

Case Law Update  
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Prepared by  
Richard L. Polin

Supreme Court of Florida

State v. Okafor, SC20-323 (Nov. 25, 2020)

In 2017, the Supreme Court vacated the sentence of death pursuant to the then-controlling decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016). After the Supreme Court partially receded from Hurst in Poole v. State, 297 So. 3d 487 (Fla. 2020), the State filed a petition in the Supreme Court, requesting that Court to reinstate the death sentence in light of Poole. The Supreme Court denied the petition, holding that its prior decision in this case, on direct appeal, in 2017, was final; resentencing therefore had to proceed, notwithstanding the intervening decision in Poole.

The Supreme Court addressed the State's petition as both an all writs petition and a petition for writ of prohibition. Significant points were that the 120-day period for recalling the mandate from the 2017 decision had expired long prior to the State's petition being filed. The Court had no authority to do indirectly, through the all writs petition, what it could not do directly. And, although Okafor's sentence would not be final until any ensuing resentencing, the Supreme Court's decision in the direct appeal was final and could not be undone. The prohibition petition further failed because the trial court had jurisdiction for the resentencing proceeding, as well as an obligation to proceed with it.

State v. Jackson, SC20-257 (Nov. 25, 2020)

Jackson had obtained a new penalty-phase proceeding in 2017, on the basis of Hurst, through a post-conviction motion in the trial court. The State did not seek rehearing; nor did the State appeal that motion. After the Poole decision, and a few weeks prior to the scheduled resentencing, the State moved, in the trial court, to vacate the order scheduling the resentencing and to "retain" the sentence of death. The trial court denied the State's motion, and the State sought review in the Florida Supreme Court, through an alternative all writs petition and prohibition petition. The Supreme Court denied the State's petitions.

The trial court order that denied the State's rule 3.851 motion became final when the State did not seek timely review of it. Although a trial court retains jurisdiction to reconsider any of its nonfinal rulings, "the State erroneously assumes that a postconviction proceeding is a step in the criminal prosecution and that a resentencing is a continuation of a postconviction proceeding. Our caselaw says otherwise."

As part of the analysis, the Court noted the First District's decision in Rogers v. State, which distinguished a 3.800(a) motion to correct sentence from a 3.850 motion. As the instant case did not involve a Rule 3.800(a) motion, Rogers was not relevant and the Supreme Court did not reach the issue of whether the First District's decision, treating a Rule 3.800(a) order as nonfinal, was correct.

[Colley v. State](#), SC18-2014 (Nov. 25, 2020)

The Supreme Court affirmed two convictions for first-degree murder and the corresponding sentences of death. Colley was convicted for killing his estranged wife and her friend, and a domestic violence injunction had been in effect, restricting his contact with his wife. The issues raised on appeal all related to the penalty phase of the proceedings.

Colley unsuccessfully challenged the CCP aggravator, arguing that the murders were not "cold" because he was upset about his deteriorating marriage and was under the influence of alcohol and drugs at the time of the murders. He further argued that he was upset by a phone call 40 minutes prior to the murders and that this negated the heightened level of premeditation required for this factor. As to the amount of time, the Court referenced prior decisions, one with as few as 5-7 minutes of time for reflection prior to a murder, as being sufficient for heightened premeditation; the Court did note that there was no bright-line rule. Two hours earlier, Colley had calmly participated in a court hearing involving his wife. After that, he calmly shopped at a gas station, armed himself, and drove to the scene of the murders, while having time to reflect. He approached the scene in a manner designed to conceal himself. He began shooting from outside and the victims did not provoke him in any way.

The Court also upheld the HAC factor. Colley argued that the victims did not experience terror, since the killings by gunshot were accomplished in less than one minute. The testimony from the medical examiner supported the HAC factor, as did that of another witness. The two women fled to the master bedroom after having been shot at by the defendant from outside the house. After the defendant shot his

wife, he left her to shoot the other victim, and then returned to inflict the shots that resulted in the death of his wife. The wife's friend also heard the defendant shooting his wife before he came to shoot her.

The trial court rejected proposed mitigators based on impairment at the time of the murders and impairment of the defendant's capacity to appreciate the criminality of his acts or to conform his conduct to the requirements of the law. This was based on the defendant's claim that he took Ambien and alcohol prior to the murders. The defense presented two experts who testified as to this factor. The State presented experts to rebut the factor. One stated that the side effects of Ambien were rare and that the parasomnia state which the defendant claimed was such that a person in that condition would not have been able to act appropriately in the courtroom at the time of the earlier hearing, which included a colloquy of Colley, 90 minutes prior to the murders.

Colley also challenged victim impact evidence on several grounds, including the interjection of an inflammatory appeal to religion. One letter asked to think of all the lives the former wife had "blessed." This was deemed "innocuous," and "did not come close to prejudicing Colley's constitutional rights."

Some of the prosecutor's statements in closing argument were challenged, absent objection, for fundamental error. The prosecutor referred to the job of the jurors in the penalty phase as one that "requires great courage." This comment did not suggest that a vote for life would be a copout. The prosecutor's argument was in the context of statements about the jurors' duty to follow the law.

In another argument, the prosecutor stated that the defendant had been on a mission, and that it was not his job to be his ex-wife's "judge, jury, and executioner," regardless of what he thought of her. And, whatever the wife did did not deserved the death penalty. These comments properly anticipated mitigation that the defense was going to assert and "properly argued the State's theory of Colley's culpability." The defense subsequently presented argument based on the emotional strain from estrangement from the victim/wife. The defense further argued that the wife bore some of the responsibility for Colley's "fragile mental state" because she allegedly lied to Colley about dating someone and leading Colley on. The defense characterized their relationship as an emotional roller coaster ride.

## Eleventh Circuit Court of Appeals

United States v. Delgado, 19-11997 (Nov. 23, 2020)

Delgado appealed convictions for importing 2.6 grams of a controlled substance, U-47700, and possession of five unregistered firearm silencers.

On appeal, he challenged the sufficiency of the warrant to establish probable cause for the search of his home, which resulted in the discovery of the silencers. The affidavit alleged that two packages of a white, powdery substance, from South Korea, were intercepted at the same post office within two weeks of one another. The substances were tested and were contraband. The packages were addressed to Delgado at the property that was ultimately searched. The property was not owned by Delgado, but he resided there. Had the packages not been intercepted, they would have been delivered to that residence. The affiant stated that those who receive shipments of narcotics through the mail often maintain records of the drug shipments at their homes. The Court rejected Delgado's contention that there was an insufficient nexus between the packages and the residence.

Even if the above facts did not establish probable cause, the good-faith reliance exception to the requirement of a warrant, pursuant to United States v. Leon, would apply.

Delgado also challenged the district court's determination of the advisory sentencing range under the Guidelines. He contested the inclusion of the contents of the first of the two packages when assessing relevant conduct. That package contained a "controlled substance analogue," and the count of the indictment pertaining to that substance had been dismissed prior to trial. The district court held Delgado accountable for the total weight of the two packages. The stipulated evidence at the bench trial did not mention the weight of the first package. Delgado argued that the government did not prove that he knew that the substance was illegal. The Eleventh Circuit did not reach the issue of whether Supreme Court case law regarding proof of knowledge applied to the determination of relevant conduct at sentencing. Even if that requirement applied, the government satisfied it by demonstrating the requisite knowledge by a preponderance of the evidence.

The evidence was that Delgado ordered the substance, hoping it would address his back pain. After taking previously prescribed hydrocodone, Delgado did not discuss the new substance, or the legality of obtaining it on his own, with his doctor. The two packages both contained illegal substances and were intercepted

within weeks of each other, and came from the same source. Delgado stipulated that he knowingly ordered the controlled substance in the second package to be shipped to the United States. The search of the residence also disclosed a third controlled substance, “kratom,” which Delgado admitted he knew was illegal to possess in Alabama.

The sentencing enhancement for possession of the silencers was properly applied. The enhancement is appropriate when “a dangerous weapon (including a firearm) was possessed” in connection with a drug offense. Delgado argued that he had multiple firearms and silencers at his residence because he was a target shooter and avid collector, and that there was no evidence that they were used in drug dealing. The Court rejected the argument because the silencers were found in the home, the same place where officers found digital scales and powders, including one controlled substance, “kratom.” The residence was also the intended destination for the intercepted contraband. As a result, a sufficient nexus was established.

[United States v. Shah](#), 19-12319 (Nov. 24, 2020)

Shah appealed convictions for receiving healthcare kickbacks. He argued on appeal that “the district court erred and should have instructed the jury that the government was required to prove that his main or only reason for accepting the payment was because it was made in return for writing prescriptions.” The Eleventh Circuit concluded that the instruction was erroneous, but the error was harmless because the government proved more than it was required to prove under the statute.

The instruction given by the district court stated, in relevant part:

To satisfy the second element of this offense, the Government does not have to prove that the defendant’s sole purpose in soliciting or receiving the remuneration or kickback was to obtain payment in return for the purchasing, leasing, ordering and arranging for, and recommending purchasing, leasing and ordering. Rather, the Government must only prove that obtaining payment in return for the purchasing, ordering or leasing was one of the defendant’s purposes in soliciting or receiving the remuneration or kickback.

The Government conceded at oral argument that the statutory elements of the offense do not require proof of the defendant’s motivation for accepting the

payment. The American Medical Association had filed an amicus brief arguing that statute required proof of either partial or primary motive. The Court agreed with the Appellant’s argument and the Government’s concession. The relevant language in the statute was “remuneration . . . in return for [writing prescriptions] . . .,” and said nothing about the purpose. The statute already required that the defendant accept the payment knowingly and willfully, and there was therefore no lack of a statutory mens rea.

[United States v. Trader](#), 17-15611 (Nov. 25, 2020)

Trader was indicted for charges related to child pornography. After the district court denied a motion to suppress evidence seized, Trader pled guilty and reserved the right to appeal the suppression issue. The Eleventh Circuit affirmed.

In [Carpenter v. United States](#), the Supreme Court held that “the third-party doctrine does not apply to retrospective collection of cell-site location information for periods of at least seven days.” Notwithstanding [Carpenter](#), the third-party doctrine was applicable in this case. The Eleventh Circuit construed [Carpenter](#) as being limited to cell-site location data, and found that it did not apply to the information obtained in the instant case – email addresses and internet protocol addresses. As such, a warrant was not required when the Government obtained this information, without a warrant, from a third party. Email addresses and internet protocol addresses are neither location records nor cell phone records.

The Eleventh Circuit’s opinion then went on to find that the warrant which was obtained after the email address and internet protocol address were obtained established probable cause for the subsequent search. The Court’s opinion details the links that were created from these addresses to the defendant.

[United States v. Green](#), 17-10346 (Nov. 25, 2020)

The Eleventh Circuit vacated its earlier opinion in the case and issue a new opinion. Five members of a drug-trafficking operation appealed convictions for their offenses, including RICO conspiracy. The primary issue addressed by the Eleventh Circuit was whether RICO conspiracy qualifies as a crime of violence under 18 U.S.C. s. 924(c). The Court concluded that it did not qualify as a crime of violence. The Court also found that the sentence of one of the defendants was procedurally unreasonable. The case was then remanded for further sentencing proceedings as a result of those two holdings.

The Court rejected the Government’s arguments based on the existence of an offense of “aggravated RICO conspiracy.” The Court did not determine whether such an offense even exists; it held that there was no indication that the defendants were charged with, or convicted of, any such offense as aggravated RICO conspiracy.

The sentence of defendant Corey was procedurally unreasonable. Corey and the Government had reached an agreement to modify the guideline range on the PSR. Corey then sought a downward departure from the agreed-upon guideline range, and the Government sought a high-end sentence between 210 and 262 months. The district court sentenced Corey to 1,440 months. The court had treated the agreement as a joint motion for a downward departure and rejected it. In the process of doing this, the district court never clarified the guideline range that it was relying on. There had been several requests by the parties for such clarification from the district court. The district court further erred by coming to a factual conclusion that Corey was involved in one particular murder, which was not supported by the evidence.

Other issues addressed in the opinion were covered by the August 17, 2020 Case Law Update addressing the original Court opinion in this case.

### First District Court of Appeal

[Williams v. State](#), 1D19-498 (Nov. 25, 2020)

Williams appealed convictions for the first-degree murder of her husband and conspiracy to commit murder. The First District reversed the murder conviction, but affirmed the conspiracy conviction.

The evidence as insufficient to establish that the defendant was a principal in the offense of first-degree murder. The Court’s opinion includes an extensive discussion of the concepts of principal, aiding and abetting. Here, the defendant’s “only ostensible culpable conduct (e.g., consideration of ways to kill Mike, development of an alibi, agreeing to encourage Mike to go hunting with Brian) did not constitute commanding or impelling Brian to commit the murder (the equivalent of accessory before the fact) or the assisting or encouraging of Brian at the time he actually was committing the offense (the equivalent of second-degree principal).”

Brian had testified, and described the discussions he and the defendant had over many months about plans to kill Mike, “before deciding to make Mike’s death look like a hunting accident.” He stated that the defendant had liked his idea about

the hunting accident. When the day came, Mike called Brian and said he could not go hunting, because his wife would not let him. She later told Brian that she got cold feet at the last minute. Brian later made plans directly with Mike for a hunting trip. The defendant was not present for those conversations, plans or the ultimate murder. Brian testified that the defendant's involvement was limited to coming up with an alibi for herself and making sure that Mike went on the trip.

“While Brian characterized the planning of the murder as ‘very mutual,’ he also stated that he ‘planned a lot of it’ and that he ‘instigated a lot of it.’ Brian never testified about anything Denise did or said to incite or encourage him to commit the murder. Brian’s testimony showed that Denise mostly agreed with the idea of killing Mike.”

The same testimony was sufficient, however, as to the conspiracy. Even after the defendant got cold feet and called off the first planned hunting trip, Brian had further conversations with her to see if she still wanted to proceed and she still expressed her agreement.

The First District also rejected the defendant’s argument that the trial court failed to make the State elect between two mutually exclusive counts of the indictment – principal to first-degree murder and accessory after the fact. The trial court found that if the defendant were found guilty of both by the jury, one of the two could then be vacated. The jury convicted the defendant only on the principal count, not the accessory-after-the fact charge. As a result, the motion to compel the State to make an election was harmless.

[Fitzsimmons v. State](#), 1D-3591 (Nov. 25, 2020)

The First District affirmed convictions for sexual battery and lewd and lascivious molestation.

There was no error in the admission of child hearsay. The child provided detailed accounts which were consistent with those provided by other witnesses. Questions to the child were not leading. The child used age-appropriate language when answering questions. And there were no indicia of untrustworthiness, coercion or coaching. As the statements were deemed reliable, they were properly admitted.

## Second District Court of Appeal

[Feagin v. State](#), 2D18-3002 (Nov. 25, 2020)

Feagin appealed convictions for armed robbery and other offenses. The Second District reversed because the judge failed to remove a juror during the trial when the juror “belatedly disclosed his relationship with one of the victims.”

After direct examination of the victim, but prior to cross-examination, the juror in question, an alternate, sent a note to the court stating that the juror knew the victim. The juror was brought in for questioning. The judge concluded that there was no problem because the juror was an alternate. During questioning, the juror referred to the victim as a good friend, but one whom the juror had not seen in a while. The juror had not spoken to the victim about the case and added that he would not give the victim’s testimony any greater weight than that of any other witness.

The relationship that was concealed was both material and relevant and provided the basis for a cause challenge. The facts were sufficient to create doubt about the juror’s ability to be impartial notwithstanding the juror’s comments about viewing the victim’s testimony in the same manner as other witnesses’ testimony. Three other jurors had already been excused based on similar, if not more remote, relationships with two of the victims in the case.

Although the juror had been an alternate at the time that this issue arose and was addressed, before the case was submitted to the jury, one of the jurors was excused and this juror ended up serving on the jury. At the time of the excusal of the other juror, defense counsel raised this issue again, and the judge relied upon the court’s prior alternative ruling that a cause challenge did not exist because of the juror’s comments about viewing the victim’s testimony the same as other testimony.