudice, should a movant not expressly acknowledge that there may be adverse consequences to prevailing on his motion." Reversed/remanded.

Third DCA

Adams v. State, 3D23-737 (Fla. 3d DCA June 12, 2024): Trial court erred at probation revocation proceeding in not properly awarding Adams the credit for time he served prior to his original sentence. The State "commendably concedes" the error. Reversed/remanded.

Gonzalez-Hernandez v. State, 3D22-1124 (Fla. 3d DCA June 19, 2024): Trial court struck Appellant's notice of expiration of speedy trial and denied his motion for discharge. The trial court's reason for striking the notice was "its belief that he had waived his speedy trial rights during hearings on September 15, 2021 and November 10, 2021." The clerk's minutes contained check boxes that reflected a speedy trial waiver, but the transcripts of both hearings established that he did not waive his speedy trial rights. Competent, substantial evidence does not support the

finding of waiver of speedy trial. Convictions and sentences vacated; remand for discharge.

Myers v. State, 3D22-2019 (Fla. 3d DCA June 26, 2024): State appeal of order granting motion to suppress statements based on a *Miranda* violation. The trial court found that the statements were improperly elicited by continued questioning after Myers requested a lawyer. DCA says the request was not clear and unequivocal and reverses. Police are not required to terminate an interrogation or clarify the suspect's wishes if the suspect makes only an ambiguous or equivocal invocation. "I think I should have a lawyer" constituted, at best, an equivocal statement. The officers were not required to terminate the interrogation. Reversed/remanded.

Fourth DCA

Moore v. State, 4D2023-2151 (Fla. 4th DCA June 5, 2024): Appeal from judgment and sentence for five misdemeanor charges of unlawful abandonment or confinement of an animal. Appellant moved for JOA on the grounds that the State failed to present any evidence that she was the person who confined the animals or had responsibility for their care. Appellant and her aggressive and controlling husband lived on the same property, but she was responsible for the "inside dogs" and her husband was responsible for the "outside dogs." The State argued that simply knowing that an animal is confined without adequate food or water or kept in an enclosure without wholesome exercise and change of air, violates the statute. The State conflated Appellant's knowledge that the animals were kept in the crates to knowingly confining them there. The statute only punishes whoever confines, impounds, or keeps the animals, not whoever knows about it. The court should have granted the JOA because the State failed to prove that Appellant confined or impounded the dogs in violation of the statute. Reversed, vacated, JOA to be entered.

McCrae v. State, 4D2023-2029 (Fla. 4th DCA June 5, 2024): The trial court erred in adjudicating the defendant a second time for a probation violation, as he had already been adjudicated on the underlying offense. Duplicative adjudications of guilt after revocation of probation are

superfluous, unauthorized, and can cause undue confusion in future proceedings. Reversed/remanded to strike the second adjudication of guilt.

Lange v. State, 4D2023-1717 (Fla. 4th DCA June 5, 2024): The trial court did not abuse its discretion in a murder and sexual battery trial when it did not allow defense counsel to recross-examine one of the State's DNA experts, or when it overruled defense counsel's objection to the State's closing argument. The crime occurred in 1985 and the defendant was arrested in 2019 on the basis of DNA results. A DNA expert was cross-examined about whether she had obtained DNA profiles from any of defendant's brothers. Defense counsel wanted to re-cross examine the expert on whether she had obtained a DNA profile from defendant's father; this was a new matter, and therefore was forbidden on cross-examination. The State's argument in closing regarding the likelihood of the DNA profile coming from anybody else being 1 in 27 quadrillion did not go beyond what is permitted during closing argument. Affirmed.

Pollock v. State, 4D2023-1310 (Fla. 4th DCA June 5, 2024): The trial court imposed both the Habitual Felony Offender and PRR enhancements, providing for a sentence of twenty-five years. The trial court needs to clarify that the *first fifteen years* of the sentence shall be served as a PRR enhancement. Remanded for correction of the sentence.

Toombs v. State, 4D2022-2978 (Fla. 4th DCA June 5, 2024): The court found that Appellant qualified as an HFO, and sentenced him as an HFO on one count but not another. Appellant argued that the resulting sentence was illegal because the court imposed a mix of enhanced and unenhanced sentences to achieve an aggregate sentence that exceeds the statutory maximum sentence allowed if he count ran consecutively without the HFO designation, or the maximum concurrent sentence for habitualized counts, pursuant to *Hale*. DCA says *Cotto* has limited *Hale*: courts are now permitted to run the unenhanced sentence consecutive to the HFO sentence. See *Cotto v. State*, 139 SO. 3d 283 (Fla. 2014). Affirmed.

Hasbrouck v. State, 4D2023-2791 (Fla. 4th DCA June 20, 2024): Defendant entered an open plea, which the trial court accepted. Prior to

sentencing, defense counsel announced that the defendant wished to withdraw his plea. The trial court denied the request without a hearing on the grounds that defendant did not submit the motion in writing. This was error, which the State concedes. Reversed/remanded with instructions to allow the defendant to be heard on his motion.

Noel v. State, 4D2021-2552 (Fla. 4th DCA June 20, 2024): The trial court erred when it listed a crime on the probation order for which he had not been convicted. The State conceded this issue. The trial court also erred in imposing special conditions of probation which were not orally pronounced at sentencing. The trial court's statement, "he's going back on probation" was not sufficient to place Noel on notice that the trial court was reimposing special conditions of probation. Reversed/remanded for the trial court to correct the scrivener's error which erroneously listed a crime for which Noel was not convicted, and to strike the special conditions of probation that were not orally pronounced at sentencing.

Frank v. State, 4D2022-1339 (Fla. 4th DCA June 26, 2024): Frank was sentenced to 15 years in prison followed by 15 years on probation. The written order of probation included a $50 per month supervision cost which was not orally pronounced at sentencing. The imposition of the cost of supervision itself is provided by statute and need not be orally pronounced. However, because no statutory authority sets the cost amount, an evidentiary hearing on the proper amount is required. The error in failing to orally pronounce the exact cost does not result in no cost being imposed. Remanded for evidentiary hearing to determine cost of supervision.

Fifth DCA

Watkins v. State, 5D2023-3374 (Fla. 5th DCA June 7, 2024): Appeal from a summary denial of a 3.850 motion, in which Appellant alleges that his attorney was deficient for failing to file a motion to disqualify the trial judge, for failing to argue and call witnesses who would prove that the threatening letter he was charged with writing was actually forged, and for failing to inform him that if he violated probation, he could be sentenced up to the statutory maximum for the offense. The summary

denial was improper as to grounds 2 and 3; there are no records conclusively refuting those grounds. Reversed/remanded for reconsideration of grounds 2 and 3.

Hastings v. State, 5D2023-3296 (Fla. 5th DCA June 7, 2024): Affirmed the summary denial of a 3.850 alleging ineffective assistance of counsel. Appellant claims that she was not informed of the maximum possible sentence, but the plea form and the discussion at the plea hearing refute this claim. Appellant also claims that counsel was ineffective for not bringing to the court's attention a double jeopardy issue. However, double jeopardy is not implicated by dual convictions for possessing a drug and actually selling it (only dual convictions for possession and possession with *intent to sell* violates double jeopardy).

Mathis Jr. v. State, 5D2023-1980 (Fla. 5th DCA June 7, 2024): The trial court erred by failing to treat his pro se motion to supplement as an amendment to a timely motion to withdraw plea, and summarily denying both. The trial court should review the motions together and hold a *Sheppard* hearing if it finds that they are legally sufficient.

Collins v. State, 5D2023-0299 (Fla. 5th DCA June 7, 2024): Appeal from the denial of a motion to correct illegal sentence, which sought a written order that specified which conditions of probation were violated. The lower court's written order and judgment fail to identify which conditions of probation were violated. "Commendably, the State has conceded the need to remand for the lower court to enter an appropriate written order." A trial judge must specify, in the written order or judgment, which conditions of probation or community control have been violated, even when a probationer openly admits in court to violating the conditions of probation. Remanded for entry of corrected order.

Brown v. State, 5D2023-1178 (Fla. 5th DCA June 14, 2024): Reversed/remanded for the imposition of the $100 cost for the FDLE Operating Trust Fund because it was not orally pronounced at sentencing.

Edwards v. State, 5D2022-1479 (Fla. 5th DCA June 14, 2024): Appeal from a summary denial of a 3.850 motion regarding revocation of

probation based on the prosecution of two drug-related offenses that were considered new law violations. Appellant proceeded to VOP hearing on the new-law-offense probation violations, was found to be in violation, and was sentenced to 30 years in prison. Subsequently, in the new prosecutions that formed the basis for the probation violations, defense counsel filed a motion to suppress the evidence and the motion was granted. As a result, Appellant contends that the *order granting* the motion to suppress was newly discovered evidence. (Note: Even if the information surrounding the illegality of the search was known while the VOP matter was pending, the fact that the motion to suppress was *granted* is newly discovered evidence.) The DCA agrees. The exclusionary rule applies to probation revocation hearings, so illegally seized evidence is inadmissible in probation revocation hearings. It is unclear from the record whether *all* of the evidence used to establish the probation violations would have been excluded from evidence, but if that were the case, the State may not have been able to prove the new law violations. Remanded for an evidentiary hearing.

Hoehaver v. State, 5D2023-1188 (Fla. 5th DCA June 28, 2024): Appeal from the denial of a dispositive motion to suppress physical evidence obtained from a traffic stop, where the police officer smelled the odor of marijuana emanating from the vehicle and subsequently searched it and found fentanyl. Appellant argues the search was illegal because marijuana odor alone no longer gives probable cause for a vehicle search, given the recent legalization of medical marijuana and hemp. Because the odor may be a result of lawful activity, Appellant argues, it should no longer be permitted to form the sole basis for a vehicle search. According to Appellant, the odor is now just a "hunch" or "suspicion" that a crime may be occurring. The DCA disagrees, holding that the smell of marijuana continues to provide probable cause for a warrantless search of a vehicle. The officer's reliance on the current state of the law was objectively reasonable, and the trial court properly denied the motion to suppress. Concurrence: The DCA did not need to reach the question of whether odor alone still provides a valid basis to search, because the totality of the circumstances test still applies, and under the totality of the circumstances in this case, there was sufficient reason to conduct the search.

State v. Boutiette, 5D2022-1598 (Fla. 5th DCA June 28, 2024): State appeal from an order granting self-defense immunity. The trial court initially held an immunity hearing and concluded that Boutiette failed to meet the evidentiary burden establish by statute at the time of his arrest (i.e., a defendant must prove entitlement to immunity by a preponderance of the evidence), and Boutiette contended that the higher standard and burden shift to the State applied retroactively to his case. The DCA reversed and remanded for a new self-defense hearing in *Boutiette I.* On remand, the State argued that the Florida Supreme Court had decided *Boston*, which held that a deficient self-defense immunity hearing that used the wrong standard is "cured" by a jury verdict because the jury uses the beyond a reasonable doubt standard and the State has the burden of proof. According to the State, the trial court did not now need to hold a new self-defense immunity hearing because Mr. Boutiette had been convicted by a jury. The trial court did not accept this argument and instead held a new immunity hearing, and found that the State did not meet its burden, and granted the motion. The DCA now reverses, noting that "we appreciate that the trial court was under instructions from *Boutiette I* to conduct a hearing under the newer, higher standard of proof in self-defense immunity; the language in *Boutiette I* was definitive and clear. At about the same time, however, the Florida Supreme Court issued its decision in *Boston*, which… takes precedence over the panel decision in *Boutiette I.*" Because *Boston* applies, the trial court's order vacated Boutiette's convictions is reversed, with instructions to reinstate the convictions and sentences.

Nelson v. State, 5D2022-0703 (Fla. 5th DCA June 28, 2024): DCA vacates its January 12, 2024 opinion and substitutes this opinion in its place. Appellant pled no contest to drug charges and proceeded to sentencing where he argued for a 36 months downward-departure sentence and the State argued for 87 months in prison (an agreed-upon cap in exchange for Appellant's plea). The judge sentenced him to the guideline sentence. He argues that the court considered an impermissible factor—that the court considered uncharged conduct (possession of guns)—in sentencing him. The court made two statements about the guns: in the first, the court said "what hurt you the most was the photographs of the guns," and in the second one, the court said "I did not take [the guns] into account." The DCA conducts an analysis of whether the trial court followed the

Banks analysis in deciding the sentence and ultimately concluded that "it appears that the trial court considered Nelson's downward departure request and exercised its discretion to deny it. At minimum, the record provides no basis for us to conclude otherwise." Further, appellant did not show fundamental error. After the Florida Supreme Court decided *Garcia*, it is no longer *per se* fundamental error for the sentencing court to rely on impermissible factors. Examples of fundamental error at sentencing are sentences exceeding the statutory maximum, an arbitrary policy of rounding up sentences, where the sentencing guidelines are invalid, and where the court upwardly departs without explanation. The DCA cannot say that Nelson's 87.23 month sentence reflects the trial court's having committed fundamental error. The bottom-of-the-guidelines sentence could have been obtained without the assistance of the purported error.

Sixth DCA

Nealy v. State, 6D23-745 (Fla. 6th DCA June 7, 2024): The trial court was without jurisdiction to revoke Appellant's probation on Count 7. Her probationary period as to this count began on April 1, 2011, and ended on March 31, 2016. Probation on that count ended prior to her arrest for violation of probation or the filing of an affidavit for VOP and issuance of a warrant. Reversed with instructions to enter an amended order that does not revoke Appellant's probation as to Count 7.

State v. Repple, 6D23-1448 (Fla. 6th DCA June 14, 2024): State appeal from order granting motion to suppress breath test results. A police officer from the City of Maitland took the defendant outside of the city's jurisdiction to read him implied consent and submit to a breath test. The breath test machine was operated by the Orange County Sheriff's Office, and was outside of the city limits. The officer asserted his official power as a police officer when he requested the breath test and gave the Defendant the implied consent warning. The question presented by the case is whether the officer had the authority to do so outside of his jurisdiction. Analysis: The legislature has granted municipalities the power to exercise police powers outside of its jurisdiction by general law in at least two instances: one is fresh pursuit, and the other is by

agreement between law enforcement agencies under the Florida Mutual Aid Act. It is possible that an agreement entered into under the FMAA may exist to authorize Maitland police officers to exercise authority outside of Maitland, but the State did not introduce such an agreement into evidence. The State argued that courts can grant extraterritorial police power to municipalities—the DCA rejects this premise. The power to grant municipalities extraterritorial powers belongs exclusively to the legislature. The DCA points out that they are in direct conflict with the Fifth District, which in *State v. Torres*, 350 So. 3d 412 (Fla. 5th DCA 2022) recognized a court-created exception to the color of office doctrine. Affirmed and conflict certified.

* Laurel Cornell Niles graduated cum laude from the Florida State University College of Law, where she was an Ucola Katzentine & Tobias Simon Scholar, on the Dean's List, and inducted into the Phi Delta Phi Legal Honor Society.

Mrs. Niles has been licensed as an attorney since 2013. She has litigated every stage of the criminal legal process, from first appearance through certiorari petition to the United States Supreme Court, providing zealous advocacy for individuals accused of misdemeanor, felony, and capital offenses. In addition to first-chair representation at the trial court level, Mrs. Niles has represented clients as appellate counsel, having briefed hundreds of direct appeals, as well as final orders from postconviction petitions. Mrs. Niles has argued in the Florida Supreme Court and is admitted to practice in all state courts of Florida and the United States District Court for the Northern District of Florida.

Mrs. Niles has presented Continuing Legal Education workshops and has lectured at the Florida State University College of Law on the topics of Fourth Amendment searches and Sixth Amendment right to counsel. Mrs. Niles is a member of the Florida Bar Criminal Law Section and the Florida Association for Criminal Defense Lawyers.

Mrs. Niles and her family reside in Tallahassee, Florida.