IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

ROBERT HOWARD,
Appellant,

V.

STATE OF FLORIDA,
Appellee.

Provided to South Bay Corr. and Rehab. Facility
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Appeal Case No.: 2D19-3299

SUPPLEMENTAL BRIEF OF APPELLANT

On Appeal from the Circuit Court in and for Polk County,
State of Florida

L.T. Case No[s]: CF81-2362; CF81-2503

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

1. As in *Jackson*, the Lower Court Lacked Authority to Retroactively Reinstate Howard's Sentences Once They Had Been Vacated 2

2. Under *Okafor*, the Lower Court Lacked Authority to Disregard This Court and the Florida Supreme Court's Mandates Reversing Howard's Case and Remanding for Resentencing 4

CONCLUSION 10

CERTIFICATE OF COMPLIANCE 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

Atwell v. State, 197 So. 3d 1040 (Fla. 2016) 1, 4

Croft v. State, 295 So. 3d 307 (Fla. 2d DCA2020) 1

Franklin v. State, 258 So. 3d 1239 (Fla. 2018) 1, 4

Hurst v. State, 202 So. 3d 40 (2016) 2, 5

Marshall v. State, No. 2D16-1095, 2019 WL 5296709 (Fla. 2d DCA Oct. 18, 2019) 4, 7, 8, 9

Morales v. State, 580 So. 2d 788 (Fla. 3d DCA1991) 9

O.P. Corp. v. Village of N. Palm Beach, 302 So. 2d 130, 131 (Fla. 1974) 5

Okafor v. State, 225 So. 3d 768, 770 (Fla. 2017) 5

State v. Jackson, 45 Fla. L. Weekly S299, Case No. SC20-257 (Fla. Nov. 25, 2020) ..... *passim*

State v. Michel, 257 So. 3d 3 (Fla. 2018) 1, 3

State v. Okafor, 45 Fla. L. Weekly S309, Case No. SC20-323 (Fla. Nov. 25, 2020) ..... *passim*

State v. Owen, 696 So. 2d 715 (Fla. 1997) 4, 9

State v. Poole, 297 So. 3d 487 (2020) 2, 5

Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986) 4

Trotter v. State, 690 So. 2d 1234, 1237 (Fla. 1997) 9

Statutes

§ 43.44, Florida Statutes (2019) 6

Other Authorities

Philip J. Padovano, *Florida Appellate Practice* § 20:8 (2020 ed.) 5

Rules

Fla. R. App. P. 9.210 10

Fla. R. App. P. 9.340(a) 6

ARGUMENT

In his amended initial brief, Howard argues that the lower court erred in rescinding its December 2016 order granting him post-conviction relief in the form of a new sentencing hearing. Specifically, the lower court issued an "Order after Remand" wherein the court "reversed" Howard's sentences in case numbers CF81-2362 and CF81-2503 and granted him "a new sentencing hearing" pursuant to the mandates from this Court and the Florida Supreme Court. R. 92 (citing *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016)). But the court later rescinded its order in light of *State v. Michel*, 257 So. 3d 3 (Fla. 2018), and *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018). R. 195-196.

The main thrust of Howard's argument on appeal is that, because the lower court's December 2016 order was a final order in a rule 3.850 proceeding, the court lacked authority to rescind the order, more than two years later, on the basis of the state's request. *See Croft v. State*, 295 So. 3d 307 (Fla. 2d DCA2020).

Two recent Florida Supreme Court holdings are critical to this Court's analysis: *State v. Jackson*, 45 Fla. L. Weekly S299, Case No. SC20-257 (Fla. Nov. 25, 2020), and *State v. Okafor*, 45 Fla. L. Weekly S309, Case No. SC20-323 (Fla. Nov. 25, 2020). *Jackson* sheds light on whether a trial court can retroactively reinstate a sentence once it has been vacated; and *Okafor* sheds light on whether a

trial court can disregard an appellate court mandate where there has been an intervening change in the relevant law.

Both *Jackson* and *Okafor* further substantiate Howard's claim on appeal. He addresses each case in turn below.

1. As in *Jackson*, the Lower Court Lacked Authority to Retroactively Reinstate Howard's Sentences Once They Had Been Vacated

In *Jackson*, Michael James Jackson was convicted by a jury of the robberies, kidnappings, and murders of two people. 45 Fla. L. Weekly S300. The jury recommended the death penalty by votes of eight to four. *Id.* The trial court imposed the death penalty for both murders. *Id.*

In 2017, Jackson filed a successive post-conviction motion seeking relief from his death sentence pursuant to *Hurst v. State*, 202 So. 3d 40 (2016). *Id.* at S300. The post-conviction court granted Jackson a new penalty phase, and the state did not appeal the order granting relief. *Id.*

In February 2020, the state sought to apply the Florida Supreme Court's holding in *State v. Poole*, 297 So. 3d 487 (2020), which "'reced[ed] from *Hurst v. State* except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt.'" *Id.* at S300 (quoting *Poole*, 297 So. 3d at 491). The state requested that the post-conviction court dismiss the resentencing proceeding and maintain Jackson's sentences of death. *Id.* The post-conviction court denied the state's motion,

reasoning that it lacked jurisdiction to reconsider the final order vacating Jackson's death sentences. *Id.*

On February 20, 2020, the state filed in the Florida Supreme Court an emergency "all writs" petition and petition for writ of prohibition along with a motion to stay the resentencing proceedings. *Id.* at S300. The question presented to the Court was "whether a death sentence that was vacated by the post-conviction court can be 'reinstated' if the [s]tate never appealed the final order granting relief, the resentencing ha[d] not yet taken place, and [the Florida Supreme Court] has since receded from the decisional law on which the sentence was vacated." *Id.* at S299.

Concluding that "Jackson's sentences [could not] be retroactively reinstated," the Court denied the state's all writs petition and its alternative writ of prohibition, thus permitting Jackson's resentencing proceeding to go forward despite the new rule of law announced in *Poole*. *Id.* at S303.

Howard's case is virtually indistinguishable from *Jackson*. As in *Jackson*, Howard's life sentences were vacated pursuant to then-binding Florida Supreme Court precedent. *See* R. 92 (post-conviction court's December 2016 "Order after Remand" stating that Howard's sentences in both cases were "reversed" and that "[a] new sentencing hearing shall be held..."). As in *Jackson*, the state sought the application of new Florida Supreme Court precedent—*i.e.*, *Michel*, 257 So. 3d 3,

and *Franklin*, 258 So. 3d 1239, which overruled *Atwell*, 197 So. 3d 1040, the decisional law on which Howard's sentences were vacated—and the state requested that the post-conviction court dismiss Howard's resentencing proceeding and maintain Howard's life sentences. R. 118-120.

Thus, as in *Jackson*, the lower court lacked authority to retroactively reinstate Howard's life sentences once they had been vacated. And this Court should order the lower court to follow through with Howard's resentencing hearing despite the new rule of law announced in *Michel* and *Franklin*. *See Jackson*, 45 Fla. L. Weekly at S302. *See also Teffeteller v. State*, 495 So. 2d 744, 745 (Fla. 1986) ("A prior sentence, vacated on appeal, is a nullity.").[1]

2. Under *Okafor*, the Lower Court Lacked Authority to Disregard This Court and the Florida Supreme Court's Mandates Reversing Howard's Case and Remanding for Resentencing

In *Okafor*, a jury found Bessman Okafor guilty of first-degree premeditated murder, along with attempted first-degree murder and armed burglary of a dwelling with explosives or a dangerous weapon. 45 Fla. L. Weekly S309. Based on the jury's 11-1 recommendation, the trial court sentenced Okafor to death for the first-degree murder conviction. *Id.* On direct appeal, the Florida Supreme Court

[1] Howard made a similar argument in his response to the state's motion requesting termination of his resentencing hearing. *See* R. 193 (citing *State v. Owen*, 696 So. 2d 715 (Fla. 1997) (refusing to retroactively reinstate Owen's prior conviction where the conviction had previously been vacated). Yet the lower court rejected Howard's argument based entirely upon this Court's holding in *Marshall v. State*, No. 2D16-1095, 2019 WL 5296709 (Fla. 2d DCA Oct. 18, 2019). R. 195-96. However, the validity of *Marshall* has now been called into question by *Okafor*, 45 Fla. L. Weekly S309, the other case upon which Howard relies in this supplemental brief.

affirmed Okafor's first-degree murder conviction, but vacated his death sentence and remanded for a new penalty phase proceeding. *Id.* at S310 (citing *Okafor v. State*, 225 So. 3d 768, 770 (Fla. 2017)). In vacating Okafor's death sentence, the Court relied on *Hurst*, 202 So. 3d 40. *Id.*

Before the trial court conducted Okafor's new penalty phase proceeding, the Florida Supreme Court decided *Poole*, 297 So. 3d 487, receding from *Hurst v. State*, the decisional law on which Okafor's sentence was vacated. *Id.* at S310. Because Okafor would have been constitutionally eligible for a death sentence under the rule of *Poole*, the state "asked the trial court to reinstate Okafor's death sentence." *Id.* The trial court denied the state's motion, ruling that a circuit court lacks the authority to ignore a Supreme Court mandate. *Id.* The state then filed a constitutional writ in the Florida Supreme Court under the "all writs" provision asking the Court to reinstate Okafor's death sentence, along with a writ of prohibition asking the Court to direct the trial court not to go through with Okafor's new penalty phase. *Id.*

In rejecting the state's position, the Court in *Okafor* held that "[i]t is a bedrock principle that 'the judgment of an appellate court, where it issues a mandate, is a final judgment in the cause.'" *Id.* at S310 (quoting *O.P. Corp. v. Village of N. Palm Beach*, 302 So. 2d 130, 131 (Fla. 1974); Philip J. Padovano, *Florida Appellate Practice* § 20:8 (2020 ed.) ("An appellate court decision

ordinarily becomes final when the appellate court issues a document known as a mandate.")).

In rendering its decision, the Court explained that "[w]hen the mandate issued in Okafor's appeal, [the Supreme Court's] labor was complete, even though [its] judgment resolving the appeal required further proceedings in the trial court." *Id.* at S310. In order to grant the relief requested by the state, the Court reasoned, it would have to "recall [its] mandate and then render a different judgment." *Id.* But, as recognized by the Court, "the law constrains [the Court's] ability to do so." *Id.* (citing § 43.44, Florida Statutes (2019) (stating that an appellate court's mandate "may not be recalled more than 120 days after it has been issued."); Fla. R. App. P. 9.340(a) (stating that a "court may direct the clerk to recall the mandate, but not more than 120 days after its issuance.")).

Under this reasoning, the Court held that "[w]hile *Poole* established a new constitutional baseline *going forward*, [the] judgment vacating Okafor's death sentence is final and no longer subject to reconsideration." *Id.* at S311 (emphasis added).

Okafor is on point and thus should guide this Court's analysis in Howard's case. As in *Okafor*, the Florida Supreme Court reversed and remanded Howard's case for resentencing based on then-binding precedent. R. 89, 91. As in *Okafor*, the state sought to terminate Howard's resentencing hearing, in effect asking the trial

court to reinstate Howard's sentences in light of a change in the relevant law. R. 118-20. And, as in *Okafor*, the state's request required the lower court to disregard this Court and the Florida Supreme Court's mandates reversing and remanding Howard's case for resentencing. R. 118-20.

Hence, just as the Court in *Okafor* lacked authority to disregard the mandate vacating Okafor's death sentence and ordering resentencing, so the trial court in Howard's case lacked authority to disregard the mandates from this Court and the Supreme Court reversing and remanding Howard's case for resentencing. As in *Okafor*, "[w]hile [*Michel* and *Franklin*] established a new constitutional baseline *going forward*, [the] judgment vacating [Howard's] sentence[s] is final and no longer subject to reconsideration." *Id.* at S311 (emphasis added). And this is true despite the new rule of law announced in *Michel* and *Franklin*.

Significantly, Howard presented this issue to the trial court in his response to the state's argument and in his motion for reconsideration, arguing, *inter alia*, that the trial court lacked authority to disregard an appellate court's mandate. R. 190-94; 198-202. But the lower court rejected Howard's argument based entirely upon this Court's holding in *Marshall*, No. 2D16-1095, 2019 WL 5296709. In so doing, the lower court concluded that in light of the decision in *Marshall*, it was "satisfied that it [was] the intent of the Second District Court of Appeals that its previously entered mandate is to be *disregarded* in light of the higher court's change in its

interpretation of the law." R. 196 (emphasis added). In other words, the court concluded that this Court's *Marshall* decision not only permitted but *required* the lower court to disregard this Court and the Florida Supreme Court's mandates in Howard's case. R. 89, 91.

But the lower court's reasoning could not be more flawed. As in *Okafor*, there was "no available legal means" for this Court or the lower court "to undo [a] final judgment" reversing Howard's case and remanding for resentencing. *Okafor*, 45 Fla. L. Weekly at S310. Besides, *Marshall*—the sole authority upon which the lower court relied in rejecting Howard's argument concerning the finality of the mandates—has now been called into question by the Supreme Court's holding in *Okafor*.[2]

As a final point, it is not insignificant that the Court in *Okafor* rejected the state's argument that one of the recognized exceptions to the law of the case doctrine allowed the Court to deviate from the mandate and reinstate Okafor's death sentence. *Id.* at S310. Specifically, the state invoked the Court's past recognition that an appellate court has "'the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous

[2] Although Howard asked this Court to strike appointed counsel's initial brief raising a mandate argument in the initial stages of this appeal, he did so in light of this Court's decision in *Marshall*, No. 2D16-1095, 2019 WL 5296709. At the time counsel filed the initial brief in this case, *Marshall* would have controlled the outcome. Now, however, *Okafor* appears to control the outcome. Given these extraordinary circumstances, Howard's decision to strike counsel's initial brief the mandate issue should not now be held against him.

decision would result in manifest injustice, notwithstanding that such rulings have become law of the case.'" *Id.* (citing *Owen*, 696 So. 2d at 720).[3]

In rejecting the state's manifest injustice argument, the Court in *Okafor* noted that the state's petition did not present the question whether the Florida Supreme Court or the trial court should adhere to an earlier decision on a question of law. *Id.* at S311. In other words, the state's petition did not ask the Court to decide whether *Poole*, rather than *Hurst*, should govern Okafor's resentencing *going forward*, but instead asked the Court to "revisit and undo a final judgment." *Id.* Significantly, "[t]he exceptions to the law of the case doctrine," the Court explained, "do not speak to that issue." *See Id.* (expressly finding unpersuasive this Court's decision in *Marshall*, No. 2D16-1095, 2019 WL 5296709, and the Third District's decision in *Morales v. State*, 580 So. 2d 788 (Fla. 3d DCA1991), both of which involved the denial of the defendants' motions to enforce mandates where the lower court deviated from those mandates).

Thus, here, even if the state attempts to invoke the manifest injustice exception to the law of the case doctrine as the state did in *Okafor*, such argument must fail just as the state's argument in *Okafor* failed. Regardless of what law should govern Howard's resentencing *going forward*, the lower court simply did

[3] Notably, the state in the lower court in Howard's case invoked the same exception to the law of the case doctrine. *See* R. 187-88 (arguing that *Trotter v. State*, 690 So. 2d 1234, 1237 (Fla. 1997), serves as an exception to the law of the case doctrine "where a manifest injustice proceeds from a trial court's being forced to follow the wrong law as a result of a mandate superseded by an intervening law change.").

not have the authority to "revisit and undo a final judgment" reversing and remanding Howard's case for resentencing. *Okafor*, 45 Fla. L. Weekly at S311.

CONCLUSION

Because the lower court lacked authority to retroactively reinstate Howard's sentences once they had been vacated, and because the lower court lacked authority to deviate from this Court and the Supreme Court's mandates ordering resentencing, this Court should reverse this case and remand with instructions for the lower court to reinstate Howard's resentencing hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2) (*i.e.*, double-spaced Times New Roman 14-point font).

Robert Howard

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief has been hand-delivered to institutional staff for mailing on this 15th day of December, 2020, to: Second District Court of Appeal, P.O. Box 327, Lakeland, FL 33802-0327; and Attorney General's Office, 3507 Frontage Rd., Ste. 200, Tampa, FL 33607-7013.

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