

CASE NO. 18-6902

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT MANSFIELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

WHETHER THIS COURT SHOULD GRANT CERTIORARI REVIEW WHERE THE FLORIDA SUPREME COURT'S RULING ON THE RETROACTIVITY OF HURST V. FLORIDA, 136 S. CT. 616 (2016), AND HURST V. STATE, 202 SO. 3d 40 (FLA. 2016), CERT. DENIED, 137 S. CT. 2161 (2017), WAS BASED ON INDEPENDENT STATE LAW GROUNDS AND WHERE THE COURT REFUSED TO ADDRESS PETITIONER'S NON-HURST RELATED CLAIMS CHALLENGING THE INDICTMENT AND JURY INSTRUCTIONS BECAUSE THESE CLAIMS WERE UNTIMELY AND PROCEDURALLY BARRED UNDER FLORIDA LAW?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Florida Supreme Court:

1) Scott Mansfield, Petitioner in this Court, was the Appellant below.

2) Respondent, the State of Florida, was the Appellee below.

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CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at Mansfield v. State, 248 So. 3d 59 (Fla. 2018).

STATEMENT OF JURISDICTION

On July 5, 2018, the Florida Supreme Court affirmed the denial of Mansfield's second successive motion for postconviction relief. (Pet. App. B). On August 21, 2018, Justice Thomas granted Petitioner an extension of time to file the petition for writ of certiorari in this Court to December 2, 2018. Petitioner filed the instant petition on November 29, 2018.

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(g)(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

Petitioner, Scott Mansfield, was found guilty and sentenced to death for the brutal murder of Sara Robles in 1995. The Florida Supreme Court set forth the following factual summary of Mansfield's conviction and sentence:

On the morning of October 15, 1995, the body of Sara Robles was found lying in a grassy area next to a Winn-Dixie grocery store in Kissimmee, Florida. Robles was lying on her back with her legs and arms outstretched. Her shirt and skirt were pushed up partially revealing her breasts and pelvic area which were mutilated.

Examination revealed that Robles' nipples had been excised, as well as portions of her labia minor, majora and clitoris.

The police recovered from the scene a Winn-Dixie bag with a receipt inside, and another receipt reflecting the purchase of some groceries which were found scattered near Robles' body.[n1] Robles was found wearing a watch, apparently broken during the murder, which was cracked and stalled at 3 a.m. Additionally, among the items recovered strewn around her body were food stamps and a pager.

[n1] Juanita Roberson, a Winn-Dixie night-clerk working the early morning hours of October 15, testified that Robles, accompanied by Mansfield, made the purchases reflected in the receipts recovered by the police at the scene.

The ensuing investigation revealed that the receipts found near Robles' body reflected purchases made roughly at 2:35 and 2:36 a.m.[n2] The police then questioned Jesus Alfonso, a friend of Robles, who visited with Robles the previous evening. Alfonso told police that he and Robles went to Rosie's Pub, located in the same shopping plaza as the Winn-Dixie. Alfonso left the bar at 1:30 a.m., but Robles remained at the bar playing pool with a male whose description matched

Mansfield's.

[n2] The receipts found at the crime scene indicated that the documented purchases were made at 1:35 and 1:36 a.m. However, when the police took the receipts to the Winn-Dixie and had the assistant manager run some receipts to check the accuracy of the time reflected therein it was discovered that the registers were approximately an hour behind.

Karen Hill, a bartender at Rosie's Pub, was then interviewed and indicated that Robles was at the bar the previous evening in the company of Mansfield. According to Hill, Mansfield, Robles, and a third individual by the name of William Finneran exited the bar together shortly after 2 a.m.

After speaking with other witnesses confirming that Robles was in the company of Mansfield and Finneran during the early morning hours of October 15, the police questioned Finneran who indicated that he had exited the bar with Mansfield and Robles shortly after 2 a.m. and that he last saw them around 3 a.m. at Winn-Dixie.

The police, after learning that the pager found at the murder scene was traced to Mansfield, focused their investigation on him. Additionally, the police interviewed Juanita Roberson, a Winn-Dixie night clerk, who indicated that Robles purchased the items reflected in the recovered receipts with a man whose description matched Mansfield's and that Robles was in the company of that same man outside the Winn-Dixie when Roberson took her break at approximately 3 a.m. the night of the murder. With this information in hand, three detectives went to Mansfield's residence the night following the murder to question him. Mansfield agreed to be interviewed by the detectives at the police station.

Prior to being transported to the station, the detectives noticed that Mansfield had fresh scratches on his knees and hands. Once at the station, he avoided and inconsistently answered many of the questions posed to him during the roughly two-and-a-

half hour videotaped session. Specifically, Mansfield admitted to being at Rosie's Pub with Robles, but initially insisted that he had gone directly home after leaving the bar. Following further questioning, he begrudgingly admitted going to Winn-Dixie after leaving Rosie's Pub.

Shortly before the interrogation ended, the police received further evidence placing Mansfield at the scene of the crime. Juanita Roberson, the Winn-Dixie night clerk, identified Mansfield in a photograph lineup at the police station as the man she saw with Robles outside the Winn-Dixie the previous evening at approximately 3 a.m. The detectives directed Mansfield to lift his shirt at which time they observed a bruise on his chest. The police then arrested Mansfield and took into evidence a ring he was wearing with a distinctive "grim reaper" design.

The following day, Mansfield's brother, Charles, called the police and asked them to come down to his apartment to gather some items found in Mansfield's room. Once there, the police recovered food stamps, a knife and sheath, clothing, and a towel.[n3]

[n3] During its case in chief, the State's senior crime lab analyst, David Baer, testified as to the results of DNA and blood testing done on the items recovered from Mansfield's room. His testimony established that some of the items had blood that was consistent with Mansfield's. The tests conducted on the items recovered from Mansfield's room, however, did not reveal the presence of Robles' blood.

While at the apartment the police also questioned Mansfield's 10-year-old niece, Melissa Mansfield, who told them that Mansfield arrived home on the morning of October 15 at about 4:30. Melissa told police that Mansfield came to the door soaking wet, wearing shorts but no shirt, and carrying his shoes. Melissa told police she gave Mansfield a towel at his request, and that she noticed what appeared to be a small blood stain on his shorts.[n4]

[n4] During Mansfield's interrogation with

police the previous evening, Mansfield told police that he had taken a swim in the pool in the early morning hours of October 15 before entering the apartment and that his niece saw him enter the apartment afterwards.

The State introduced several other witnesses at trial who placed Mansfield with Robles at or near the crime scene at approximately the time the murder was presumed to have occurred. The State's medical examiner, Dr. Julie Martin, testified as to the existence of a pattern injury on the neck of Robles consistent with the pattern found on the "grim reaper" ring removed from Mansfield following his arrest.

Dr. Martin testified that Robles died of asphyxia due to airway compression as a result of blunt force trauma to the neck. Specifically, Dr. Martin opined that the murderer, while straddling Robles, strangled her with one hand, using the other hand or an object (the ring) to press down on her lower neck, causing her trachea to collapse. She further testified as to the existence of extensive bruising about Robles' eye, neck and collarbone. Dr. Martin concluded that Robles was conscious and struggling to breathe for "more than a few minutes" before becoming unconscious. According to Dr. Martin, Robles was alive but most likely unconscious when parts of her genitalia were excised by a sharp object consistent with the knife recovered from Mansfield's room.

The State also introduced the testimony of convicted felon Michael Derrick Johns who recounted a jailhouse conversation with Mansfield in which Mansfield confessed to Robles' murder. The defense did not present any evidence.

The jury, after being instructed on both first-degree premeditated murder and first-degree felony murder, found Mansfield guilty of first-degree murder. The jury unanimously recommended the death penalty. The trial court followed the recommendation and sentenced Mansfield to death.

In support of the death sentence, the trial judge found two aggravating circumstances: (1) the crime was

especially heinous, atrocious, or cruel; and (2) the crime was committed during the commission of or an attempt to commit a sexual battery. The court found no statutory mitigation and five nonstatutory mitigators and found the following three mitigators were entitled to very little weight: (1) the defendant's good conduct during trial; (2) the defendant is an alcoholic; and (3) the defendant's mother was an alcoholic during his childhood. The court accorded the remaining two mitigators some weight: (1) the defendant had a poor upbringing and dysfunctional family; and (2) the defendant suffers from a brain injury due to head trauma and alcoholism.

Mansfield v. State, 758 So. 2d 636, 640-42 (Fla. 2000) (emphasis added).

The Florida Supreme Court affirmed Mansfield's judgment and sentence in its opinion released on March 30, 2000. Id. Mansfield's conviction and sentence became final on April 23, 2001, when this Court denied certiorari review. Mansfield v. Florida, 532 U.S. 998 (2001).

Following Mansfield's unsuccessful collateral attacks in state and federal court,¹ Mansfield filed a second successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851 challenging his conviction and death sentence based on Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v.

¹ See Mansfield v. State, 911 So. 2d 1160 (Fla. 2005) (affirming denial of postconviction relief); Mansfield v. Secretary, Dep't of Corr., 679 F.3d 1301 (11th Cir. 2012) (reversing the district court's ruling granting federal habeas relief), cert. denied, 568 U.S. 1098 (2013); Mansfield v. State, 204 So. 3d 14 (Fla. 2016) (affirming the denial of successive postconviction motion), cert. denied, 137 S. Ct. 1818 (2017).

State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). In addition to seeking a new penalty phase based on Hurst, Mansfield asserted that his first-degree murder conviction was unconstitutional because the indictment failed to allege that the murder occurred during the course of a felony.²

The circuit court summarily denied Mansfield's motion, and Mansfield appealed to the Florida Supreme Court. On July 5, 2018, the Florida Supreme Court affirmed the lower court's order denying relief and stated:

Having reviewed Mansfield's initial brief, the State's answer brief, and Mansfield's reply brief, we conclude that Mansfield has not raised any issue that does not depend on the retroactive application of Hurst and that Mansfield is not entitled to relief.*¹ Mansfield was sentenced to death following a jury's unanimous recommendation for death. Mansfield v. State, 758 So. 2d 636, 642 (Fla. 2000). Mansfield's

² Mansfield first challenged his conviction on this basis in his *initial* postconviction motion in 2001. The state trial court denied the claim as procedurally barred because it was a claim that should have been raised on direct appeal. The Florida Supreme Court affirmed the trial court's denial of Mansfield's initial postconviction motion. Mansfield v. State, 911 So. 2d 1160 (Fla. 2005).

Mansfield also asserted in his state habeas petition that his appellate counsel was ineffective for failing to challenge the jury instructions that allowed the jury to convict him of first-degree murder under either the felony murder or premeditated murder theory of prosecution. The Florida Supreme Court rejected this claim and noted that the court, as well as this Court, have repeatedly rejected relief based on this claim. Id. at 1178-79 (citing Schad v. Arizona, 501 U.S. 624, 645 (1991) (holding that the United States Constitution does not require the jury to come to a unanimous decision on the theory of first-degree murder and that separate verdict forms for felony and premeditated murder are not required)).

sentence of death became final in 2001. Mansfield v. Florida, 532 U.S. 998, 121 S. Ct. 1663, 149 L. Ed. 2d 644 (2001). Thus, Hurst does not apply retroactively to Mansfield's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Mansfield's motion.

[*¹Although Mansfield has argued claims related to the State's presentation of alternate theories of murder that would otherwise appear facially to be independent of Hurst and yet untimely, he argues that they are timely because they were filed within one year of the issuance of Hurst v. Florida. Because Hurst v. Florida, as interpreted by this Court in Hurst, does not apply retroactively to Mansfield's case, it does not open the door to otherwise untimely claims under Florida Rule of Criminal Procedure 3.851(d)(2)(B).]

Mansfield v. State, 248 So. 3d 59, 60 (Fla. 2018).

Mansfield now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT RELIED ON INDEPENDENT STATE LAW GROUNDS WHEN DETERMINING THAT PETITIONER WAS NOT ENTITLED TO THE RETROACTIVE APPLICATION OF HURST V. FLORIDA, 136 S. CT. 616 (2016), AND HURST V. STATE, 202 SO. 3d 40 (FLA. 2016), CERT. DENIED, 137 S. CT. 2161 (2017), AND WHEN REFUSING TO ADDRESS PETITIONER'S UNTIMELY AND PROCEDURALLY BARRED NON-HURST RELATED CLAIMS CHALLENGING HIS INDICTMENT AND JURY INSTRUCTIONS.

Petitioner requests that this Court review the Florida Supreme Court's decision affirming the denial of his second successive postconviction motion based on Hurst v. Florida, 136 S. Ct. 616 (2016), as interpreted in Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). The Florida Supreme Court found that Mansfield was not entitled to relief as he did not raise "any issue that does not depend on the retroactive application of Hurst." Mansfield v. State, 248 So. 3d 59, 60 (Fla. 2018) (emphasis added).³ The Florida Supreme Court's denial of the retroactive application of Hurst to Petitioner's case is a matter of state law. Because the Florida Supreme Court's decision was based on adequate and independent state grounds, does not conflict with any other state court of

³ Petitioner attempted to raise arguably non-Hurst related claims, but the Florida Supreme Court refused to address these untimely and procedurally barred claims as Hurst did "not open the door to otherwise untimely claims under Florida Rule of Criminal Procedure 3.851(d)(2)(B)." Mansfield, 248 So. 3d at 60 n.1; see also footnote 2, supra, noting that Mansfield first raised these non-Hurst related claims in his initial postconviction motion and state habeas petition.

last review, does not conflict with any federal appellate court, and does not conflict with this Court's jurisprudence, this Court should find that Mansfield has not provided any "compelling" reason for this Court to grant certiorari review. See Sup. Ct. R. 10.

In arguing that this Court should grant certiorari review, Petitioner completely ignores the Florida Supreme Court's ruling that he was not entitled to relief on his second successive postconviction motion because Hurst was not retroactive to his case under state law. The Florida Supreme Court's analysis on this point was based entirely on state law and the denial of relief is not violative of federal law or this Court's precedent. This fact alone militates against the grant of certiorari in this case. Indeed, this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of Hurst v. State. See, e.g., Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017); Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112 (Fla.), cert. denied, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505 (Fla.), cert. denied, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548 (Fla.), cert. denied, 138 S. Ct. 1164 (2018); Cole v. State, 234 So. 3d 644

(Fla.), cert. denied, 138 S. Ct. 2657 (2018); Kaczmar v. State, 228 So. 3d 1 (Fla. 2017), cert. denied, 138 S. Ct. 1973 (2018); Zack v. State, 228 So. 3d 41 (Fla. 2017), cert. denied, 138 S. Ct. 2653 (2018); Jones v. State, 234 So. 3d 545 (Fla.), cert. denied, 138 S. Ct. 2686 (2018).

Rather than addressing the Florida Supreme Court's analysis in affirming the denial of successive postconviction motion, Petitioner erroneously focuses exclusively on the merits of his untimely and procedurally barred non-Hurst related claims. However, the Florida Supreme Court's refusal to address these claims was also a decision based on independent and adequate state law grounds. Under Florida law, Petitioner was prohibited from raising a challenge to his indictment and his jury instructions in a second successive postconviction motion. Petitioner's attempt to argue below that these claims were timely under the guise of Hurst was unavailing because, as the Florida Supreme Court properly noted, Hurst "does not open the door to otherwise untimely claims" under Florida's rules of criminal procedure. Mansfield, 248 So. 3d at 60 n.1. Thus, this case is inappropriate for certiorari review as this Court would have to reach the retroactivity issue before even addressing the underlying merits of Petitioner's untimely non-Hurst related

issues regarding his indictment and jury instructions; issues that the state court did not even address in its decision below.

A. There is no compelling reason for this Court to review the state-law based decision that Hurst v. Florida is not retroactively applicable to Petitioner

In January, 2017, Petitioner filed a second successive postconviction motion in the state trial court following the issuance of Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), and raised a number of claims relating to Hurst, including an allegation that his jury instructions violated Caldwell v. Mississippi, 472 U.S. 320 (1985). Additionally, Petitioner argued that his constitutional rights were violated because the jury was instructed on both theories of first degree murder, premeditation and felony murder, despite the fact that the indictment did not charge him with a specific underlying felony. The state trial court summarily denied his claims, and the Florida Supreme Court affirmed this ruling on appeal finding that "Mansfield has not raised any issue that does not depend on the retroactive application of Hurst." Mansfield v. State, 248 So. 3d 59, 60 (Fla. 2018). The court further noted that "[a]lthough Mansfield has argued claims related to the State's presentation of alternate theories of murder that would otherwise appear facially to be independent of Hurst and yet

untimely, he argues that they are timely because they were filed within one year of the issuance of Hurst v. Florida. Because Hurst v. Florida, as interpreted by this Court in Hurst, does not apply retroactively to Mansfield's case, it does not open the door to otherwise untimely claims under Florida Rule of Criminal Procedure 3.851(d)(2)(B)." Id. at n.1.

The Florida Supreme Court's holding in Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), followed this Court's ruling in Hurst v. Florida, 136 S. Ct. 616 (2016), in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." Hurst v. State, 202 So. 3d at 57.

The Florida Supreme Court analyzed the retroactive application of Hurst in Mosley v. State, 209 So. 3d 1248, 1276-83 (Fla. 2016), and Asay v. State, 210 So. 3d 1, 15-22 (Fla.

2016), cert. denied, 138 S. Ct. 41 (2017). In Mosley, the court held that Hurst is retroactive to cases which became final *after* this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), on June 24, 2002. Mosley, 209 So. 3d at 1283. In determining whether Hurst should be retroactively applied to Mosley, the Florida Supreme Court conducted a Witt analysis; the state-based test for retroactivity. See Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618 (1965)).

Since "finality of state convictions is a *state* interest, not a federal one," states are permitted to implement standards for retroactivity that grant "relief to a broader class of individuals than is required by Teague," which provides the federal test for retroactivity. Danforth v. Minnesota, 552 U.S. 264, 280-81 (2008) (emphasis in original); Teague v. Lane, 489 U.S. 288 (1989); see also Johnson v. New Jersey, 384 U.S. 719, 733 (1966) ("Of course, States are still entirely free to effectuate under their own law stricter standards than we have laid down and to apply those standards in a boarder range of

cases than is required by this [Court].”). As Ring, and by extension Hurst, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying Witt instead of Teague for determining the retroactivity of Hurst. See Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (holding that “Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review”); Lambrix v. Secretary, Fla. Dep’t of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) (“under federal law Hurst, like Ring, is not retroactively applicable on collateral review”), cert. denied, 138 S. Ct. 217 (2017); Ybarra v. Filson, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a Hurst v. Florida claim concluding that Hurst v. Florida did not apply retroactively).

The Florida Supreme Court determined that all three Witt factors weighed in favor of retroactive application of Hurst only to cases which became final post-Ring. Mosley, 209 So. 3d at 1276-83. The court concluded that “defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by Ring should not be penalized for the United States Supreme Court’s delay in explicitly making this determination.” Id. at 1283. Thus, the Florida Supreme Court

held Hurst to be retroactive to Mosley, whose case became final in 2009, which is post-Ring. Id.

Conversely, applying the Witt analysis in Asay v. State, 210 So. 3d 1, 22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017), the Florida Supreme Court held that Hurst is not retroactive to any case in which the death sentence was final pre-Ring. The court specifically noted that Witt "provides *more expansive retroactivity standards* than those adopted in Teague." Asay, 210 So. 3d at 15 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)). The court determined that prongs two and three of the Witt test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of Hurst to pre-Ring cases. Asay, 210 So. 2d at 20-22. As related to the reliance on the old rule, the court noted "the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive application of Hurst v. Florida to this pre-Ring case." Id. at 20. As related to the effect on the administration of justice, the court noted that resentencing is expensive and time consuming and that the interests of finality weighed heavily

against retroactive application. Id. at 21-22. Thus, the Florida Supreme Court held that Hurst was not retroactive to Asay since his judgment and sentence became final in 1991, pre-Ring. Id. at 8, 20.

Since Asay, the Florida Supreme Court has continued to apply Hurst retroactively to all post-Ring cases and declined to apply Hurst retroactively to all pre-Ring cases. See, e.g., Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112, 113 (Fla. 2017), cert. denied, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505, 513 (Fla. 2017), cert. denied, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548, 549 (Fla. 2018), cert. denied, 138 S. Ct. 1164 (2018). This distinction between cases which were final pre-Ring versus cases which were final post-Ring is neither arbitrary nor capricious.

While Mansfield seeks certiorari review of the Florida Supreme Court's decision which refused to apply Hurst retroactively to his case because his conviction was final prior to Ring, this case is not a proper vehicle for certiorari review. Notably, Florida's partial retroactive application of Hurst is based on state law, not federal law. This Court has generally held that a state court's retroactivity determinations are a matter of state law rather than federal constitutional

law. Danforth v. Minnesota, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under Danforth.

The Florida Supreme Court's determination of the retroactive application of Hurst under the state law Witt standard is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); see also Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below). If a state court's decision is based on separate state law, this

Court "of course, will not undertake to review the decision." Florida v. Powell, 559 U.S. 50, 57 (2010). Because the Florida Supreme Court's decision regarding the retroactive application of Hurst to Petitioner's case is based on adequate and independent state grounds, certiorari review should be denied.

B. The Florida Supreme Court's ruling refusing to address Petitioner's non-Hurst related claims was based on an adequate and independent state procedural law

In his second successive postconviction motion, Petitioner argued that his conviction for first degree murder was unconstitutional because the indictment charging him with first degree murder did not specifically allege felony murder, He further asserted that the trial court erred in instructing the jury at the guilt phase on both theories of premeditated murder and felony murder,⁴ and for subsequently instructing the penalty phase jury that they could find the aggravating factor of during the course of, or attempt to commit, a sexual battery. As previously noted, in affirming the lower court's order summarily

⁴ On page 19 of his petition, Mansfield erroneously asserts that "[t]he evidence for both theories was insubstantial." Contrary to Petitioner's assertions, the State introduced substantial evidence that Mansfield strangled the victim to death in a premeditated manner and that the crime occurred during the course of a sexual battery or attempted sexual battery. See generally Mansfield v. State, 758 So. 2d 636, 640-42 (Fla. 2000) (discussing substantial evidence of Mansfield's guilt), cert. denied, 532 U.S. 998 (2001); Mansfield v. State, 679 F. 3d 1301 (11th Cir. 2012) (reversing the district court's granting of habeas relief and finding that the erroneous admission of a videotaped interrogation was harmless error).

denying Petitioner's motion, the Florida Supreme Court refused to address the merits of these claims as they were untimely and procedurally barred under state law. Mansfield v. State, 248 So. 3d 59, 60 n.1 (Fla. 2018).

Obviously, Petitioner's challenge to the language of his indictment and the jury instructions were issues that could have been, and should have been, raised on direct appeal in order to preserve these claims under Florida law. Petitioner, however, failed to raise these claims at that time and did not raise them until over a decade ago his initial postconviction motion and state petition for writ of habeas corpus. See footnote 2, supra. At that time, the Florida Supreme Court rejected Petitioner's ineffective assistance of appellate counsel claim alleging that counsel was ineffective for failing to challenge the jury instructions that allowed the jury to find him guilty of first-degree murder if he was found guilty of either felony or premeditated murder. See Mansfield v. State, 911 So. 2d 1160, 1178-79 (Fla. 2005). The court noted that appellate counsel could not be ineffective for failing to raise a meritless claim as both the Florida Supreme Court and this Court have repeatedly rejected relief based on this claim. Id. at 1178-79; citing Schad v. Arizona, 501 U.S. 624, 645 (1991) (holding that the United States Constitution does not require the jury to come to

a unanimous decision on the theory of first-degree murder and that separate verdict forms for felony and premeditated murder are not required); Parker v. State, 904 So. 2d 370 (Fla. 2005) ("It is well established that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated and felony murder theories."); Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995) (noting that "[b]ecause the State has no obligation to charge felony murder in the indictment, it similarly has no obligation to give notice of the underlying felonies that it will rely upon to prove felony murder").

In the instant case, the Florida Supreme Court refused to address Petitioner's attempt to relitigate these claims as they were procedurally barred and untimely under Florida law. See Fla. R. Crim. P. 3.851(d)(2)(B). As previously noted, this Court will not exercise its certiorari jurisdiction to review decisions which rest on adequate independent state law grounds. Even if not procedurally barred and untimely, Petitioner's claims are meritless and unworthy of certiorari review as this Court has previously held that it is not unconstitutional for a jury to convict a defendant of first degree murder when instructed on both premeditated murder and felony murder. Schad, supra.

Likewise, Petitioner's complaint that the jury instructions violated Caldwell v. Mississippi, 472 U.S. 320 (1985), because the penalty phase jury was instructed that its determination was merely a recommendation is without merit. To establish constitutional error under Caldwell, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." Romano v. Oklahoma, 512 U.S. 1, 9 (1994); see also Darden v. Wainwright, 477 U.S. 168, 183 n.15 (1986) (rejecting a Caldwell attack, explaining that "Caldwell is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision"). Here, Mansfield's jury was properly instructed according to the state law at the time of his penalty phase. See Reynolds v. State, 251 So. 3d 811, 823 (Fla. 2018) (explaining that under Romano, the Florida standard jury instruction "cannot be invalidated retroactively prior to Ring simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").

Members of Mansfield's jury were properly informed that they needed to determine whether sufficient aggravating circumstances existed that would justify the imposition of the

death penalty and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. They were instructed that if they found the aggravating circumstances did not justify the death penalty, their advisory sentence must be life in prison. Jury members were also told that it was their duty to advise the court, but that the final sentencing determination would be made by the trial judge.

Notably, a Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. See Dugger v. Adams, 489 U.S. 410 (1989); see also § 921.141(2)(c), Fla. Stat. (2018) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's *recommendation* to the court shall be a sentence of death") (emphasis added). Accordingly, there was no violation of Caldwell because there were no comments or instructions to the jury in Mansfield's case that "improperly described the role assigned to the jury by local law." Romano, 512 U.S. at 9.

In sum, this Court should decline to exercise its certiorari review because the Florida Supreme Court's decision in this case regarding the retroactive application of Hurst v. Florida as applied in Hurst v. State was based on an independent state ground and is not violative of federal law or this Court's precedent. The Florida Supreme Court's refusal to allow

Mansfield to attempt to relitigate untimely and procedurally barred claims under the guise of Hurst does not present this Court with a significant or important unsettled question of law. Because Petitioner has failed to demonstrate that there is a compelling reason for this Court to exercise its certiorari jurisdiction in this case, certiorari review should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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