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

REPLY BRIEF OF THE APPELLANT

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REPLY 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.

More was at issue at in Mr. Mansfield's postconviction motion than Claim 7. Mr. Mansfield raised that "the fact-finding that subjected Mr. Mansfield to death was not proven beyond a reasonable doubt" in Claim 3. (R. 26). Mr. Mansfield raised the issue that his "death sentence should be vacated because it was obtained in violation of the Florida Constitution." (R. 27). This claim argued that Mr. Mansfield was denied notice and a grand jury indictment under the Florida Constitution. (R. 27-28). Throughout the motion there were claims regarding the Eighth Amendment, especially Claim 8. These claims went well beyond the Sixth Amendment violation that the United States Supreme Court found in *Hurst v. Florida*, 136 S.Ct 616 (2016). Indeed the only claim in Mr. Mansfield's motion that addressed the Sixth Amendment claim based on *Hurst v. Florida* was Claim 1. The other claims have independent viability beyond *Hurst*.

Mr. Mansfield's claims were not untimely. The key trigger date was the date that *Hurst v. Florida* was issued, January 12, 2016. In the instant case, and in almost every case that was pre-

Ring, the courts denied relief because *Hurst v. State* and *Hurst v. Florida* were not retroactive, not because the motions were untimely. Counsel throughout the State worked diligently to file successive motions within one year from *Hurst v. Florida*. This was necessary not only to comply with the Florida time limits, but also necessary to seek further review in the cases in which relief was denied.

Without moving into a forbidden area of *Hurst* argument, suffice it to say that the *Hurst* cases lifted the judicial barriers to obtaining relief by correcting the fundamental misunderstanding of what required a jury verdict. Once this misunderstanding was rectified, other constitutional violations that were hidden in Florida's unconstitutional death penalty system emerged. Mr. Mansfield raised claims that went well beyond the *Hurst* cases because of the overall unconstitutionality of Florida's death penalty scheme. Mr. Mansfield also presented a basis for guilt phase relief. He was no less entitled to a fair trial, notice, a grand jury indictment and a properly instructed jury in the guilt phase as he was in the penalty phase.

The law of the case is overcome because having raised these claims in the motion at issue and previously dating back to before trial, adhering to the law of the case would result in a manifest injustice. This Court explained in *State v. Owen*, 696 So.2d 715 (Fla. 1997):

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." Brunner Enters., Inc. v. Department of Revenue, 452 So.2d 550, 552 (Fla.1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case. *See Strazzulla v. Hendrick*, 177 So.2d 1, 3 (Fla.1965) (explaining underlying policy). This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. *Preston v. State*, 444 So.2d 939 (Fla.1984).
>
> An intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case. *Brunner*, 452 So.2d at 552; Strazzulla, 177 So.2d at 4.

Id. at 720. On a very basic level, this Court's previous denial of relief on the same or similar issues to those now before this Court, is fundamentally unfair and a manifest injustice. The claims presented in the motion, and now under the limits of this Court's briefing, show that Mr. Mansfield has been correct all along. Whatever precedential value of this Court's authority should be reconsidered in light the intervening decisions of this Court and the United States Supreme Court.

The State's brief seeks to limit this Court's authority to correct gross constitutional violations and injustice when such becomes apparent over time. This Court has the inherent authority to correct error as the highest court in this State.

Recently this Court enforced a "promise to a defendant, made by a state attorney with authority over a case, by transferring the case to another circuit violates general contract principles and notions of fundamental fairness." *Johnson v. State*, - -So.2d - - 2018 WL 1324839 (Fla. March 15, 2018). Contract law aside, Mr. Mansfield was told by the trial court that:

> 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). Beyond the lack of indictment for and the omission of felony murder, Mr. Mansfield was affirmatively told that he was not charged with sexual battery even though the jury was eventually instructed on sexual battery as a predicate for felony murder and as an aggravating factor during penalty phase. That was fundamentally unfair even before the *Hurst* cases made clear that all of the elements that subjected an individual to death or a conviction had to be found by a jury. Mr. Mansfield was denied the right to a jury trial, proof beyond a reasonable doubt, a grand jury indictment and notice. This Court should reverse.

The State's reliance on the 12-0 recommendation of the advisory panel is of no account because it fails to consider the distinctions in Mr. Mansfield's case that overcome the State's claim of harmlessness.

While a 12-0 recommendation of an advisory panel is something that this Court has considered in the run-of-the-mill *Hurst* cases, Mr. Mansfield has presented issues well beyond those cases. The 12-0 recommendation does not render the fundamental constitutional error in this case harmless.

Under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the advisory panel was instructed in a way that diminished its role, the 12-0 recommendation should not be determinative. To consider the recommendation of the advisory panel attributes an importance that was undermined by the instructions given at the time of Mr. Mansfield's trial.

On direct appeal, this Court found that the error of admitting Mr. Mansfield's video interrogation was harmless under the *Chapman* standard. *Mansfield v. State*, 758 So. 2d 636, 644–45 (Fla. 2000). After Mr. Mansfield received federal habeas relief, the Eleventh Circuit applied a more stringent harmless error standard under federal habeas law. Neither Court considered the case with an understanding that one vote would make a difference in whether Mr. Mansfield eventually would receive relief.

The harmless error of admitting Mr. Mansfield's interrogation is not harmless if the effect of the video interrogation

contributed to the 12-0 advisory panel recommendation. Because it would have affected the recommendation of one advisory panel member's vote, if not the jury's guilt phase verdict, there must be reconsideration of the harmlessness if this Court were to consider denying relief based on the advisory panel recommendation. The videotaped interrogation showed law enforcement repeatedly accusing Mr. Mansfield of murder and repeatedly confronting Mr. Mansfield with otherwise inadmissible evidence and false facts. Law enforcement went so far as to discuss the victim's children who were now motherless because of the homicide, thus allowing victim impact evidence to be heard during the guilt phase of Mr. Mansfield's trial. *See* (SR T. 27, R. 31). Law enforcement even went so far as to ask Mr. Mansfield if he was a "sicko." (SR T. 18, R. 22).

In *Jackson v. State*, 107 So.3d 328 (Fla. 2012), this Court vacated a conviction because "the videotaped interrogation allowed the State to elicit sympathy for the victim and repeatedly informed the jury that the police adamantly believed Jackson was guilty." This Court stated that "it is especially troublesome when a jury is repeatedly exposed to an interrogating officer's opinion regarding the guilt of innocence of the accused." *Id.* at 340. *See also Dragovich v. State*, 492 So.2d 350, 354 (Fla. 1986)(reversing a death sentence where the State presented evidence that the defendant was an alleged "arsonist," and "one of the victim's

children testified that the appellant's nickname was 'The Torch.'"

The State did not go through the trouble of admitting the video testimony if it was not incriminating and it did not portray Mr. Mansfield in a negative light. Unware that what he said could be used against him, Mr. Mansfield certainly acted in a way that would be viewed negatively by the jury and later the advisory panel. This would have affected not only the guilt phase determination but at least one of the advisory panel member's recommendation.

There was insufficient evidence that Mr. Mansfield committed the crime at issue. There was a viable alternative suspect in Billy Finneran. The State's ultimate witness at trial, notorious multiple convicted felon Michael Johns was at issue in Mr. Mansfield's last successive postconviction motion and his original motion. *See Mansfield v. State*, 911 So.2d 1160, 1175-76 (Fla. 2005); *see also Mansfield v. State*, 204 So.3d 14 (Fla. 2016) and the briefing on the cases. Mr. Johns had little credibility at trial and no credibility following postconviction.

The issues presented by Mr. Mansfield show that an improperly instructed jury and advisory panel led to confusion and a lack of proof beyond a reasonable doubt. Any error in this case was harmful and should be remedied by this Court.

CONCLUSION AND RELIEF SOUGHT

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 obtained 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.

Cumulatively, or based on each issue raised in the initial brief, this Court should reverse because the error in this case is more than the Constitution allows.

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 19th day of March, 2018.

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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.

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