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**IN THE SUPREME COURT OF FLORIDA**

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**CASE NO. ____________**

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**WILLIAM A. GREGORY,**

**Petitioner,**

**v.**

**SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA**

**Respondent.**

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# PETITION FOR WRIT OF HABEAS CORPUS

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## PRELIMINARY STATEMENT

The original record on direct appeal in this case comprises of twenty-nine consecutively numbered volumes and four consecutively numbered supplemental volumes. Citations to the record on direct appeal will be cited in the form R[volume number]/[page number]. The post-conviction record is comprised of twenty-five consecutively numbered volumes. Citations to the post-conviction record will be cited in the form PC[volume number]/page number].

## REQUEST FOR ORAL ARGUMENT

Given the gravity of the case and the complexity of the issues raised herein, Mr. Gregory, through counsel, respectfully requests that this Court grant oral argument.

## JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

Article I, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This is an original action under Florida Rule of Appellate Procedure 9.100(a). This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Gregory's death sentences.

This Court has jurisdiction, *see, e.g., Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Gregory's direct appeal. *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969); *Brown v. Wainwright*, 392 So. 2d 1327 (Fla. 1981).

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. *Dallas v. Wainwright*, 175 So. 2d 785 (Fla. 1965); *Palmes v. Wainwright*, 460 So. 2d 362 (Fla. 1984). This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Mr. Gregory's claims.

## STATEMENT OF THE CASE AND OF THE FACTS

William A. Gregory was convicted at a jury trial and, based on seven (7) to five (5) advisory verdicts, sentenced to death for the August 2007 first-degree murders of Skyler D. Meekins and Daniel A. Dyer. The facts of the case are set out in detail in this Court's direct appeal opinion, wherein the Court ultimately affirmed the convictions

and sentences. *Gregory v. State*, 118 So. 3d 770 (2013). Generally speaking, the State's theory of the case was that 24 year old William Gregory had been jilted by Skyler Meekins, with whom he had lived in her parents' house and was the mother of his infant child, and that one night he broke in and shot her and her new boyfriend, Daniel Dyer, in a jealous rage. He was convicted of both murders at a jury trial and sentenced to death by the judge after two seven (7) to five (5) advisory verdicts.

Mr. Gregory was originally represented by Assistant Public Defender Matthew D. Phillips. The Public Defender's Office stayed on the case from its inception in the summer of 2007 until withdrawing due to a conflict of interest around two years later. R2/312. After that, Mr. Gregory was represented by registry counsel Gary Wood through the conclusion of the trial court proceedings in 2011, another two years. Many of the issues that were raised by the defense during the trial proceedings were abandoned on direct appeal and are asserted here as subcomponents of the instant claim of ineffective assistance of appellate counsel on direct appeal. In particular, Mr. Wood filed a forty point statement of judicial acts to be reviewed. R4/734-39. Points five through twenty-four claimed error in admitting tape phone calls made by Mr. Gregory to the victim, Skyler Meekins, and various family members while he was incarcerated. Points thirty and thirty-one were that the court erred in declining to grant the Mr.

Gregory's proposed penalty phase jury instructions. These issues were abandoned by appellate counsel, and the claim here is that doing so amounted to ineffective assistance.

Of note in light of the recent decision in *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016), which determined that Florida's death penalty scheme is unconstitutional, Mr. Phillips filed and fully litigated a claim predicated on *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See generally* R1/34 through R2/310. Doing so was standard practice among capital defense attorneys at the time of Mr. Gregory's direct appeal. *See e.g. Rigterink v. State*, 66 So. 3d 866, 895-96 (Fla. 2011) (noting that "[i]n over fifty cases since *Ring*'s release, this Court has rejected similar *Ring* claims."). Defense counsel in those cases filed *Ring claims* despite this Court's rejection of them because the evident tension in Florida capital jurisprudence as the result of *Ring* and the need to raise and preserve it in anticipation of a future decision like *Hurst* was well known to capital defense attorneys at the time. This petition contends that appellate counsel's abandonment of a fully preserved *Ring/Apprendi* claim fell "measurably outside the range of professionally acceptable performance" for capital defense appeals attorneys in Florida at that time.

The notice of appeal was filed on April 20, 2011, and the Public Defender's Office was appointed five days later. R4/731. On May 18 the Public Defender moved to withdraw due to a conflict of interest. Around two months after that, July 12, 2011, the court granted the motion and appointed Richard R. Kuritz to represent Mr. Gregory on direct appeal. R4/765-67. The court indicated that it had consulted with Mr. Kuritz, who had agreed to the appointment. Nearly four months after that, on November 8, 2011, Mr. Kuritz filed a notice of appearance and a "first" motion for an extension of time of 45 days to file the initial brief. In it, Mr. Kuritz represented that he was a sole practitioner with a number of capital cases that were in the midst of trial litigation. He also noted that the brief was due in nine days.

The initial brief, eventually filed on January 9, 2012, was 28 pages long. The brief does not cite any federal authority, including from the Supreme Court, at all. It asserted that (1) the trial court erred in denying Mr. Gregory's motion to disqualify the judge based on statements the judge made during a pretrial hearing; (2) the trial court erred in admitting into evidence threatening statements directed toward the victims made eight months before the murders by Mr. Gregory to a co-worker; (3) the trial court erred in admitting testimony from a witness who could not identify Mr. Gregory in court; (4) the trial court erred in admitting testimony about a statement Mr. Gregory

made to one of the victims; and (5) the trial court erred in instructing the jury on and in finding the cold, calculated, and premeditated (CCP) aggravator. *Gregory v. State*, 118 So. 3d 770, n.4 (2013). This delineation of the issues presented differs slightly from that of the initial brief because there, what were presented as Issues 5 and 6 were essentially the same, ie an attack on the CCP aggravator. The Court also conducted a sufficiency and proportionality review, although those issues were not addressed in the initial brief.

The brief contained a statement that "[a]ny delay [in the filing of the brief] was due to the substitution of counsel and numerous attempts to acquire the complete Record prior to the undersigned accepting the appointment for representation." *See* Initial Brief, page 8. The Record on Appeal bears the date stamp of the Clerk of this Court of July 20, 2011. The Record was supplemented months later, but that was on motion of the Appellee in February 2012, long after the initial brief had been filed. In other words, appellate counsel filed a notice of appearance with a motion for an extension of time nearly four months after he had been appointed and almost that long since the record had been filed, and with nine days left until the brief was due, citing an incomplete record and "numerous" undocumented attempts to rectify the situation without any supplementation having occurred.

The first claim, that the judge erred by not granting trial counsel's motion for recusal, did not fare well on appeal. The oral argument can be viewed at http://wfsu.org/gavel2gavel/viewcase.php?eid=2035 (last visited January 22, 2016). The recusal motion cited the judge's use of the term "prophetic" to describe a proffered statement by Mr. Gregory that he talked about killing the victims eight months before the incident, but it omitted the fact that the use of the word occurred after the judge had first qualified the remark by saying that "if he [Gregory] is, in fact, the one who committed the murder . . ." The motion also alleged that the trial judge stated that hearing the victim's voice on certain taped telephone calls would be "refreshing" because she "has now been silenced," and argued that this constituted a legally sufficient basis for disqualification. *Gregory,* 118 So. 3d at 779. In fact, as the record showed, the judge had not used that word. Instead, he said that he found it "quite interesting" that the jury would be able to hear the victim's voice.

Appellate counsel started off the oral argument with this claim. That led to an exchange which showed that it had not been received favorably and that it was time to move on. "I find it somewhat troubling that an affidavit is filed by the attorney which presents this in a light that I think can only be described as misleading . . . Counsel, this is your strongest issue? You're using up all your time." In its opinion, this Court

observed that the "prophetic" argument took the word out of context and that the alleged "refreshing" remark never took place. "[W]e begin by noting that Gregory's disqualification motion and accompanying affidavit misstated the judge's remarks." *Id.*

> Although trial counsel apparently did not intentionally misrepresent the judge's comment but instead misheard the remarks, a motion made on a trial judge's statement in open court that does not accurately represent what has actually been said cannot comply with the requirement that an affidavit be made "in good faith. . ." Further, for the motion to be legally sufficient, a movant cannot simply pluck one word from a full sentence made by the trial judge and omit the remainder of the statement.

*Gregory,* 118 So. 3d at 779. For the purposes of this petition, it should be noted that appellate counsel had the record, which the trial attorney did not when he filed the inaccurate motion and affidavit, and not only argued the claim anyway but asserted it as his leading argument in both the initial and reply briefs, even after the State had pointed out the misrepresentation of the record in its answer brief. *See* Answer Brief, page 57.

The initial brief asserted three claims based on the lower court's evidentiary rulings which were ultimately rejected. It also raised a claim regarding the CCP aggravator which was ultimately rejected. It did not address sufficiency of the evidence

or proportionality of the sentence. The answer brief did, and the reply brief contains argument in response. This Court ultimately denied relief on all of these issues. Neither a motion for rehearing nor a petition for certiorari to the United States Supreme Court were filed.

## STANDARD OF REVIEW

Under *Strickland v. Washington*, 466 U.S. 668, 688 (1984), ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). The standard of review for claims of ineffective assistance of appellate counsel mirrors the *Strickland* standard for ineffective assistance of trial counsel. In order to grant habeas relief on an ineffectiveness of appellate counsel claim, this Court must determine: first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Conahan v. State*, 118 So. 3d 718 (Fla.2013); *Pope v. Wainwright*, 496 So. 2d 798 (Fla.1986).

## **GROUNDS FOR HABEAS CORPUS RELIEF**

Mr. Gregory petitions for habeas corpus and seeks a renewed appeal of his convictions and death sentences on the ground that he was not afforded fully effective assistance of counsel on his previous appeal to this Court. Significant errors which occurred at Mr. Gregory's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Gregory. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s]." *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," *Barclay v. Wainwright*, 444 So. 2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that "*confidence* in the correctness and fairness of the result has been undermined." *Wilson*, 474 So. 2d at 1165 (emphasis in original). As this petition demonstrates, Mr. Gregory is entitled to habeas relief.

By this petition for a writ of habeas corpus, Mr. Gregory also asserts that his capital convictions and sentences of death were obtained and then affirmed during this Court's appellate review process in violation of his rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. This Petition also contends that Florida's death penalty scheme is fatally flawed under the Sixth and Eighth Amendments and that Mr. Gregory's death sentence, based on seven (7) to five (5) jury recommendations, must be set aside.

## GROUND I

## MR. GREGORY RECEIVED PREJUDICIAL INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON DIRECT APPEAL.

### Introduction

Appellate counsel has the "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that appellate counsel was ineffective, *Strickland* requires a defendant to demonstrate: (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the

fairness and correctness of the appellate result. *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine "whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986). Appellate counsel's failure to assert the claims addressed in this petition proves his advocacy involved "serious and substantial deficiencies" which establish that "confidence in the outcome is undermined." *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986); *Barclay v. Wainwright*, 444 So. 2d 956, 959 (Fla. 1984); *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985).

"This Court's review of the propriety of death sentences and the proceedings in which they are imposed is no substitute for the careful, partisan scrutiny of a zealous advocate.'" *Fitzpatrick v. Wainwright*, *supra* (Fla. 1986) *citing Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985). Mr. Gregory manifestly did not receive the "careful, partisan scrutiny of a zealous advocate." An appellant has a right to effective

assistance of appellate counsel in a direct appeal of a capital case and has an opportunity to present claims of appellate counsel's ineffectiveness in state habeas corpus proceedings. *See*, e.g., *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) ("Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel.").

Prejudice is established where there is a substantial omission by appellate counsel sufficient to undermine confidence in the outcome the appellate process. *Wilson*, 474 So. 2d at 1164. Mr. Gregory also asserts here in the alternative that the appropriate standard for prejudice is that of *United States v. Cronic*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984). Appellate counsel simply abandoned many of Mr. Gregory's preserved claims. In that regard, Mr. Gregory not only received ineffective assistance on appeal, he received no assistance at all. Appellate counsel's complete inaction even falls short of the requirements of an *Anders* brief. "The procedure established in *Anders* and its progeny requires an indigent's appellate counsel to "master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal." *In re Anders Briefs*, 581 So. 2d 149 (Fla. 1991). Abandonment of preserved meritorious claims thus precluding

appellate review is in effect a complete absence of counsel which undermines the integrity of the appellate process.

**Abandonment of Defense Objections to Jail Phone Calls**

The State's overall theory of the case was that Mr. Gregory murdered the victims out of obsessive jealousy. This idea was emphasized throughout the trial. In opening statements, Assistant State Attorney Johnson said that "[jealousy] is what is at the heart of the case." R12/641. During the testimony of inmate witness Tyrone Graves, he testified that "[Gregory] was very jealous of her, very jealous of her, and upset that she wasn't available to answer his phone calls" and that "[Skyler] just didn't want to be bothered with [Gregory]." R15/1104-05. In closing arguments, Assistant State Attorney Roys states, "Skyler was trying to move on with her life . . . She opted to move on. Billy Gregory couldn't accept it. And he - his frustrations grew and grew, until ultimately he took matters into his own hands." R22/1991. Further, ASA Roys used Tyrone Graves' testimony to show that Mr. Gregory would "get so angry. She wouldn't take his calls. She told him not to write." R22/1999. ASA Roys went on to say "[e]verybody was seeing this escalation of Billy's anger, of his jealousy. He was losing control because he was losing Skyler, and he knew it." R22/2001. Ultimately this Court, in determining the sufficiency of the evidence to support convictions for

first-degree murders, observed that the State presented evidence that Mr. Gregory was aware Skyler Meekins had begun dating Daniel Dyer and "demonstrated through the litany of recorded phone calls it published to the jury how jealous and obsessive Gregory was about Skyler leaving him." *Gregory*, 118 So. 3d at 785.

The jail calls that were presented by the prosecution at trial (the defense presented none) generally painted Mr. Gregory in a bad light: that of a rebuffed former lover who won't let go. *See generally* State's Trial Exhibits 43 through #2. The State also implied that from Skyler Meekins' point of view there was no longer even any possibility of a relationship and that the calls were essentially an unwanted form of harassment. Jurors likely would have been predisposed to that assessment of the calls merely because of their origination from a jail inmate.

At the post-conviction evidentiary hearing, collateral counsel presented a wealth of information to rebut that picture that had not been presented to the jury at trial. *See generally* Initial Brief of Appellant, Argument I. This evidence showed that even though Mr. Gregory was aware that Skyler Meekins began dating Daniel Dyer, Mr. Gregory and Skyler remained in close contact and on friendly terms. For example, Kory Gregory, Mr. Gregory's brother, said that while Mr. Gregory was in the county jail during June 2007, he would help Mr. Gregory and Skyler speak on the phone using

three-way calling. PC9/176. After Mr. Gregory was released from jail, Kory would often see Skyler and Gregory together. PC9/177. Mr. Gregory and Skyler were back and forth between one another'' houses and called each other on the phone. PC9/177. Kory testified that Mr. Gregory and Skyler hosted a first birthday party for Kyla together and they acted like a "mother and dad . . . being protective over the kid." PC9/177-78. Gregory's sister, Leigha Furmanek, testified that she considered herself friends with Skyler and they would often socialize. PC8/40. Ms. Furmanek witnessed Skyler writing Gregory letters when he was in the county jail during June 2007. PC8/40-41. During this incarceration, Skyler and Mr. Gregory communicated with one another often through phone calls and mutual letter writing. PC8/42. When Ms. Furmanek bonded Gregory out of jail in July 2007, she brought him to Skyler's house to spend the night because "when I had talked to Skyler, she wanted him to come over there and I dropped him off there." PC8/44. Lynda Wilson testified that while Gregory was in the county jail in June 2007, Ms. Wilson would assist Skyler and Mr. Gregory in communicating by three-way calling. PC10/281. She observed the two speaking on the phone almost daily. PC10/281, 293.

In particular collateral counsel presented taped jail calls that were available to defense counsel but had not been used by him at the trial, that would have been useful

to rebut the State's theory of the case. *See generally* Post-Conviction Defense Exhibits 7 - 9. For example, in PC Def. Ex. 7, PC20/129-54 (jail phone call on June 23, 2007), Skyler Meekins told Mr. Gregory that she mailed him three letters; that he can call her later that day; that she had made plans with Lynda Wilson to attend Mr. Gregory's court hearing; and both parties said "love you." During the call entered as Defense Exhibit 8 (jail phone call on June 27, 2007), an exchange was, "'Am I bothering you? You want me to let you go?' Skyler: 'No.'" PC20/169. Also, "I don't know. You just – seems like I'm imposing. I can let you go if you want. [Skyler]: No, that's okay." They then go on to talk about their baby and other matters. The call further has Skyler asking Mr. Gregory to call three-way because her phone bill is too high and the couple then make plans for a follow-up call.

The calls were recorded when Mr. Gregory was incarcerated in June through early July 2007. Defense counsel apparently moved to exclude all of the jail calls early on, but at that time the court ordered that they only be proffered at trial, and that a ruling would then be made on their admissibility. "The following may be raised during trial, first by proffer, outside the presence of the jury . . . Any recorded phone calls made by the Defendant from either the Volusia County Jail, Flagler County Inmate Facility, or St. John's Jail." Order on Motions in Limine dated October 1, 2010,

R3/465-67. The subject was revisited shortly before the first trial (that was ultimately mistried) at a more lengthy hearing on October 8, 2010. R6/1-94. There, the State announced its intention to play the actual tapes, minus some redactions, rather than merely have them read or their substance described by a witness. R6/58. The defense objected to the calls between Mr. Gregory and his brother, mother and other friends and family because they necessarily revealed his incarceration and did not contain any threats, admissions of any intent to do harm, or anything else that was relevant. The defense position was that the calls between Mr. Gregory and Skyler Meekins were irrelevant and prejudicial not only because they revealed that Mr. Gregory was in jail for unrelated criminal activity, but also because they were emotional discussions about the nature of their relationship, and "the emotional impact of the jury just hearing the calls in and of themselves is prejudicial to the defendant." *Id.* What he was getting at, although he never quite articulated it this way, is that they constituted a form of victim impact evidence of the (audio) family portrait variety. The trial court also observed that they contained a lot of language which did not demonstrate anything other than Mr. Gregory's proclivity to use vulgarities, obviously something not likely to be looked on favorably by a jury. R6/48. The defense also pointed out that the calls preceded the incident by two months and were not inextricably entwined with the murders. *Id.*

After the case was mistried and a successor judge assigned, the court entered a comprehensive written order on the defendant's motions in limine. R(supp)1/4-7. In it, the trial court essentially denied the defense motion in limine regarding the jail phone calls:

> 13 The State MAY offer as evidence relevant recorded telephone conversations between the Defendant and certain witnesses while the Defendant was incarcerated in the Flagler and St. Johns County Jails. These calls include, but are not limited to, the following:
>
> a. Conversations between the Defendant and Skyler Meekins' brother, Colton Meekins, prior to the murders concerning Skyler Meekins' whereabouts, activities and communications as they related to other guys. These conversations include, but are not limited to requests by the Defendant for Colton Meekins to access Skyler Meekins' home computer, review her personal e-mails and MySpace account, and delete photographs of and communications between other guys. Such conversations are relevant to the issue of motive and are, accordingly, admissible at trial.
>
> b. Conversations between the Defendant and Skyler Meekins, Kory Gregory and/or Linda Probert prior to the murders concerning the relationship between the Defendant and Skyler Meekins, Skyler Meekins' conduct, and/or the Defendant's plans when he was released from jail. These-conversations provide the context and background of the relationship and are relevant to the issue of motive.
>
> c. Conversations between the Defendant and Kory Gregory and Linda Probert after the murders pertaining to his

> association to the murders, or the lack thereof. Such statements are clearly relevant to the issues of this case.
>
> d. Conversations between the Defendant and Amber Curnutt after the murders in which the Defendant discusses shooting a gun the day before the murders and her relaying that information to law enforcement. As stated previously, these statements are relevant to the issue of the Defendant's consciousness of guilt.
>
> These calls, collectively, are quite lengthy and include a number of conversations that are not relevant to any issue in the case. These irrelevant conversations must be redacted prior to their publication of them at trial. Counsels for the State and the Defendant have agreed to collaborate and attempt to agree on the necessary redactions. To the extent that the parties are not able to agree, then they will submit to the court those conversations that remain in dispute, at which time the court will resolve the matter.

*Id.*

During the guilt phase trial, defense counsel made contemporaneous objections as the State moved each individual call into evidence in order to preserve the question of their admissibility for appellate review. PC4/533-34. At the post-conviction evidentiary hearing, Attorney Wood explained that one of the reasons he did not present the positive-sounding jail phone calls between Skyler and Mr. Gregory that were introduced by collateral counsel at said hearing was  because he was concerned that doing so might waive his objection to all the phone calls, thus losing a potential

appellate argument. PC4/539. In other words, he staked his entire defense on this issue on the direct appeal. However, appellate counsel simply abandoned the issue entirely.

It can't be both: either Mr. Gregory received ineffective assistance of trial counsel for failing to present available beneficial evidence to the jury when he needed to do so, a claim argued in the pending 3.851 appeal, or Mr. Gregory received ineffective assistance of appellate counsel for failing to argue that the court erred by admitting, over defense objection, the phone calls that were introduced by the State. The calls with Skyler Meekins constituted prejudicial victim impact evidence improperly introduced during the State's case in chief in the guilt phase, their prejudicial impact outweighed their only probative value, which was that they showed at best Mr. Gregory's unhappiness with the situation months *before* the offense. They also unnecessarily but inevitably revealed that he was in custody. "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Fla. Stat. § 90.403. Defense counsel's objections should have been sustained and appellate counsel should have raised the court's refusal to do so on appeal.

**Abandonment of *Ring/Apprendi* Claim**

As noted above, the Public Defender's office filed and fully litigated a *Ring*/*Apprendi* claim when it first had the case. *See* Motion to Declare Florida's Capital Sentencing Unconstitutional Under *Ring v. Arizona* Based on Violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Art. I, §§2, 9, 15(a), 16, 17, & 22 of the Florida Constitution. R1/101-49. In particular, the motion claims: "The jury's advisory role under Florida law does not alter the controlling point under *Ring* that the Florida statute is unconstitutional because a death sentence cannot be imposed without findings of fact by the trial judge. *See Ring*, 536 U.S. at 595 ("All the facts which must exist in order to subject to the defendant to a legally prescribed punishment must be found by the jury.")" *Id.*at 106. This language is virtually identical to the specific holding in *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016): "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's fact-finding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Id.* Slip op. 10. A hearing on the motion was conducted on January 7, 2009. R27/17-43. Of note is the remark by defense counsel: "I do know this issue has been presented before and we're just not giving up on it. . . So we're wanting

to preserve this argument to present it to the . . . panel that's up there now. . . . And, of course, also, Your Honor, we're preserving this issue for Federal Court review." R27/29-30. The court denied the motion. R3/401-02.

By the time the *Ring* motion was filed on November 18, 2008, *Ring* had prompted a considerable amount of litigation. The motion filed in this case is recognizable as a standard Florida "death penalty motion" routinely filed in capital cases at the time.

The ABA Guidelines require legal claims to be asserted at every stage. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), reprinted at 31 Hofstra L. Rev. 913 (2003). Although not binding on the courts, the Supreme Court has held that the "ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." *Wiggins v. Smith*, 539 U.S. 510 (2003). "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Strickland*, 466 U.S. at 688-89.

While admittedly there is no requirement that trial counsel, to be reasonably effective, must anticipate changes in the law. However, this situation is different. The

tension in Florida jurisprudence occasioned by *Ring* was well known to capital defense attorneys in the state. Filing and litigating claims based on it was routine practice. Moreover, the motion and hearing on the *Ring* claim referred extensively to *State v. Steele*, 921 So. 2d 538 (Fla. 2005), in which this Court recognized that Fla. Stat. § 921.141 has placed the Florida death penalty system on the fringes of constitutionality. The Court urged the Legislature to act: "[I]n light of development in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations." *Id*. at 548. However, attempts at reform repeatedly stalled in the legislature. Those concerns have now been vindicated. Appellate counsel could and should have seen it coming and acted to preserve the issue – all the other reasonably competent appellate capital defense lawyers did, including those in the over fifty cases mentioned in the *Rigterink* opinion cited above (decided the same year as the appeal in this case), and the trial lawyer in this case.

## GROUND II

**FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER THE SIXTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND VIOLATES EVOLVING STANDARDS OF DECENCY WHICH MARK THE PROGRESS OF A MATURING SOCIETY. MR. GREGORY'S SENTENCES OF DEATH, PREDICATED ON SEVEN TO FIVE ADVISORY JURY VERDICTS, WERE UNCONSTITUTIONAL**

Mr. Gregory was sentenced under the capital sentencing scheme the U.S. Supreme Court held unconstitutional in *Hurst*. Under Florida law, the maximum punishment a defendant may receive for a capital crime on the basis of a conviction alone is life imprisonment. Under the unconstitutional scheme, however, he could be sentenced to death if an additional sentencing proceeding "result[ed] in findings by the court that [he] shall be punished by death." Fla. Stat. § 775.082(1). Fla. Stat. §§ 921.141(2) and (3) set forth a proceeding in which the jury rendered an "advisory vote," and the court independently found and weighed the aggravating and mitigating circumstances before entering a sentence of life or death.

In *Hurst*, the United States Supreme Court nullified the above-mentioned statutory provisions. Applying *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that "[t]he Sixth Amendment requires a jury, not a judge, to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst*, 2016 WL at 3. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. "[A]ny fact that expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict is an 'element'

that must be submitted to a jury." *Hurst*, 2016 WL at 4-5, quoting U.S. Const. Amend. VI.; citing *Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); and quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Under *Hurst*, the jury's fact-finding role is protected, as is the necessity that the facts it finds justifying a death sentence be found beyond a reasonable doubt. *Hurst* specifically rejects any notion that a jury's advisory recommendation can now be used as the necessary factual finding required under *Ring*. *See Hurst*, 2016 WL 112683 at 6-7 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding Ring requires.").

It would be substantially injurious to Mr. Gregory if he continues to be denied the Sixth Amendment right to a constitutional jury sentencing that he specifically sought. He is entitled to relief under *Hurst* and respectfully requests that this Court consider the following:

**Section 775.082, Florida Statutes, Mandates a Life Sentence Following *Hurst*.**

Fla. Stat. § 775.082(2), first enacted in 1972 as Fla. Stat. § 775.082(2) and (3), provides in relevant part:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the

> United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

Ch. 72-118, Laws of Fla. (1972).

Under this statutory provision, Mr. Gregory is entitled to an automatic life sentence. It was enacted in anticipation of the ruling in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), which ultimately determined that the death penalty as imposed and carried out at the time violated the Eighth and Fourteenth Amendments. *See Donaldson v. Sack*, 265 So. 2d 499, 505 n. 10 (Fla. 1972). All individuals under sentence of death at the time *Furman* was decided were ultimately resentenced to terms not exceeding life imprisonment. *See Anderson v. State*, 267 So. 2d 8 (Fla. 1972); *In re Baker*, 267 So. 2d 331 (Fla. 1972).

In *State v. Whalen*, 269 So. 2d 678, 679 (Fla. 1972), during the time between *Furman* and the legislature's enactment of new capital sentencing statutes, this Court, citing *Donaldson*, held that "at the present time capital punishment may not be imposed" and therefore "there are currently no capital offenses in the State of Florida." Like *Furman*, *Hurst* invalidated the statutory procedures by which Florida sentences a person to death, creating a situation in which, until constitutional provisions are

enacted, capital punishment cannot be imposed. According to this Court in *Whalen*, "if there is no capital offense, there can be no capital penalty." *Id.* Like *Furman*, *Hurst* removed capital offenses, however temporarily, from Florida law.

**Hurst is Retroactive Under *Witt*.**

Should this Court determine that Fla. Stat. § 775.082(2) does not provide a remedy for Mr. Gregory, it should nevertheless apply the *Hurst* decision retroactively to Mr. Gregory's case. This Court determines retroactivity in post-conviction proceedings using the test set forth in *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980); *See also Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015) (applying the *Witt* test and holding that *Miller*, 132 S. Ct. 2455, which "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" applies retroactively). The retroactivity standard articulated by this Court in *Witt* held that a change in the law does not apply retroactively "unless the change (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So. 2d at 931. Under a *Witt* analysis, *Hurst* is applicable to all individuals sentenced to death under the unconstitutional statute, including Mr. Gregory. The first two prongs of *Witt* are unquestionably satisfied, as *Hurst* emanates from the United States Supreme Court, and

it is clearly constitutional in nature, as the Court held that Florida's sentencing scheme violates the Sixth Amendment.

Having satisfied the first two prongs of *Witt*, this Court must determine whether the change in law affected by *Hurst* "constitutes a development of fundamental significance." This Court explained in *Witt*, most major constitutional changes are likely to fall within two broad categories: (1) changes in the law that "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L.Ed.2d 1199(1967)] and *Linkletter [v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L.Ed.2d 6010 (1965]." *Witt*, 387 So. 2d at 929.

*Hurst* constitutes a "development of fundamental significance" because the change in the law is "of sufficient magnitude to necessitate retroactive application." As summarized in *Witt*, the relevant three-fold test considers: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Witt*, 387 So. 2d at 926. With regard to the first consideration in the three-fold test, the purpose of *Hurst*

is to protect the Sixth Amendment right of capital defendants for their sentences to be based on a jury's verdict, as opposed to a judge's fact-finding. The purpose served by this rule is one a need for which has gone unanswered for far too long.

When the *Furman* Court abolished the death penalty, it did so under the Eighth and Fourteenth Amendments. However, no two justices in favor of the holding agreed on the rationale. *See Furman*, 408 U.S. 238 (Douglas, J., Brennan, J., Stewart, J., White, J., and Marshall, J., filing separate opinions in support of judgments; Burger, C.J., Blackmun, J., Powell, J., and Rehnquist, J., filing separate dissenting opinions). Three justices, in concurring opinions, raised the issue of the arbitrary application of the death sentence as reason to find the death penalty unconstitutional. *Id*. at 240-57, 306-14 (Douglas, J., Stewart, J., White, J., concurring separately).

The legislature enacted a new statute following *Furman*, requiring a separate penalty phase hearing during which a judge and jury would weigh aggravating and mitigating evidence specific to the defendant. Fla. Stat. § 921.141 (1973), Ch. 72724, Laws of Florida (1972). However, the legislature chose to make the jury's verdict only advisory. As *Hurst* now makes clear, in order to satisfy the Sixth Amendment's guarantee to a jury trial, "a jury's mere recommendation is not enough." *Hurst*, 2016 WL at 3. The jury must find every fact necessary to expose the defendant to a greater

punishment than that authorized by a guilty verdict. *Id*. at 3-4. Thus, the simple fact that Mr. Gregory was sentenced based on seven (7) to five (5) recommendation means that the first consideration in the three-fold test weighs heavily in favor of retroactive application.

With regard to the second consideration, the extent of reliance on the old rule, while it is true that the State has relied for 40-plus years on an unconstitutional sentencing statute in obtaining death sentences and carrying out executions, at least since Ring was decided the decision to do so has been misguided. *See Hurst*, 2016 WL at 8-9. In *Johnson v. State*, 904 So. 2d 400, 405-13 (Fla. 2005), this Court simultaneously rejected *Ring* as having no applicability in Florida and determined that it would not be given retroactive effect. *Johnson* was based upon the faulty premise that *Ring* did not apply in Florida; therefore, the retroactivity of *Hurst* cannot be decided based on *Johnson*. However, in *Johnson* this Court, in considering the extent of reliance on the sentencing scheme now explicitly held unconstitutional, cited to the fact that 59 people had been executed between the reinstatement of the death penalty and the time of the *Ring* decision. *Id.* at 410. This Court reasoned that the number of executions showed the extent of the reliance. *Id.* The number of executions has now reached 91. Far from being a factor weighing against retroactive application, the fact

that 91 people have been executed after being sentenced in violation of their constitutional rights should be a factor weighing strongly in favor of retroactivity, as it applies more to the first consideration in the three-fold test of "sufficient magnitude" described in *Witt* than the second. The rule's purpose, ensuring capital defendants are sentenced to death only after receiving the jury determination guaranteed by the Sixth Amendment, cannot be emphasized enough. The first two considerations set forth in the three-fold test indicate that *Hurst's* "purpose would be advanced by making the rule retroactive," *Linkletter*, 381 U.S. at 637, by ensuring that the Sixth Amendment rights of all capital defendants are protected and that their death sentences resulted from constitutional proceedings, regardless of whether or not their convictions and sentences were final when *Hurst* was decided.

The third consideration, "the effect on the administration of justice of a retroactive application of the new rule," also strongly favors retroactive application. The number of individuals who would be affected by retroactive application of *Hurst* is limited and easily determinable, as it would be limited to the individuals currently on death row whose cases are in the post-conviction posture. There are currently 389 people on death row, and while the Department of Corrections does not divide them

by case procedural posture on its roster, it is clear that the number of people who are in the post-conviction phase is less than 389.

If the sentences of every death-sentenced prisoner were automatically commuted to life sentences, Florida would suffer very little in terms of an impact on its administration of justice. In Fiscal Year 2014-2015, there were an average of 100,563 prisoners housed in the Florida Department of Corrections. The death row population therefore represents less than half of one percent of the Florida prison population. Such a small percentage would be easily absorbed by the general population facilities.

Equal protection concerns are at issue in the determination of retroactivity as well. *See In re Baker*, 267 So. 2d at 334 ("We have already granted this requested relief to 27 members of the class of persons under sentence of death. There appears to be no reason why the remaining members of the class need be treated differently."). Each of the 389 prisoners currently on death row was sentenced under an unconstitutional sentencing scheme. Under *Hughes v. State*, 901 So. 2d 837, 839 (Fla. 2005), *Hurst* will apply to convictions that are not yet final. If *Hurst* is not applied retroactively to post-conviction cases, prisoners whose direct appeals are still pending will have their death sentences vacated, while prisoners with otherwise indistinguishable cases whose sentences are final will have no mechanism for relief.

**A Harmless Error Analysis is Not Necessary Because the Error in Question Can Never Be Harmless.**

The Court in *Hurst* declined to address the State's argument that the error in that case was harmless and instead left any harmless error analysis necessary to the state courts. *Id.* at 8. It is Mr. Gregory's position that *Hurst* claims are claims of structural error, and are not subject to harmless error analysis at all.

The United States Supreme Court recognized a limited class of fundamental constitutional errors that defy analysis by harmless error standards in *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). Structural errors of this type are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome. In determining whether *Hurst* errors are structural, this Court must determine whether the error identified in *Hurst* constitutes a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id*. at 310. *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson,* 507 U.S. 619, 630, 113 S. Ct. 1710, 123 L.Ed. 353 (1993).

The error resulting from a *Hurst* violation can never be harmless. The statute under which Mr. Gregory and 388 other living citizens of this state were sentenced to

death has been held to be unconstitutional in violation of the Sixth Amendment. A harmless error review in this context would be illogical, and would require the courts to hypothesize how a jury might have decided the sentence in a hypothetical proceeding consistent with *Hurst* and the Sixth Amendment.

According to Florida law, the element distinguishing death-eligible first degree murder from first-degree murder, the maximum punishment for which is life imprisonment without the possibility of parole, is the existence of "sufficient aggravating circumstances" not outweighed by mitigating circumstances. *See* Fla. Stat. § 775.082 and § 941.121. Every fact necessary to raise the penalty beyond the maximum must be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Because Mr. Gregory's jury was never required to find beyond a reasonable doubt sufficient aggravating circumstances not outweighed by the mitigating circumstances, there is no way to determine whether the error was harmless.

*Hurst* changes the dynamics of jury selection and death qualification, and its proper application will impact an attorney's strategy and decision-making throughout the trial. No longer will the jury's role in determining death-eligibility be advisory; it will make the ultimate decision of whether the defendant's life will be spared. Although the Florida Legislature has not yet enacted a statute to replace the one that

was found unconstitutional in *Hurst*, thus leading to even more speculation regarding a harmlessness analysis, the landscape of voir dire and death qualification, pre-trial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions will have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments.

## CONCLUSION

*Hurst* reaches to the heart of an adversarial process where a capital defendant's life hangs in the balance, and expressly clarifies the role of the impartial jury in capital cases and directly changes the dynamics of the trial and voir dire. For the reasons discussed above, Mr. Gregory and all defendants sentenced to death under the unconstitutional statute are entitled to have their death sentences vacated and life sentences imposed or, in the alternative, new penalty phase proceedings consistent with *Hurst* in order to preserve the guarantees of the Sixth and Eighth Amendments.

For the reasons given above, habeas relief should be granted. Under Ground I Mr. Gregory should have a new appeal *ab initio.* Under Ground II his sentence must be vacated. The Petitioner requests any other relief this Court may deem appropriate.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR A WRIT OF HABEAS CORPUS has been transmitted to this Court through the Florida Courts E-Filing Portal, which will send a notice of electronic filing to Stacey Kircher, Assistant Attorney General, at capapp@myfloridalegal.com and Stacey.Kircher@myfloridalegal.com, and has been mailed via United States Postal Service to William A. Gregory, DOC# V19522, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 1st day of February, 2016.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for a Writ of Habeas Corpus was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210(a)(2).

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