Filing # 68447949 E-Filed 02/26/2018 12:35:27 PM

RECEIVED, 02/26/2018 12:38:29 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-690

SCOTT MANSFIELD,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT,
IN AND FOR OSCEOLA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

JAMES L.DRISCOLL JR.,
FLORIDA BAR NO. 0078840
ASSISTANT CCRC
driscoll@ccmr.state.fl.us

DAVID DIXON HENDRY
FLORIDA BAR NO. 0160016
ASSISTANT CCRC
hendry@ccmr.state.fl.us

GREGORY W. BROWN
FLORIDA BAR NO. 0086437
ASSISNTANT CCRC
brown@ccmr.state.fl.us

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
12973 N. Telecom Parkway
TEMPLE TERRACE, FL 33637
(813) 558-1600

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REQUEST FOR ORAL ARGUMENT	iv
PRELIMINARY STATEMENT	iv
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	9
STANDARD OF REVIEW	10
ARGUMENT	10
CONCLUSION AND RELIEF SOUGHT	25
CERTIFICATE OF SERVICE	26
CERTIFICATE OF COMPLIANCE	27

TABLE OF AUTHORITIES

Case **Page(s)**

Apprendi v. New Jersey,
530 U.S. 466 (2000) 16

Caldwell v. Mississippi,
472 U.S. 320 (1985). . . . . *passim*

Cole v. State of Ark.,
333 U.S. 196 (1948). 22

In re Winship,
397 U.S. 358 (1970). 13

Ivan V. v. City of N.Y.,
407 U.S. 203 (1972). 13-14

Jackson v. Virginia,
443 U.S. 307 (1979). 15

Mansfield v. Florida,
137 S.Ct. 1818 (2017). 3

Mansfield v. Florida,
532 U.S. 998 (2001). 1

Mansfield v. Sec'y,
601 F. Supp. 2d 1267 (USDC MD Fla. 2009). 2

Mansfield v. State,
204 So.3d 14 (Fla. 2016). 2

Mansfield v. State,
758 So.2d 636 (Fla. 2000). 1

Mansfield v. State,
911 So.2d 1160(Fla. 2005). 2

Mansfield v. Tucker,
133 S.Ct. 861 (2013). 2

Mullaney v. Wilbur,
421 U.S. 684 (1975). 14

Ring v. Arizona,
536 U.S. 584 (2002). *passim*

Russell v. United States,
369 U.S. 749 (1962). 20

Schad v. Arizona,
501 U.S. 624 (1991). 15

Sec., DOC v. Mansfield,
679 F.3d 1301 (11th Cir. 2012). 2

Stephens v. State,
748 So.2d 1028 (Fla. 1999) 10

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Mansfield lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Mansfield.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are from the transcript and of the form Vol. # Page#. All other record citations are self-explanatory or explained herein. Generally, Scott Mansfield is referred to as Mr. Mansfield throughout this brief.

STATEMENT OF THE CASE AND FACTS

1. Procedural History

Mr. Mansfield was charged by one count indictment charging murder by “premeditated design.” (Vol. I R. 15). In 1997, Mr. Mansfield was convicted of first-degree murder in the Circuit Court for the Ninth Circuit, Osceola County. Before opening statements, the State offered Mr. Mansfield a plea to second-degree murder and 20 years, which Mr. Mansfield rejected. (Dir. Vol. II T. 247). Following the guilt phase trial, the State offered Mr. Mansfield a life sentence if he would waive his right to appeal. (Dir. Vol. PPT. 103-109). Ultimately, the State's plea offer was not accepted and the advisory panel returned a death recommendation. The circuit court (“trial court”) imposed a death sentence.

Mr. Mansfield appealed. This Court affirmed the conviction and death sentence. *Mansfield v. State*, 758 So.2d 636 (Fla. 2000). This Court found that Mr. Mansfield "was in custody for purposes of *Miranda*, and accordingly the tape of his interrogation should have been suppressed." *Id*. at 644. This Court then found that the error was "harmless." *Id.* at 645. Mr. Mansfield petitioned the United States Supreme Court for a Writ of Certiorari, which denied the writ. *Mansfield v. Florida*, 532 U.S. 998 (2001).

Mr. Mansfield filed a Motion to Vacate Judgment of Conviction and Sentence in the trial court in 2002. Prior to the hearing in 2003, he amended the Motion in light of *Ring v. Arizona*, 536 U.S.

584 (2002). The trial court denied relief.

Mr. Mansfield appealed the trial court's decision to this Court and filed a State Petition for Writ of Habeas Corpus. This Court affirmed the denial of postconviction relief and denied the habeas petition. *Mansfield v. State*, 911 So.2d 1160(Fla. 2005). Justice Anstead dissented on the issue of whether Mr. Mansfield was denied a fair tribunal. *See Id.* 1180.

In federal court, Mr. Mansfield filed a Petition under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody. The United States District Court granted relief on Ground I and denied relief on the remaining claims. *Mansfield v. Sec'y*, 601 F.Supp. 2d 1267, 1288-90 (USDC MD Fla. 2009). Ground I challenged this Court's decision finding that the admission of the video interrogation in violation of *Miranda* was harmless error.

The United States Court of Appeal for the Eleventh Circuit reversed. *Sec., DOC v. Mansfield*, 679 F.3d 1301 (11th Cir. 2012). Mr. Mansfield filed a Petition for Writ of Certiorari. The United States Supreme Court denied the writ. *Mansfield v. Tucker*, 133 S.Ct. 861 (2013).

Mr. Mansfield filed a successive postconviction motion which the trial court denied. After full briefing, this Court affirmed the denial of Mr. Mansfield's successive motion. *Mansfield v. State*, 204 So.3d 14, 18 (Fla. 2016). The United States Supreme Court denied certiorari. *Mansfield v. Florida*, 137 S. Ct. 1818

(2017).

Mr. Mansfield filed a second successive postconviction motion following the United States Supreme Court's decision in *Hurst v. Florida*. The trial court denied the motion and Mr. Mansfield appealed. On September 22, 2017, this Court issued an Order to Show Cause. The order required Mr. Mansfield to "show cause on or before Thursday, October 12, 2017, why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*, SC17-445." Mr. Mansfield and the State complied with the Court's show cause order. "After reviewing the responses to the order to show cause, the Court direct[ed] further briefing on the non-*Hurst* related issues in this case." Filing# 67039921 E-Filed 01/25/2018 (footnote omitted).

2. Relevant Facts and Prior Litigation

Mr. Mansfield was charged by indictment solely with the crime of premeditated murder: "Scott Mansfield did . . . in violation of Florida Statute 782.04, from a premeditated design to effect the death of [ ], murder [ ] . . . by application of blunt force causing trauma to the neck with airway and/or vascular obstruction." (Vol. I R. 15). It was a very specific indictment that specifically does not list the offense of felony murder, sexual battery or the "during the course of a felony" aggravating factor.

Relevant to the instant brief, before trial, Mr. Mansfield

moved for a "special verdict as to theory of guilt." (Vol. III R. 487). Therein, he argued:

> Although the indictment alleges only murder from a premeditated design the state may also be proceeding under a theory of felony murder. Without abandoning the argument that proceeding on such an uncharged theory of guilt would violate the Notice and Due Process Clauses of the state and federal constitutions, the defendant argues that the court must require that the jury render a special verdict explicitly stating the theory of guilt if it returns a verdict of first degree murder.
>
> 3. In *Schad v. Arizona*, 111 S.Ct 2491 (1991) the Court ruled that, "on the facts of th[e] case," the Due Process Clause did not require special verdicts as to the theory of first degree murder accepted by the jury. The Court specifically did not decide the issue now presented: the effect of a lack of a special verdict on the penalty determination. The plurality wrote at footnote 9: " . . .Moreover, the dissent's concern that a general verdict does not provide the sentencing judge with sufficient information about the jury's findings to provide a proper premise for the decision whether or not to impose the death penalty . . .goes only to the permissibility of a death sentence imposed in such circumstances, not the issue currently before us, which is the permissibility of the conviction." At footnote 4 of his dissent, Justice White noted that, "the disparate intent requirements of premeditated murder and felony murder have life-or death consequences at sentencing." *See also U.S. v. McNeese*, 901 F.2d 585, 605-606 (7th Cir. 1990)(approving use of special verdicts where information sought is relevant to sentencing).
>
> *****
>
> It would violate the Equal Protection Due Process, Jury Trial and Cruel and Unusual Punishment Clauses of the state and federal constitutions not to require special verdicts in a capital case.

(Vol. III R. 487-88). Mr. Mansfield also moved for an "interrogatory guilt phase verdict." See Vol. III R. 511-14.

Mr. Mansfield moved to prohibit argument and/or instructions concerning first degree felony murder. (Vol. III R. 556-58).

Therein he argued,

> It is well settle[d] that the Sixth Amendment to the United States Constitution requires that an indictment or information state the elements of the offense charged with sufficient clarity to apprise the Defendant of what must be prepared to defend against.

(Vol. III R. 557).

Mr. Mansfield moved for an "Interrogatory Guilt Phase Verdict."(Vol. III R. 511). The motion argued that specific findings would "clarify[] the jury's recommendation to the court" and prevent double jeopardy should resentencing take place. Mr. Mansfield also moved "for a statement of the particulars as to aggravating circumstances and to dismiss indictment for lack of notice as to aggravating circumstances." (Vol. III R. 513). He moved for an order requiring the State "elect and justify aggravating circumstances." (Vol. III R. 572). Lastly, based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), he moved to "prohibit any reference to the advisory role of the jury in sentencing." (Vol. III R. 574).

The trial court denied all of the motions. Before trial, Mr. Mansfield's trial counsel inquired of the trial court:

> MR. IRWIN: Judge, just briefly, Mr. Mansfield had some concerns. Apparently, he's been informed by some folks at the jail that he's additionally charged with sexual battery. I explained to him that we have contacted the state; they have denied that there is such a charge. I wanted to address that, I think, more to ease his mind. But the indictment does not make any mention of sexual battery. I'm unaware of any formal charge of sexual battery. And I'm just assuming whatever information that

> has been provided to him by jail is simply inaccurate or false.
>
> THE COURT: Well, the only thing I can say to Mr. Mansfield is that we do not have indictment and prosecution by rumor or innuendo or rank hearsay floating through the jail. In this particular case, Mr. Mansfield has been accused of the crime of murder in the first degree, a one-count indictment. That is the only thing that he's going to be tried on in this particular case. Now, whether or not there is something lurking out there in the bushes, I can't say. I suspect if the State of Florida wanted to charge him with, quote, sexual battery, they would have done it a long time ago since he was indicted October 20, 1995.

(Motion Hearing on 9/30/97 R.2156-57; T10-11).

Despite the court’s promise that Mr. Mansfield would only be tried on what he was charged with in the indictment, the court went on to instruct on the felony murder based on sexual battery when the trial court charged the jury. (Vol. VIII R. 1019-20). This led to confusion and the jury submitted the following question:

> On the verdict form, there is a finding for first degree murder, but without a finding for premeditated murder or felony murder under first degree. In the instruction, it reads: you can find the defendant guilty of first degree felony murder.
>
> Question: If a finding of first degree murder is arrived at, must we distinguish between premeditated or felony murder?

(Vol. VIII R. 1038). The court answered by note, “you need not distinguish between premeditated or felony murder if there is a finding of guilt as to first degree murder.” (Vol. VIII R. 1038). The jury returned a non-specific verdict of guilty of one count of

"first degree murder."

Mr. Mansfield proceeded to a penalty phase trial before the advisory panel. After the evidence was heard, the court informed the advisory panel of its advisory role and that the panel was to consider whether the crime was committed during a sexual battery:

> The Court: ladies and gentleman of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree.
>
> As you have been told, the final decision as to what punishment should be imposed is the responsibility of the judge; however, your advisory sentence as to what sentence should be imposed on this defendant is entitled by law and will be given great weight by this court in determining what sentence to be imposed in this case. It is only under rare circumstances that this court could impose a sentence other than what you recommend.
>
> It is your duty to follow the law that I will now give you and to render to the court an advisory sentence based upon you determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented in these proceedings.
>
> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.
>
> 1. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or an attempt to commit the crime of sexual battery.
> 2. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

(Vol. Penalty Phase Trans. 97-98).

Mr. Mansfield filed an amendment to his original postconviction motion based on *Ring v. Arizona*, 536 U.S. 584 (2002). Mr. Mansfield then raised *Ring and Caldwell* claims in his state habeas corpus motion. This Court found:

Issue 2: *Ring and Caldwell Claims*

> Mansfield next argues that his sentence of death is unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We recently held that Ring is not retroactive. *Johnson v. State*, 904 So.2d 400 (Fla. 2005). Thus, Mansfield's claim is denied.
>
> We have also repeatedly rejected objections based on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), to Florida's standard jury instructions. See *Sochor v. State*, 619 So.2d 285, 291 (Fla.1993); *Turner v. Dugger*, 614 So.2d 1075, 1079 (Fla.1992). This claim is also denied.

Mansfield, 911 So. 2d at 1180 (Fla. 2005).

Mr. Mansfield went well beyond the *Ring* issue of the day and challenged the general verdict and lack of indictment for felony murder and sexual battery as he does here. This Court found:

> Mansfield first claims that appellate 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. This Court and the United States Supreme Court have repeatedly rejected relief on this issue. In *Schad v. Arizona,* 501 U.S. 624, 645, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), the Supreme Court held that the United States Constitution did 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 were not required.

> "It is well established that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated and felony murder theories." *Parker v. State,* 904 So.2d 370 (Fla. 2005). Furthermore "[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." *Kearse v. State,* 662 So.2d 677, 682 (Fla.1995). [ ] To the extent that Mansfield raises a substantive claim on this issue, this claim is without merit under this prior case law.
>
> Mansfield also argues that the Supreme Court decisions in *Ring* and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), have changed the constitutional requirements for a death penalty jury. However, Mansfield fails to demonstrate *how* the holdings in *Ring* and *Apprendi* overruled the decision in *Schad.* Also, the *Apprendi* and *Ring* decisions were released after our decision on Mansfield's direct appeal, and appellate counsel is not required to anticipate changes in the law. *Walton v. State,* 847 So.2d 438, 445 (Fla.2003). Thus, this claim would not have had any merit on direct appeal.

Mansfield, 911 So.2d at 1178-79 (Fla. 2005).

SUMMARY OF ARGUMENT

The State obtained a conviction from a jury improperly instructed on felony murder under a theory that the murder occurred during a sexual battery. The State went on to obtain a death sentence from an advisory panel that was instructed it could consider whether the murder was committed during the commission of a sexual battery that Mr. Mansfield was never charged with, and was never convicted of, either separately or as a predicate for felony murder.

Mr. Mansfield had a right to notice, a grand jury indictment,

a trial, a jury in both guilt and penalty phase properly instructed and acting in its proper role, and proof beyond a reasonable doubt of every element that led to his conviction and death sentence. While the trial court was correct that "we do not have indictment and prosecution by rumor or innuendo or rank hearsay floating through the jail" (DIR. Motion Hearing on 9/30/97 R2156-57 T10-11), what Mr. Mansfield received in this case was no more fair, constitutional, or reliable.

This Court should reverse the lower court and grant Mr. Mansfield the trial the United States Constitution and the Florida Constitution demand.

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), these claims are mixed questions of law and fact requiring *de novo* review.

ARGUMENT

THE LACK OF AN INDICTMENT FOR FELONY MURDER AND SEXUAL BATTERY, THE DENIAL OF A SPECIFIC JURY VERDICT FOR FELONY MURDER AND SEXUAL BATTERY AND THE INSTRUCTION ON DURING THE COURSE OF A SEXUAL BATTERY WITHOUT A SPECIFIC JURY FINDING DURING PENALTY PHASE, VIOLATED MR. MANSFIELD'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Mansfield was convicted and sentenced to death with confused proceedings that denied Mr. Mansfield his constitutional rights and a fair and reliable determination of his guilt and of

the applicability of his death sentence.

1. Mr. Mansfield does not waive any argument based on *Hurst*, *Hurst v. State* and the implications therefrom.

While Mr. Mansfield will comply with this Court's order by not presenting arguments based on or related to *Hurst* and *Hurst v. State*, he does not waive any claim or argument. These cases have brought to light unconstitutionality throughout Florida's death penalty system. As a "system," in theory, the parts operate to allow the critical decisions to be made constitutionally. While Mr. Mansfield will refrain from argument based on the *Hurst* cases, he respectfully submits that no judicial decision can be made without considering the implications to the system brought to light by *Hurst* and the cases that followed. Mr. Mansfield has argued the important constitutional protections that *Ring* and *Apprendi* solidified, and which *Hurst* and the cases that follow offer further application to Florida, demand relief apply to him generally and based on the unique facts of his case. He abandons no claim now.

2. The general guilty verdict of first degree murder was unconstitutional because the jury was instructed on felony murder when Mr. Mansfield was not charged with felony murder or sexual battery, and the jury never specifically found proof beyond a reasonable doubt on either theory.

Mr. Mansfield had a fundamental constitutional right under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution to require the jury to reach a unanimous verdict beyond a reasonable doubt as to whether he committed

premeditated murder. He had the additional fundamental right to not be convicted based on felony murder when he was not charged with it in the indictment. He also had a fundamental right to not have an aggravating factor weighed against him in favor of death based on sexual battery when he was not charged with sexual battery separately or as a predicate for felony murder in the indictment or found guilty of felony murder or sexual battery.

Mr. Mansfield was charged by indictment with only a single count of first degree murder, "by premeditated design." (Vol. I R. 15). Nevertheless, the trial court instructed the jury on two theories of first degree murder, premeditated and felony murder. There was no unanimous verdict on either specific theory of murder and thus no proof beyond a reasonable doubt.

The evidence for both theories was insubstantial. At Mr. Mansfield's trial, the State presented no definitive physical evidence that Mr. Mansfield committed this crime. Moreover, the State's testimonial evidence was of little probative value or was dubious in nature. There was no DNA evidence that showed Mr. Mansfield committed the murder or a sexual battery. There was an equally viable suspect in Billy Finneran who was near the crime scene at the alleged time of offense. As raised in Mr. Mansfield's first successive postconviction appeal and his original postconviction motion, jailhouse informant Michael Johns had every reason to testify falsely. Mr. Johns was impeached at trial and

should have been impeached further by the 10 federal bank robbery charges he faced at the time he testified against Mr. Mansfield. Lastly, while this Court found the illegal interrogation of Mr. Mansfield harmless, it certainly is not harmless now when all of the other error is considered in this brief.

In *In re Winship* the United States Supreme Court held that to convict and sentence an individual requires each fact necessary for conviction be proved beyond a reasonable doubt. The Court made clear, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

In *Ivan V. v. City of New York*, the Supreme Court applied *Winship*'s proof-beyond-a-reasonable doubt standard retroactively, stating,

> 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' [citations omitted]

> *Winship* expressly held that the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' 397 U.S., at 363—364, 90 S.Ct., at 1072.
>
> Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.

Ivan V. v. City of N.Y., 407 U.S. 203, 204–05 (1972). In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court held that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion or sudden provocation when the issue is properly presented in a homicide case. *Id*. at 704. Thus, under the Due Process Clause, the state, and the state alone, must prove each element beyond a reasonable doubt and has the extremely high burden of proof.

The United States Supreme Court has recognized in *In Re Winship*, that "as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond

a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Here, there was no jury finding of proof beyond a reasonable doubt of premediated murder, felony murder or sexual battery contained in the jury's general first degree murder verdict. It remains unknown whether there was unanimity on any of the charged or uncharged offenses.

It gets even worse during Mr. Mansfield's penalty phase that occurred under Florida's unconstitutional system. After being tried on an alternative theory not charged in the indictment of felony murder, and not receiving a verdict on either theory, the court went on to instruct the advisory panel that it could consider and weigh in favor of a death recommendation that the murder was committed during a sexual battery when Mr. Mansfield was not charged by the indictment with felony murder, let alone sexual battery. The court then found the aggravating factors itself.

In *Schad v. Arizona*, 501 U.S. 624 (1991), the plurality held that a conviction based on alternative theories did not require a unanimous verdict for each under the Constitution when the defendant was charged generally. *See Id*. at 629. The plurality went on to say that *Schad* did not "exhaust the universe of those potentially relevant to judgments about the legitimacy of defining certain facts as mere means to the commission of one offense", but that the "jury's options *in this case* did not fall beyond the

constitutional bounds of fundamental fairness and rationality." *Id.* at 645. Mr. Mansfield's case is an extreme example that was not bound by *Schad* because Mr. Mansfield was not charged *de facto* with both theories under one statute like in *Schad;* he was specifically charged with only one type of murder - - premeditated murder.

The Court in *Schad* also never considered that the implications of using a murder theory or an uncharged sexual battery as an aggravating factor in a penalty phase when the jury had not found them specifically. This was because there was no jury consideration of the death penalty in Arizona at all. *See Ring v. Arizona*, 536 U.S. 584, 592-93 (2002). *Schad* was decided before *Apprendi* and *Ring*. Even if Mr. Mansfield's case fell within the parameters of *Schad*, which it does not, *Schad's* applicability can hardly survive *Apprendi*, *Ring, and Hurst,* because there was no jury finding of sexual battery or felony murder based on sexual battery.

Non-unanimous general verdicts when only one theory results in an aggravating factor, and indeed the non-verdicts in Mr. Mansfield's case, are contrary to Supreme Court's Sixth Amendment requirement of jury findings on all elements of a crime in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring* and now *Hurst.* The way that Arizona charged *Schad* was different than how Mr. Mansfield was charged. Both systems functioned differently. The Arizona statute and death penalty merely sets forth circumstances which

constituted "murder in the first degree." The Florida statutes at the time of Mr. Mansfield's case specifically stated in relevant part:

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; **or**
2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . .

782.04. Murder, West's F.S.A. § 782.04 (1995). (Emphasis added). The State then chose premediated design to the exclusion of felony murder in the indictment in Mr. Mansfield's case. The statute provided for specific elements for each of these two types of murder. After that there was a sentencing hearing where the advisory panel considered aggravating factors. Arizona only had proceedings before the "court alone."

The criminal indictment filed in Mr. Mansfield's case contained only one count, alleging premeditated murder. Mr. Mansfield was not charged with any underlying felony, and the trial court expressly informed him of such. There is no verdict showing proof that he was guilty of sexual battery. It is entirely possible that NO juror found premeditation or that NO juror found an underlying felony that the murder was committed during. If less than twelve jurors found premeditation, then all twelve jurors would have had to find that Mr. Mansfield committed a sexual battery during the murder for the "during a felony murder"

aggravating factor to apply, a crime which Mr. Mansfield was not charged. There is simply no basis for believing the jury was unanimous as to either theory. With *Ring* and *Apprendi* requiring the jury find every element of the crime that subjects an individual to death, a general verdict cannot suffice.

The lack of a jury finding on felony murder or sexual battery was clearly demonstrated when the jury sent out an inquiry directly addressing the question of specific unanimous verdicts. (Vol. VIII R. 1038). The jury question clearly indicates that the jury had reached only a general verdict of guilt, and had not reached a specific verdict of guilt as to specific elements of either premeditated or felony murder. There was no charge or verdict for the alleged sexual battery, so there is no way to ascertain whether the jury unanimously agreed there had been a felony murder. Similarly, there is no indication the jury found unanimously found premeditation.

Before and at penalty phase, Mr. Mansfield did not receive a jury verdict on any of the aggravating factors, and most importantly on the "during the course of a sexual battery" aggravating factor. The trial court unconstitutionally weighed the "during the course of a sexual battery" aggravating factor against his mitigating factors and based the court's unilateral decision to impose death on that aggravating factor. This was an entirely additional layer of constitutional violation because the jury

never found that a sexual battery was committed or that the murder happened during the commission of a felony.

If Mr. Mansfield's death sentence was to be based on his having committed a murder during the commission of a sexual battery, he had to have been charged with at least felony murder, if not sexual battery, and convicted based on proof beyond a reasonable doubt. Such rights are indeed fundamental and, accordingly, this Court should reverse.

3. Mr. Mansfield was not charged by the indictment with felony murder or sexual battery, thus the consideration of such by the jury and advisory panel denied Mr. Mansfield his right to notice and grand jury indictment under the United States and Florida Constitutions.

Mr. Mansfield's death sentence and conviction violated the notice requirement of the United States Constitution and the Florida Constitution, and the grand jury requirement of the Florida Constitution, because Mr. Mansfield received no notice of felony murder, sexual battery, or the "during the course of a sexual battery" aggravating factor in the indictment.

The grand jury returned an indictment for premeditated murder but not felony murder. The State very easily could have charged felony murder and sexual battery if the grand jury itself found that a sexual battery occurred. The only logical conclusion for the specific omission of felony murder was that the grand jury did not find that Mr. Mansfield committed one, or the State did not even bother to put forth evidence that he had. While the State may

have chosen the path of least resistance at the time of indictment, it led to the road of unconstitutionality in Mr. Mansfield's case.

Even prior to *Ring* and *Hurst*, it was very common for the State to obtain a grand jury indictment on premeditated and felony murder. While the State could proceed on both theories, the jury would only return a general verdict, and little was risked. It was also fairly common to not charge the underlying felony murder crime because even in the time before *Ring* and its progeny, a not guilty verdict on the underlying felony prevented consideration of the "during the course of a violent felony" aggravating factor.

Mr. Mansfield received no notice that he was charged with felony murder or sexual battery, only that he was charged with murder by "premeditated design." All of the motions that would have attempted to relieve some of the unconstitutionality that plagued Mr. Mansfield's trial were denied. *See* (Vol. IV R. 757-59). The lack of notice is even worse in Mr. Mansfield's case because the trial court affirmatively told Mr. Mansfield he was not charged with sexual battery.

The Sixth and Fourteenth Amendments of the United States Constitution require a charging document enumerate the elements sufficiently to apprise the defendant of what he must defend against. *Russell v. United States*, 369 U.S. 749 (1962). In *Russell*, the Court,

> . . . emphasized two of the protections which an

> indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, secondly, in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *Cochran and Sayre v. United States*, 157 U.S. 286, 290[ ];*Rosen v. United States*, 161 U.S. 29 [ ]*Hagner v. United States*, 285 U.S. 427, 431. See *Potter v. United States*, 155 U.S. 438, 445; Bartell v. United States, 227 U.S. 427, 431; *Berger v. United States*, 295 U.S. 78, 82,; United *States v. Debrow*, 346 U.S. 374, 377–378.

Id. at 763-64(1962)(internal quotations and long cites omitted).

The Florida Constitution also requires notice and a grand jury indictment in a capital case. Article I, Section 15(a) provides:

> (a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges . . ..

Due process requires specific charges to prevent the jury from being instructed on an uncharged offense and the state and courts from relying on one theory at trial and another on appeal or before the sentencing court. In *Cole v. Arkansas*, the United

States Supreme Court considered the constitutionality of considering an unnoticed and uncharged offense. The Court found:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, and cases there cited. If, as the State Supreme Court held, petitioners were charged with a violation of s 1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De Jonge v. State of Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278.

Cole v. State of Ark., 333 U.S. 196, 201 (1948).

The Constitution required the State to allege all the elements of felony murder and sexual battery in the indictment if the State wanted to proceed on such theories, and if the grand jury had found them. Mr. Mansfield was not properly charged and not properly noticed, especially after the trial court specifically informed him that he was not charged with sexual battery. Even if the State could forgo charging him in the indictment, he was entitled to be charged with the aggravating factor in the indictment. Mr. Mansfield had a right to a proper grand jury indictment and notice as an essential part of a constitutional trial and death sentence. This Court should reverse.

4. The advisory panel's recommendation violated the Eighth Amendment under *Caldwell v. Mississippi* and Mr. Mansfield's case is not reliably one of the most aggravated and least mitigated cases based on how his death sentence was reached.

In Mr. Mansfield's case, the advisory panel was instructed that, although the court was required to give great weight to its recommendation, the recommendation was only advisory. Had this been an actual jury trial, this would have been contrary to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Supreme Court stated and held that it,

> has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 341. Any reliance or argument based on the advisory recommendation in Mr. Mansfield's case is misplaced and fails to rise to the level of constitutional equivalence of a jury properly instructed according to *Caldwell*. An advisory panel accurately instructed on its diminished role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell*.

In *Caldwell*, the United States Supreme Court found that: "it is constitutionally impermissible to rest a death sentence on a

determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". *Id.* at 328-29. If the jury's responsibility for its role in determining a death sentence has been diminished, the sentencing determination is unreliable and may bias the jury to make a decision for death on the mistaken belief that the courts have the ultimate authority on all matters including fact-finding and will correct any mistake the jury may have made. This would deprive a defendant of the constitutional right to an individualized sentencing proceeding because the jury feels that any lack of consideration will be appropriately decided by another authority. The jury might be "unconvinced that death is the appropriate punishment" but still recommend a death sentence to "express extreme disapproval for the defendant's acts" or "send a message to the community," believing the courts can and will cure the harshness. *Id.* at 331. "A defendant might thus be executed, although no sentencer had ever made a determination that death was the appropriate sentence." *Id.* at 331-32.

Moreover, a jury "'confronted with the truly awesome responsibility of decreeing death for a fellow human,' *McGautha v. California*, 412 U.S. 183, 208 (1971)," might find a diminution of its role and responsibility for sentencing "attractive." *Id.* at 332-33.

In Mr. Mansfield's case, the advisory panel's role was

diminished even further than most cases because the jury was improperly instructed to consider felony murder. Rather than functioning as a jury with the responsibility to return a unanimous and specific verdict, the jury returned only a general verdict. This error became more pronounced during penalty phase when the advisory panel was instructed that its role was advisory and that it could consider that the murder happened during the commission of a sexual battery. The jury's role was not only diminished in violation of *Caldwell*, it was ultimately not allowed to function at all. Based on *Caldwell* and the error discussed throughout this brief, Mr. Mansfield's case is not one of the most aggravated and least mitigated, thus his death sentence violates the Eighth Amendment. This Court should reverse.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Mansfield respectfully urges this Honorable Court to reverse the trial court's order denying a new trial.

CERTIFICATE OF SERVICE

We certify that a copy hereof has been furnished to opposing counsel by filing with the e-portal, which will serve a copy of this Initial Brief on Stephen Ake, Assistant Attorney General on this 26th day of February, 2018.

S/JAMES L. DRISCOLL JR
JAMES L. DRISCOLL JR.
Fla. Bar No. 0078840
driscoll@ccmr.state.fl.us

S/DAVID DIXON HENDRY
DAVID DIXON HENDRY
Fla. Bar No. 0160016
hendry@ccmr.state.fl.us

S/GREGORY W. BROWN
GREGORY W. BROWN
Florida Bar No.86437
brown@ccmr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway Temple Terrace, Florida 33637
(813) 558-1600

COUNSEL FOR APPELLANT

CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

S/JAMES L. DRISCOLL JR
JAMES L. DRISCOLL JR.
Fla. Bar No. 0078840
driscoll@ccmr.state.fl.us

S/DAVID DIXON HENDRY
DAVID DIXON HENDRY
Fla. Bar No. 0160016
hendry@ccmr.state.fl.us

S/GREGORY W. BROWN
GREGORY W. BROWN
Florida Bar No.86437
brown@ccmr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway Temple Terrace, Florida 33637
(813) 558-1600

COUNSEL FOR APPELLANT