No. 19-6200

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL SCOTT SMITH, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Florida law has long treated premeditated murder and felony murder as the same offense—first-degree murder—and has long placed defendants on notice that an allegation of premeditated first-degree murder encompasses both methods of committing the offense. The question presented is whether Petitioner's conviction and sentence for first-degree murder violate either the Equal Protection Clause or Due Process Clause where Petitioner was indicted for premeditated first-degree murder and the jury was instructed on the alternative theories of premeditated murder and felony murder.

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OPINIONS BELOW

The unreported decision of the First District Court of Appeals is provided in Petitioner's Appendix as Appendix A. The arrest report is provided in the appendix as Respondent's Appendix A, the transcript of the pretrial discussion is provided in the appendix as Respondent's Appendix B, and the transcript of the initial charge conference is provided in the appendix as Respondent's Appendix C. Documents in the appendices are referred to as Petitioner's or Respondent's Appendix A, B, and so forth, followed by a page number. The Respondent will reference the page numbers in the original transcripts found at the top right corner.

JURISDICTION

The First District Court of Appeal issued its unreported decision affirming the order denying Petitioner's motion to correct illegal sentence on June 28, 2019. The petition for writ of certiorari was filed on September 19, 2019. The petition was timely. *See* Sup. Ct. R. 13.1; 28 U.S.C. § 2101(c). Petitioner invokes this Court's jurisdiction exists pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the United States Constitution, section one, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Law enforcement officers arrested Petitioner for Murder and Robbery. According to the probable cause affidavit on the arrest report, a witness saw Petitioner entering the victim's home wearing a tan shirt with a work logo on it. Another witness saw Petitioner leaving the home a short time later without a shirt and covered in large amounts of blood. Petitioner told a witness he had gotten into a fight and punched a different individual in the mouth. The witness took Petitioner home and Petitioner attempted to wash off the blood. Petitioner changed clothes, and later left his home to check into a motel under a false name. Petitioner used money with blood on it to pay for the motel.

The victim was discovered in her home. She died from being struck with a hammer multiple times. Bleach was used to attempt to clean up the crime scene. Blood was found on Petitioner's hands, and Petitioner told the crime scene examiner that he had bleach on his hands from washing clothes. Officers found Petitioner's bloody shoes and the victim's money clip at an abandoned trailer next door to Petitioner's house. (Respondent's App A). In addition to this evidence, the State presented at trial Petitioner's girlfriend's testimony that on the day of the murder Petitioner had a weed eater. Petitioner had given to the victim that same weed eater a short time earlier in an exchange in which Petitioner had felt shortchanged in the deal. The State also presented DNA evidence establishing it was the victim's blood on the various objects including Petitioner's clothes and shoes.

The State of Florida indicted Petitioner with one count of first degree premeditated murder. Prior to the trial, defense counsel sought to challenge the proposed jury instructions which included first degree felony murder because felony murder had not been charged in the indictment. Defense counsel renewed the objection during the charge conference. The trial court overruled the objection based on long standing

precedent from the Florida Supreme Court. The jury found Petitioner guilty as charged. Petitioner's conviction and sentence were affirmed on direct appeal in a per curiam affirmance without written opinion in 2011. *Smith v. State*, 64 So. 3d 121 (Fla. 1st DCA 2011).

On June 4, 2018, Petitioner filed a motion to correct illegal sentence claiming his sentence was illegal because the jury was instructed on felony murder when it was not charged in the Indictment. Petitioner contended that his sentence violated the equal protection clause because the essential elements of felony murder were not charged in the information. The state court judge denied relief finding that:

> The Defendant correctly asserts that, generally, a charging document which omits an essential element of the crime cannot support a conviction for that crime. See *Figueroa v. State*, 84 So.3d 1158, 1161 (Fla. 2d DCA 2012). However, the Florida Supreme Court has clearly specifically stated that "the state may proceed on theories of both premeditated and felony murder when only premeditated first-degree murder is charged. Also, a special verdict form demonstrating which theory the jury based its verdict on is not required." *Young v. State*, 579 So.2d 721, 724 (Fla. 1991). See also *Bedford v. State*, 589 So.2d 245, 252 (Fla. 1991); *Lynch v. State*, 2 So.3d 47, n.7 (Fla. 2008). Accordingly, the Defendant's Motion is due to be denied.

(Pet. at App. B). Petitioner appealed this order to the First District Court of Appeal and the First District issued a per curiam affirmance without written opinion in June 29, 2019. (Pet. at App. A).

REASON FOR DENYING THE WRIT

This Case Does Not Warrant Review Because It Is a Poor Vehicle, Presents No Split of Authority, and Was Correctly Decided By the State Intermediate Appellate Court.

Petitioner asserts that this Court should grant certiorari review because the state court decision denying his motion for illegal sentence finding no error in the trial judge instructing the jury on both premeditated and felony murder theories of guilt when he was charged with premeditated murder is in conflict with the decisions of the of the Sixth Circuit Court of Appeals. Petitioner is incorrect. There is no conflict of decisions between the Florida Supreme Court and the Sixth Circuit's opinion in *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977), because the opinions are based on the interpretation of different state laws. This Court, reviewing a similar issue, recognized that States were entitled to deference in their interpretations of their own laws and determinations of what is an element of an offense versus an alternative means of conduct. Moreover, this case is a poor vehicle for this court's review, as Petitioner did not present this issue in his direct appeal, as Florida law requires. Furthermore, even if this Court were to reverse for the State court to reconsider the issue, because of the overwhelming evidence of premeditation even if the judge had not given a felony murder instruction, the jury's verdict would be the same. Therefore, any error was harmless.

A major consideration in this Court's decision to grant review is whether there is conflict on a significant legal issue among federal circuit courts and state supreme courts. The rule of this Court explaining the considerations governing review on writ of certiorari, Rule 10, provides:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial

> proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari to invoke "this Court's appellate jurisdiction of state criminal judgments, 'is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.'" *Fay v. Noia*, 372 U.S. 391, 436, (1963), overruled in part by *Wainwright v. Sykes*, 433 U.S. 72 (1977), and abrogated by *Coleman v. Thompson*, 501 U.S. 722 (1991). Petitioner is asking this Court to review a long held position of Florida law without showing a conflict with a decision of another state court of last resort or of a United States court of appeals on an important question of federal law that has not been, but should be, settled by this Court, or that Florida's precedent has decided an important federal question in a way that conflicts with relevant decisions of this Court. No such conflict is presented in this petition. Nor does this case test the limits of this Court's precedent. Lastly, because of the procedural posture of this case, even if this Court wanted to revisit its previous decision, this would not be the best case for that. Therefore, this Court should decline to accept jurisdiction to review this case.

Florida courts have recognized, and consistently held, that a criminal defendant has a right to be informed of the charges against him. *Weatherspoon v. State*, 214 So. 3d 578, 583 (Fla. 2017)("This Court, citing centuries-old United States Supreme Court precedent, has stated that 'to apprise the accused of the specific charges against him, an information or indictment must contain all facts essential to the 'offence intended

to be punished.'")(citations omitted). Florida courts have also recognized that a criminal defendant's right to due process is denied when he or she is convicted of an offense not charged in the information or indictment. *Weatherspoon*, at 583. However, even when a charging document fails to allege an essestial element, the Florida Supreme Court held that "'[g]enerally the test for granting relief based on a defect in the information is actual prejudice to the fairness of the trial.' ... Due to Florida's liberal discovery rules, this Court has held that 'an information is legally sufficient if it expresses the elements of the offense charged in such a way that the accused is neither misled or embarrassed in the preparation of his defense nor exposed to double jeopardy.'" *Id.* at 584, citing, *State v. Dilworth*, 397 So.2d 292, 294 (Fla. 1981).

Additionally, Florida courts, as far back as 1915, have allowed a judge to instruct a jury on both premeditated and felony murder theories of guilt when a defendant is charged with first degree premeditated murder. The Florida Supreme Court explained that "[i]n the 1915 case of *Sloan v. State*, 70 Fla. 163, 69 So. 871 (1915), this Court first articulated what was constitutionally required to be charged in an indictment in the first-degree and felony murder context." *Weatherspoon*, at 584. Sloan "charged only with first-degree premeditated murder challenged his indictment, which did not allege the underlying felony of the robbery of the victim." *Id.* The Florida Supreme Court had reviewed other states laws and "agreed with the majority of states that a charge of premeditated murder in the indictment is sufficient for the State to proceed under either the theory of first-degree premeditated murder or felony murder." *Id.* at 584. The Florida Supreme Court followed a Missouri case which had held that: "[a]n indictment in the usual form, charging murder to have been done deliberately and premeditatedly, is sufficient under the statute to charge murder in the first degree, regardless of whether the murder was committed in the perpetration of a felony or otherwise. The perpetration or attempt to perpetrate any of the felonies mentioned in

the statute, * * * during which perpetration or attempt a homicide is committed, stands in lieu of and is the legal equivalent of that premeditation and deliberation which otherwise are the necessary attributes of murder in the first degree." *Sloan*, at 69 So.2d 872, citing, *State v. Meyers*, 99 Mo. 107, 12 S.W. 516 (1889).

The Florida Supreme Court has "continued to adhere to the principle of *Sloan* in subsequent cases. *See O'Callaghan v. State*, 429 So.2d 691, 695 (Fla. 1983); *Weatherspoon*, at 586. In 1957, in *Killen v. State*, 92 So.2d 825 (Fla. 1957), the Florida Supreme Court explained why premeditation covered the mens rea element for both premeditated and felony murder. The court stated that a charge of first-degree premeditated murder necessarily includes the theory of felony murder because "the perpetration, or attempt to perpetrate, any of said felonies, during which a homicide is committed, stands in lieu of and is the legal equivalent of premeditation, and ... in such cases it is only necessary to charge that the homicide was committed with a premeditated design and then show the facts in evidence." 92 So.2d at 828. The Florida Supreme Court explained that "[t]he basis of this Court's reasoning in the Sloan line of cases was that the crimes of first-degree premeditated murder and felony murder were in the same statute and simply different theories the State might assert in its attempt to prove first-degree premeditated murder. In other words, the crime of felony murder is included in the current first-degree murder statute. See § 782.04(1)(a) 2., Fla. Stat. (2016)." *Id.* at 586. The court concluded that "[b]ecause the State can prove premeditation by either showing direct premeditation or imputed premeditation through the underlying felony, charging premeditated murder and citing that statute is enough to put a defendant on notice that the State might pursue the theory of felony murder." *Id.*

Petitioner claims that the Florida Supreme Court's line of cases is in conflict with the Sixth Circuit's decision in *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977). Like

Petitioner, the Ohio grand jury indicted Watson for premeditated first degree murder, and the prosecutor, at trial, proceeded on a felony murder theory of guilt as well. However, unlike Florida, "[u]nder Ohio law, a felony-murder conviction cannot be sustained under an indictment charging first degree murder with premeditated and deliberate malice." *Id.* at 334-335. The Sixth Circuit had found that the "Ohio Supreme Court in *State v. Ferguson*, 175 Ohio St. 390, 195 N.E.2d 794 (1964), held that although felony-murder and premeditated murder were both included in the same paragraph of the then existing first degree murder statute, felony-murder and premeditated murder constituted separate offenses." *Id.* at 334-335 (footnotes omitted). In addition to the difference between Florida and Ohio law, the question before the Sixth Circuit was not whether Watson was forced to defend himself against charges not included in the indictment, but instead, the Sixth Circuit was reviewing whether or not the Ohio's prosecutor's decision to proceed on the felony murder charge should have been considered an amendment to the indictment, which would require reversal, or a variance in the indictment which is subject to the harmless error rule. *Id.* at 333. The Sixth Circuit, in this 1977 case, granted habeas relief concluding that the indictment had been amended and reversal was required. *Id.* at 339.

Accordingly, Florida's line of cases do not conflict with the Sixth Circuit's decision in *Watson v. Jago*, because unlike Ohio, which had ruled that premeditated and felony murder were separate offenses under its statutory scheme, Florida has determined that the offenses are the same. Florida has determined that the premeditation charged in the indictment provides adequate notice that the State may prove premeditation by evidence of direct premeditation or imputed premeditation through the underlying felony. Because Florida's law differs from Ohio's law, there is no conflict.

Furthermore, in a case issued after *Watson v. Jago*, this Court recognized the importance of the deference that must be accorded to a state's interpretation of its own

law. In *Schad v. Arizona*, 501 U.S. 624 (1991), a plurality opinion, this Court addressed an issue very similar to the one which Petitioner has raised. Like Petitioner, Arizona charged Schad with first degree murder and the prosecutor proceeded to trial on both a premeditated and felony murder theory of guilt. The jury found Schad guilty of murder, but did not specify which theory the verdict was based upon. However, this Court found that the real challenge was not whether the verdict had to be unanimous as to theories of guilt, but instead, whether the State's decision to define the criminal conduct as one offense provided Schad due process. *Id.* at 630. This Court stated that Schad's "real challenge is to Arizona's characterization of first-degree murder as a single crime as to which a verdict need not be limited to any one statutory alternative, as against which he argues that premeditated murder and felony murder are separate crimes as to which the jury must return separate verdicts. The issue in this case, then, is one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions, not one of jury unanimity." *Id.* at 630–31.

This Court reliedon the "long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed." *Id.* at 631. This Court acknowledged that due process requires "that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning." *Id.* at 632–33. However, this Court concluded that "[i]f a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." *Id.* at 636. This Court stated that "[d]ecisions about what facts are material and what are immaterial, or, in terms of ...what 'fact [s] [are] necessary to

constitute the crime,' and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court. Respect for this legislative competence counsels restraint against judicial second-guessing[.]" *Id.* at 638 (citations omitted).

In his concurrence, Justice Scalia addressed the history of the murder law, and stated that:

> Submitting killing in the course of a robbery and premeditated killing to the jury under a single charge is not some novel composite that can be subjected to the indignity of "fundamental fairness" review. It was the norm when this country was founded, was the norm when the Fourteenth Amendment was adopted in 1868, and remains the norm today. Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is "due."

Schad v. Arizona, 501 U.S. at 651 (Scalia, J., concurring in part and concurring in the judgment).

Numerous other states follow this long held doctrine and treat premeditated murder and felony murder as alternate means to commit the same offense. *Doisher v. State*, 632 P.2d 242, 261 (Alaska App., 1981)("Premeditated murder and felony murder are two separate theories constituting first degree murder under former AS 11.15.010.29"); *State v. Tucker*, 68 P.3d 110, 120 (2003)("Felony murder is not a separate offense, ... felony murder and premeditated murder contain different elements does not make them different crimes, rather they are simply two forms of first degree murder.); *People v. Nakahara*, 30 Cal. 4th 705, 68 P.3d 1190, 1194 (2003)("Felony murder and premeditated murder are not distinct crimes, and need not be separately pleaded.")*People v. Lowe*, 660 P.2d 1261, 1269 (Colo. 1983), abrogated by *Callis v. People*, 692 P.2d 1045 (Colo. 1984)("Murder after deliberation and felony murder are not denominated by the Code as separate and independent offenses, but only ways in which criminal liability for first-degree murder may be charged and prosecuted.");

People v. Smith, 233 Ill. 2d 1, 16, 906 N.E.2d 529, 537 (2009)("While our statute describes three "types" of murder, first degree murder is a single offense. As we have explained on numerous occasions, " 'the different theories embodied in the first degree murder statute [citation] are merely different ways to commit the same crime.' "); *State v. Thomas*, 302 Kan. 440, 447, 353 P.3d 1134, 1139 (2015)(noting that there " the long line of cases holding that premeditated and felony murder are not separate and distinct crimes but are two different theories for establishing first-degree murder."); *People v. Bigelow*, 225 Mich. App. 806, 807, 571 N.W.2d 520, 521 (1997), opinion vacated (Sept. 16, 1997), opinion reinstated, 229 Mich. App. 218, 581 N.W.2d 744 (1998)("By providing felony murder and premeditated murder as alternative theories of proving first-degree murder, our Legislature authorized two mental states as alternative means of proving the same crime."); *State v. Fortune*, 128 Wash. 2d 464, 468, 909 P.2d 930, 931 (1996)("Under Washington law, premeditated murder and felony murder 'are alternative ways of committing the single crime of first degree murder.'").

However, there are other states which have found that under their state law the offenses are separate offenses. *Allen v. State*, 310 Ark. 384, 385, 838 S.W.2d 346, 346 (1992)(finding that it was reversible error to convict Allen of felony murder when he was charged with premeditated murder because "[u]nder the capital murder statute, Ark.Code Ann. § 5–10–101 (Supp.1991), there are two types of capital murder. One is the premeditated and deliberate killing of a person, and the other is the killing of a person in the course of one of several enumerated felonies."); *State v. Cooper*, 151 N.J. 326, 360, 700 A.2d 306, 322 (1997)("Because the mens rea for purposeful-or-knowing murder is different from that required for felony murder, we do not believe that the Legislature intended to create a unified crime of murder. This Court has acknowledged

in a capital case that the 'elements are different' in felony murder than they are in purposeful-or-knowing murder.").

Florida was free to define the elements and necessary facts needed to prove first degree murder as it did, and Florida's treatment of premeditated murder and first degree felony murder as one offense does not violate due process. Petitioner had adequate notice of the charge. In fact, Petitioner had both actual and constructive notice of the charges. Again, for more than 100 years Florida has allowed a judge to instruct a jury on both premeditated and felony murder theories of guilt when a defendant is charged with first degree premeditated murder. *Sloan v. State*, 70 Fla. 163, 69 So. 871 (1915). Secondly, Florida allows for extensive pre-trial discovery which alerted Petitioner to the charges and facts supporting those charges. *See O'Callaghan v. State*, 429 So.2d 691, 695 (Fla.1983)(providing that "[w]e have previously expressly stated that 'the state does not have to charge felony murder in the indictment but may prosecute the charge of first-degree murder under a theory of felony murder when the indictment charges premeditated murder.' ... Appellant, because of our reciprocal discovery rules, had full knowledge of both the charges and the evidence that the state would submit at trial. This is much more information than he would have received in almost any other jurisdiction, federal or state. We conclude that appellant was not prejudiced by the manner in which he was charged in the indictment or by the instructions given to the jury on the crime as charged in the indictment.")(citations omitted).

In addition, Petitioner had actual knowledge of the charge and theories of prosecution. Prior to jury selection, Petitioner's trial counsel was aware of the State's intent to proceed on both a premeditated and felony theory of guilt because there was a discussion about the proposed jury instructions in court before the jury selection process began. In the discussion, there is an indication that Mr. Dingus, Petitioner's

trial counsel, had already been presented with a written copy of the proposed jury instructions and Mr. Dingus indicated to the court that there was a disagreement between him and the prosecutor as to whether or not the State was entitled to the felony murder instruction because Petitioner had only been indicted for first degree premeditated murder. (Respondent's appendix B).

During the trial, Petitioner's counsel objected to the felony murder instructions, relying on a First District Court of Appeal case of *Atwell v. State*, 739 So. 2d 1166, 1166 (Fla. 1st DCA 1999), which had held that Florida's statutory crime of escape was an alternative conduct statute and *Atwell* could not be convicted of a theory of escape that was not charged in the information. The trial judge in Petitioner's case had overruled Petitioner's objection and gave the felony murder instructions, rejecting Petitioner's *Atwell* argument as the Florida Supreme Court had authorized the instruction for felony murder in cases directly on point addressing the crime of first degree murder. (Respondent's appendix C). Therefore, defense counsel was aware that the theory of prosecution was going to be based upon both premeditated and felony murder before the trial began.

Additionally, Petitioner did not present this issue to the court in his direct appeal. His postconviction claim was therefore deemed waived under state law. *See Raulerson v. State*, 420 So. 2d 567, 569 (Fla. 1982) ("A motion to vacate judgment and sentence cannot be used as a substitute for an appeal, and where matters raised therein could have been or were raised on direct appeal, denial of the motion is proper."); *Wyatt v. State*, 71 So. 3d 86, 97 n.12 (Fla. 2011) (holding that an error in instructing the jury was "procedurally barred because '[c]laims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal'").

Petitioner is before this Court on the summary denial of a motion to correct illegal sentence. Even if this Court were to find this to be a significant legal issue, the

procedural posture of this case precludes Petitioner from obtaining relief. This case is a poor vehicle for addressing the merits of Petitioner's due process claim because, regardless the outcome in this Court, procedural reasons barred the state postconviction court from granting relief. Petitioner sought to vacate his conviction under Florida Rule of Criminal Procedure 3.800(a), which allows a trial court to correct "at any time correct an illegal sentence imposed by it." Fla. R. Crim. P. 3.800(a). Florida law is clear, however, that "such a motion is not the correct procedural vehicle for attacking the merits of an underlying criminal *conviction*." *Echeverria v. State*, 949 So. 2d 331, 335 (Fla. Dist. Ct. App. 2007) (emphasis added). Instead, when a defendant wishes to collaterally attack not only his sentence but also the conviction, that motion "must be brought under [Florida Rule of Criminal Procedure] 3.850." *Id.*; *see also State v. Anderson*, 821 So. 2d 1206, 1209 (Fla. Dist. Ct. App. 2002) (reversing a trial court order granting relief under rule 3.800(a) because "[t]he defendant was seeking to invalidate his conviction, not merely his sentence"); *Coughlin v. State*, 932 So. 2d 1224, 1226 (Fla. Dist. Ct. App. 2006) (explaining that "rule 3.800(a) is limited to claims that a sentence itself is illegal, without regard to the underlying conviction").

That rule applies here. Though Petitioner styled his pleading as a motion to correct his sentence under rule 3.800(a), the remedy he sought was to vacate his conviction for first-degree murder based on an alleged due process error that occurred at trial. Thus, the legality of his sentence for that offense was implicated only insofar as vacating the underlying conviction and judgment would necessarily result in the vacatur of the sentence. Put differently, Petitioner's challenge to his sentence hinged entirely on the success of his challenge to his conviction.

Had Petitioner wished to challenge his first-degree murder conviction on due process or equal protection grounds, Florida law offered a mechanism to do so: He could have timely sought relief under rule 3.850, which permits a trial court to set aside a

criminal judgment where it was "entered ... in violation of the Constitution or laws of the United States or the State of Florida" or "is otherwise subject to collateral attack." Fla. R. Crim. P. 3.850(a)(1), (6). Having failed to avail himself of that remedy, Petitioner's later motion to correct sentence was "an untimely and procedurally-barred challenge to a conviction." *McClellion v. State*, 186 So. 3d 1129, 1131 (Fla. Dist. Ct. App. 2016); *see also Coughlin*, 932 So. 2d at 1226 ("permitting defendants to attack their conviction and sentence under rule 3.800(a) would subsume Florida Rule of Criminal Procedure 3.850 into rule 3.800(a), thereby allowing defendants to circumvent rule 3.850's two-year time bar for attacking their convictions and sentences"). That alone precludes him from obtaining any meaningful relief on remand.

In addition, if this Court addressed the merits and found the trial judge erred in denying the motion to correct illegal sentence under a misapplication of the law, the remedy would be to remand for reconsideration of this issue under the correct law. However, even if this Court were to hold that the State misinterpreted its own statutes and there was an error in this particular case, it was clearly harmless. "An instructional error arising in the context of multiple theories of guilt no more vitiates all the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted." *Hedgpeth v. Pulido*, 555 U.S. 57, 61, 129 S. Ct. 530, 532, 172 L. Ed. 2d 388 (2008). Therefore, even if an alternative theory of guilt was invalid, the error is subject to harmless error review. *Id. Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008). *Skilling v. United States*, 561 U.S. 358, 414 (2010)("Because the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud—Skilling's conviction is flawed. See *Yates v. United States*, 354 U.S. 298 (1957) (constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory). This determination, however, does not necessarily require

reversal of the conspiracy conviction; we recently confirmed, in *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curiam), that errors of the *Yates* variety are subject to harmless-error analysis.").

In this case, even if the trial court had erred by giving the felony murder instruction, the error was harmless. The State could show beyond a reasonable doubt that the lack of a felony murder instruction would not have changed the jury's verdict. Petitioner's girlfriend had testified at the trial that Petitioner was upset at the victim because he believed that she had shortchanged him or that he did not get what he bargained for in exchange for the weed eater. Petitioner brought a hammer that was on the porch of the victim's home into the house and he beat her with the hammer, hitting her multiple times. He even put a shirt over the victim to limit the blood splatter. Accordingly, even if the judge had not instructed the jury on felony murder, the jury would have convicted Petitioner of premeditated murder. Accordingly, the state court's decision to find that Petitioner's sentence was not illegal because there was no error in instructing the jury on both premeditated and felony murder in accordance with Florida's decision to treat the offenses as one offense is not in conflict with any decision of this Court and or other circuit courts of appeals. Moreover, Petitioner had notice of the charges and theories of guilt before trial and there was an abundance of evidence which proved the element of premeditation beyond a reasonable doubt. Therefore, the State has not pushed the limits of this Court's precedent, much less created a conflict of law, and this is not a good case for this Court to revisit its previous decisions. Accordingly, there is no grounds for certiorari review, and this Court should deny the petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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