IN THE SUPREME COURT OF FLORIDA

Case No. SC15-953

Lower Court Case No. 2006-CF-2999-A-W

RENALDO MCGIRTH,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT, IN AND
FOR MARION COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the Fifth Judicial Circuit in and for Marion County's Final Order Denying Defendant's Rule 3.851 Motion for Post-Conviction Relief.

References to the record on appeal from the post-conviction proceeding are made with the letter "R," followed by the record volume number, followed by a "p," followed by the volume page number or numbers. References to the record on appeal from the original trial are made with the letters "TR," followed by the record volume number, followed by a "p," followed by the volume page number or numbers. For ease of reading, the Appellant is referred to as "McGirth" or the defendant, and the Appellee is referred to as "state" or prosecution.

REQUEST FOR AN ORAL ARGUMENT

Undersigned counsel for the Appellant respectfully requests the opportunity to present oral argument pursuant to Fla. R. App. P. 9.320. This is a capital case, the resolution of the issues presented will determine whether Mr. McGirth will live or die, and a complete understanding of the complex factual, legal and procedural history of this case is critical to the proper disposition of this appeal.

STATEMENT OF THE CASE AND FACTS

On July 21, 2006, three young men entered the home of Diana and James Miller in The Villages in Ocala, Florida. The men knew their daughter, Sheila Miller. TR1, p. 7. After Sheila Miller invited the men into her family home, they

robbed and shot her parents. The men left the home with Sheila in the family's van, and Renaldo McGirth and his co-defendants were later apprehended after a high-speed chase. TR1, p. 7. Diana Miller was shot in the chest and back of the head, and died as a result of her injuries. James Miller was shot in the head, but survived his injuries. TR1, p. 7.

On August 9, 2006, McGirth was indicted on one count of first degree murder with a firearm of Diana Miller, one count of attempted first degree murder with a firearm of James Miller, one count of robbery with a firearm of Diana and James Miller, one count of kidnapping with a firearm of Sheila Miller, and one count of felony fleeing or attempting to elude a law enforcement officer. TR1, pp. 1-4.

At the time of the crimes, McGirth was just three months beyond his 18th birthday. TR1, pp. 1-4.

McGirth was convicted of first-degree murder with a firearm of Diana Miller, attempted first-degree murder with a firearm of James Miller, robbery with a firearm of James and Diana Miller, and fleeing to elude a law enforcement officer operating a marked patrol vehicle. TR45, pp. 3170 – 3171.

On February 13, 2008, the jury recommended McGirth be sentenced to death for the murder of Diana Miller by a vote of 11 to 1. TR47, p. 3526.

The *Spencer* hearing was held on March 26, 2008. TR48, pp. 1-96.

On May 5, 2008, the trial court sentenced McGirth to death for the murder of Diana Miller. TR49, pp. 1 – 61.

McGirth filed a direct appeal to the Florida Supreme Court. His conviction and death sentence were affirmed on November 10, 2010. *McGirth v. State,* 48 So. 3d 77 (Fla. 2010). R1, pp. 1 – 42.

On December 2, 2010, the Florida Supreme Court appointed Capital Collateral Regional Counsel – Middle Region ("CCRC-Middle") to represent McGirth in his proceeding for post-conviction relief. R1, p. 43. On January 10, 2011, David Gemmer, attorney with CCRC-Middle, filed a Notice of Appearance on behalf of McGirth. R1, pp. 50 – 51.

Through counsel, McGirth filed his initial 3.851 Motion on April 10, 2012. R2, pp. 220 – 370. McGirth made the following claims:

- The state violated *Brady v. Maryland* when it failed to disclose material witness Roxanna Baker, and violated *Giglio v. United States* when it allowed Sheila Miller to testify that she did not know Jarrord Roberts before July 21, 2006. R2, p. 222.
- The state violated *Brady* and *Giglio* when it suppressed the final report of Dr. Louis Legum. R2, p. 227.
- McGirth was denied his rights under the 5th, 6th, 8th and 14th Amendments to the United States Constitution and corresponding provisions of the Florida

Constitution, based on newly discovered evidence that Sheila Miller was the instigator and director of the crime. The evidence also raises the question of a due process violation for denial of severance of McGirth's and Jarrord Roberts' trials, and possible ineffective assistance of counsel regarding failure to develop evidence from Robin Smart. R2, p. 234.

- McGirth was deprived of his 4th, 5th, 6th, 8th, and 14th Amendment rights under the United States Constitution and corresponding provisions of the Florida Constitution when he was deprived of his right to reliable adversarial testing due to ineffective assistance of counsel at the guilt phase of his capital trial. R2, p. 238.
- McGirth's counsel was ineffective during the penalty phase of his trial. R2, p. 247. Counsel should have located and utilized Roxanna Baker. R2, p. 247. Counsel should have called Detective Stroup to testify about Sheila Miller's concerns that she would be implicated by the codefendants. R2, p. 248. Counsel failed to investigate and present additional testimony from Theodore Houston relevant to the penalty phase. R2, p. 249. Counsel failed to investigate substantial mitigation evidence and relied on a single expert, Dr. Krop, who never had adequate background information and never performed an adequate evaluation and diagnosis. R2, p. 250. Counsel deficiently presented evidence in support of mitigation in the penalty phase,

and failed to present all available mitigation, and failed to refute the state's case in favor of McGirth's death. R2, p. 256.

- McGirth's trial was fraught with procedural and substantive errors which combined deprived him of a fundamentally fair trial guaranteed by the 6th, 8th, and 14th Amendments. R2, p. 276.

The state filed its Response to Motion to Vacate Judgment of Conviction and Sentence on June 7, 2012. R3, pp. 408 – 429. The court held a case management conference on September 11, 2012, and ruled that the Defendant would be granted an evidentiary hearing on claims one (1) through four (4) of the nine (9) claims raised in the initial 3.851 Motion. R3, pp. 465 – 481. The evidentiary hearing was scheduled for February 4, 2013. R3, pp. 462 – 464.

The hearing was later rescheduled for April 22, 2013, due to a scheduling conflict for one of the attorneys. R3, pp. 482 – 487.

On March 6, 2013, the state filed a Motion to Continue Post-Conviction Hearing and to Set Timetable of Discovery. R3, pp. 503 – 506. The court granted the state's motion to continue the hearing, and ordered the parties to coordinate a hearing regarding the state's request for a discovery timetable and to address the state's motion to permit discovery of post-conviction psychotherapy reports and work product. R3, p. 500.

On April 30, 2013, the court issued its Second Order Rescheduling Rule 3.851 Evidentiary Hearing for September 23, 2013. R3, pp. 533 – 535.

Through counsel, McGirth filed a Motion to Amend Motion to Vacate Judgment of Conviction and Sentence on August 22, 2013. R3, pp. 579 – 589. McGirth's proposed Amendment to Motion to Vacate Judgment of Conviction and Sentence amended all claims to include a claim of ineffective assistance of counsel and newly discovered evidence to the extent such claims were not raised in the original Rule 3.851 Motion. R3, p. 584. The proposed Amendment also expanded Claim I "to account for the possibility that the court finds that trial counsel may have been on notice or could have discovered by the exercise of due diligence the existence of Roxanne Baker and the knowledge that she had." R3, p. 585. Claim I was also "expanded to account for the possibility that the defense could be charged with notice or could have discovered by due diligence the report by Dr. Legum of March 11, 2002." R3, pp. 585 – 586. Claim II was amended to take into account the possibility that "trial counsel could be deemed to have been lacking in due diligence in discovering" the newly discovered evidence regarding Sheila Miller, Jarrord Roberts, and Robin Smart. R3, p. 586.

The state filed its Response to Defendant's Motion to Amend 3.851 Motion and Response to Defendant's Amended Claims in Motion to Vacate Judgment of Conviction and Sentence on September 5, 2013. R5, pp, 892 – 894. The court

issued its Order Granting Defendant's Motion to Amend Rule 3.851 Motion on September 10, 2013. R5, pp. 902 – 903.

On September 12, 2013, McGirth filed a Motion to Quash and for Protective Order or for Continuance of Hearing. R5, pp. 916 – 920. The state had served a subpoena to appear at the evidentiary hearing on Grita Perry, an investigator with CCRC-Middle with knowledge of McGirth's case subject to attorney-client privilege. R5, p. 916. The state filed a Response to Defendant's Motion to Quash Subpoena of Greta Perry and Continue Hearing on September 12, 2013. R5, pp. 921 – 922. The court denied McGirth's motion in an Order issued on September 16, 2013. R5, pp. 933 – 935.

McGirth appeared with counsel from CCRC-Middle at the evidentiary hearing on September 23, 2013. R30, p 4. After the court heard a few preliminary matters, McGirth asked to be heard and requested his attorneys be removed from his case. R30, pp. 8 – 10. McGirth asked that new counsel be appointed, or he be allowed to proceed pro se with a "legal advisor" due to a conflict with CCRC-Middle's representation. R30, p. 9.

As grounds for his request that his attorneys be removed for his case, McGirth informed the court that Mr. Gemmer and CCRC-Middle were providing ineffective representation. McGirth cited specific instances, including Mr. Gemmer's unfamiliarity with *Alleyne v. United States,* the *McCleskey* issue raised

by the attorney for defendant Michael Woods, and the extent of the involvement of Sheila Woods in her mother's murder. R30, pp. 11 – 22; R30, pp. 25 – 27; R30, p. 31.

McGirth also asked for a continuance for six months so he could prepare his own defense. R30, p. 12. At no time during the proceeding did CCRC-Middle request an ex parte hearing so McGirth could discuss his concerns about the strategy of his defense outside the presence of the state. Prosecutor Brad King was actively involved in the proceeding and provided case law to the court regarding pro se proceeding on a 3.851 motion. R30 pp. 15 – 18.

The court conducted a *Nelson* hearing in open court, in the presence of the state. R30, pp. 23 – 61.The court found "no reasonable cause to believe that counsel is rendering ineffective representation." R30, p. 61. The court refused McGirth's request to appoint substitute counsel. R30, p. 61. The court informed McGirth that if he insisted on discharging CCRC-Middle, he would treat McGirth's decision as "an exercise of his right of self-representation." R30, p. 61. McGirth informed the court he wanted to represent himself. R30, pp. 61 – 62.

The court conducted a *Faretta* hearing in open court, in the presence of the state. R30, pp. 63 - 75. Again, Mr. King was actively involved in the hearing and took over much of the inquiry required by *Faretta.* R30, pp. 65 – 68. The court and the state inquired about McGirth's mental health and medications, and

McGirth testified that although he had been told that he had "a mass or hole or something" in his brain, it did not affect him. R30, p. 65. The court also inquired about McGirth's ability to read and write and understand cases. R30, p. 66, 74. The state asked McGirth if there was any reason he could not decide for himself how he wanted to proceed with his case. R30, p. 68. The court also reviewed the advantages and disadvantages of self-representation. R30, pp. 69 – 73. The court did not inquire about McGirth's knowledge of the legal system.

The court found that McGirth was competent to make the decision to discharge his attorneys and proceed pro se, and that he made his choice knowingly and voluntarily. R30, p. 75. CCRC-Middle raised concerns about the legality of McGirth's decision to proceed pro se in a post-conviction proceeding, and the court took a brief recess to investigate the issue. R30, pp. 75 – 80. When the proceeding resumed, CCRC-Middle and McGirth represented to the court that McGirth had changed his mind and wanted to proceed with the evidentiary hearing with CCRC-Middle as counsel. R30, pp. 81 – 82.

CCRC-Middle's first witness on McGirth's behalf was Dr. Robert M. Berland. R30, p. 85. During Dr. Berland's testimony about his opinions regarding McGirth's mental health, McGirth again requested to personally address the court. R30, p. 93. McGirth objected to CCRC-Middle's strategy to call his mental health into question. R30, pp. 93 – 94. McGirth renewed his request to proceed pro se

with the assistance of standby counsel. R30, p. 94. He also requested a continuance to consult with standby counsel and prepare his defense according to his preferred strategy. R30, p. 96. Again, CCRC-Middle did not request an ex parte hearing and the state was actively involved in McGirth's discussions with the court about his representation and strategy. R30, pp. 95 – 98.

The court addressed McGirth for the purpose of standby counsel, and informed him that standby counsel's purpose was to help if McGirth had any questions about the proceedings. R30, p. 111. The court also informed McGirth, "You have the entire responsibility for your own defense." R30, p. 115. The court declined to name CCRC-Middle as standby counsel. R30, p. 103.

The court granted McGirth's oral motion for continuance and rescheduled the evidentiary hearing for December 2, 2013, and CCRC-Middle represented to the court they would provide McGirth with his file materials within two weeks. R30, p. 119.

On September 26, 2013, the state filed a Motion to Clarify Appointment and Role of Standby Counsel. R5, pp. 965 – 966. The state objected to the appointment of regional counsel and argued CCRC-Middle should be standby because the court did not find a conflict during the *Nelson* hearing on September 23, 2015.

On September 27, 2013, the court issued its Order on the September 23, 2013 hearing. R5, pp. 967 – 974. The court granted McGirth's motion to discharge

his former counsel and ordered CCRC-Middle to forward to McGirth, within two (2) weeks of the Order, all documents CCRC-Middle had in its possession regarding McGirth's case. The court appointed Capital Collateral Regional Counsel – South Region ("CCRC-South") as standby counsel, but made it clear that McGirth was "entirely responsible for the organization and content in presenting his motion at the hearing." R5, p. 970. At this point in the posture of the case, CCRC-Middle was no longer involved in the case. CCRC-Middle had been relieved as counsel for McGirth and had not been appointed as standby counsel.

The court also granted McGirth's oral motion for leave to amend his Rule 3.851 motion, and required his amended motion be filed no later than November 12, 2013. The evidentiary hearing was scheduled for four (4) days, beginning on December 2, 2013. The court also ordered McGirth to file written notice within 30 days from the date of the Order if he sought to delete any of his previously listed witnesses.

On October 7, 2013, CCRC-South filed a Motion for Rehearing and/or Reconsideration of Order Appointing CCRC-South as Standby Counsel. R5, pp. 975 – 978. CCRC-South argued that the court did not find CCRC-Middle deficient, so there was no reason to appoint CCRC-South as standby.

On October 29, 2013, although the agency was out of the case and no longer counsel of record or standby counsel for McGirth, CCRC-Middle filed a Motion

and Memorandum of Law Regarding Appointment of Standby Counsel, and represented that McGirth agreed with the motion and would provide a Motion to Appoint CCRC-Middle as standby counsel prepared by McGirth. R5, pp. 979 – 986. CCRC-Middle asked the court to extend the deadline to file amendments due to the substantial amount of materials provided to McGirth, and to continue the evidentiary hearing due to a conflict with Mr. Gemmer's schedule. R5, pp. 980 – 981. CCRC-Middle did not file any document signed by McGirth that indicated he agreed with CCRC-Middle's motion.

On October 31, 2013, the court issued an Order Granting CCRC-South's Motion for Rehearing and/or Reconsideration, Order Appointing CCRC-Middle as Standby Counsel, Order Rescheduling 3.851 Evidentiary Hearing, and Order Extending Defendant Leave to Amend Rule 3.851 Motion. R5, pp. 988 – 989. The court did not hear arguments on any of the motions, and granted CCRC-Middle's motion to be appointed standby counsel without hearing from McGirth, who was representing himself at this point in the proceeding. R30, p. 15. The court extended McGirth's deadline to file his amended 3.851 Motion to December 12, 2013, and rescheduled the evidentiary hearing to January 21, 2014. R5, p. 988.

On December 10, 2013, pro se defendant McGirth filed a Motion for Extension of Time to File Amended 3.851 Motion. R5, pp. 990 – 994. As grounds for his motion, McGirth informed the court he had not received the file materials

that CCRC-Middle was ordered to produce to him in the court's Order dated September 27, 2013. R5, p. 991. McGirth asked the court for an Order directing CCRC-Middle to turn over all files and records within a time to be specified by the court, and extending McGirth's time for filing his amended 3.851 Motion to January 24, 2014. *Id.*

On December 10, 2013, pro se defendant McGirth also filed a Motion Requesting a Hearing to Address the Improper Standard, *Nelson*, Utilized in Assessing Allegations Made Regarding the Representation of CCRC-Middle and the Appropriateness of CCRC-Middle Appearing as Standby Counsel in Accord with Section 27.7001-27.702 Florida Statutes. R5, pp. 995 – 1000; R6, pp. 1001 – 1005. McGirth maintained his objection to any representation by CCRC-Middle, and asked the court to grant his motion to appoint substitute standby counsel, or conduct a hearing and allow McGirth to be present or appear by phone. R6, p. 1002.

On December 20, 2013, the court issued an Order Denying Defendant's Motion to Continue Hearing and Order Granting Defendant's Motion for Extension of Time to File Amended Rule 3.851 Motion. R6, pp. 1006 – 1007. The court extended McGirth's time to file his amended Rule 3.851 Motion to January 2, 2014. R6, p. 1007.

On December 23, 2013, the court issued an Order Denying Defendant's Request for Hearing Regarding CCRC-Middle Appearing as Standby Counsel and Order Denying Defendants Request to Address Standard for Effectiveness of Counsel. R6, pp. 1008 – 1010. The court stated, "Defendant remains entirely responsible for his representation in these proceedings." R6, p. 1010.

On January 2, 2014, pro se defendant McGirth filed a Motion for Extension of Time to File Amended 3.851 Motion. R6, pp. 1032 – 1037. McGirth informed the court he could not properly prepare his amended 3.851 Motion because he had not received all files and records from CCRC-Middle. R6, p. 1036.

On January 2, 2014, McGirth also filed a Motion for Appointment of an Investigator. R6, pp. 1038 – 1040.

On January 7, 2014, the state filed a Response to Defendant's Pro Se Motion to Extend Time for Filing Amended Motion for Post-Conviction Relief and for Continuance of Hearing. R6, pp. 1041 – 1042. The state informed the court that not granting McGirth's Motion for an Extension of Time and continuing the evidentiary hearing would cause an undue burden on the state in light of the late submission of materials to McGirth, and McGirth's failure to file a timely amended Rule 3.851 Motion. R6, p. 1042. The state requested a status conference on January 21, 2014, to resolve the foregoing issues. R6, p. 1042.

On January 8, 2014, the court issued an Order Setting Status Conference and Order Postponing Rule 3.851 Evidentiary Hearing. R6, pp. 1043 – 1045. The court ordered standby counsel to attend the hearing. R6, p. 1044.

The Status Conference was held on January 21, 2014. R32, pp. 1 - 25. McGirth's standby counsel was present at the hearing. R32, p. 4. CCRC-Middle represented to the court they had tendered over thirty thousand pages of paper documents in their file to McGirth, R32, p. 6. McGirth told the court that CCRC-Middle had not produced the CDs in their possession. R32, p. 8. The court ordered CCRC-Middle to make copies of all CDs and media files and deliver them to McGirth. R32, p. 23. The court scheduled the evidentiary hearing for four (4) days beginning May 27, 2014. R32, p. 20. The court also ordered McGirth to file his amended Rule 3.851 Motion by March 21, 2014, along with his list of all witnesses and exhibits he intended to use at the evidentiary hearing. R32, p. 18. The court also appointed an investigator with CCRC-Middle to assist McGirth regarding any investigations required to present his case. R32, p. 17.

On March 11, 2014, pro se defendant McGirth filed a Petition for Writ of Mandamus, requesting the court issue an Order compelling the Warden of Union Correctional Institution to allow him to view the CDs, and media files. R6, pp. 1064 – 1097. The court dismissed McGirth's Petition for Writ of Mandamus on

March 17, 2014, without prejudice, on venue grounds because it should have been filed in Leon County. R6, pp. 1062 – 1063.

On March 11, 2014, contemporaneously with his Writ of Mandamus, pro se defendant McGirth also filed a Motion for Extension of Time to File Amended Rule 3.851 Motion and for Filing Witness and Exhibit Lists, based on his struggles to view the CDs and media materials related to his case. R6, pp. 1104 – 1106.

On March 19, 2014, the court issued an Order Granting Defendant's Motion for Extension of Time to File Amended Rule 3.851 Motion and for Filing a Witness and Exhibit Lists. R6, pp. 1107 – 1108. The court extended McGirth's deadline to April 7, 2014. R6, p. 1107. McGirth filed a Motion for Reconsideration. R6, pp. 1110 – 1140. The court denied the motion. R6, pp. 1109.

On April 21, 2014, the state filed a Motion to Strike Subclaims (b), (c)(iii), (c)(iv), of Claim Four of the Defendant's Original Motion for Post-Conviction Relief filed April 10, 2012, and Notice of Non Filing of Any Responsive Pleading or Witness List. R6, pp. 1141 – 1143. The court issued an Order Directing Defendant to Respond to the State of Florida's Motion to Strike on April 23, 2014. R6, pp. 1144 – 1145. McGirth filed his response on May 25, 2014. R6, pp. 1182 – 1185.

On April 28, 2014, pro se defendant McGirth filed a Demand for Additional Public Records Pertaining to Defendant's Case. R6, pp. 1186 – 1200. He

simultaneously filed a Motion to Continue Post-Conviction Proceedings. R7, pp. 1221 – 1224.

On April 28, 2014, pro se defendant McGirth also filed a Motion to Amend Motion to Vacate Judgment of Conviction and Sentence, as well as a Motion to Appoint Defense Expert. R6, pp. 1155 – 1159. On the same day, McGirth also filed his Post-Conviction (3.851) Supplemental Witness and Exhibit List. R6, pp. 1160 – 1163.

On May 7, 2014, the court issued an Order Denying Defendant's Motion for Continuance, Order Granting Defendant's Motion to Amend Motion to Vacate Judgment of Conviction and Sentence, Order Denying state of Florida's Motion to Strike Subclaims (b), (c)(iii), and (c)(iv) of Claim 4 of the Defendant's Original Motion for Post-conviction Relief and Order Directing state of Florida to respond to Defendant's Demand for Additional Public Records. R6, pp. 1164 – 1165. The court did not rule on Defendant's Motion to Appoint a Defense Expert, and instructed McGirth to clarify that the expert witness was available for the scheduled hearing and the purpose of her anticipated testimony. The state filed its Response to Defendant's Demand for Additional Public Records on May 12, 2014. R7, pp. 1223 – 1234.

On May 7, 2014, pro se defendant McGirth filed his Amendment to Motion to Vacate Judgment of Conviction and Sentence. R6, pp. 1166 – 1179. McGirth

expanded Claim I of the original Rule 3.851 Motion, stating "the state violated *Brady* when it failed to disclose Sheila Miller's admission that she shot her mother, and violated *Giglio* when it allowed Sheila Miller to testify that Mr. McGirth shot her mother." R6, p. 1167.

The state filed its Response on May 15, 2014. R7, pp. 1252 – 1269.

On May 7, 2014, CCRC-Middle filed a Motion to Clarify Role of Standby Counsel. R6, pp. 1180 – 1181. CCRC-Middle filed an Amended Motion to Clarify Role of Standby Counsel on May 8, 2014, and asserted that McGirth wanted CCRC-Middle to be reappointed as his counsel. R7, pp. 1225 – 1226. CCRC-Middle did not attach any affidavits or other documents as evidence that McGirth wanted them reappointed as counsel.

On May 9, 2014, the court issued an Order on Motion to Clarify Role of Standby Counsel, as Amended. R7, pp. 1242 – 1244. The court stated that CCRC-Middle was not re-appointed as counsel of record for McGirth. R7, p. 1243. The court further stated that "CCRC-Middle Region is not entitled to make opening or closing statements, arguments to the court, direct examination of witnesses, cross examination of witnesses or filing of motions on behalf of the defendant." R7, p. 1243.

On May 14, 2014, McGirth filed a Notice of Pending Petition for Writ of Prohibition and Request to Stay All Proceedings until Prohibition is Ruled On. R7,

pp. 1248 – 1251. The court issued an Order Denying Defendant's Request for a Stay on May 19, 2014. R7, p. 1292.

McGirth appeared pro se at the evidentiary hearing on May 27, 2014, and his standby counsel CCRC-Middle attended the hearing. R5, p. 5. CCRC-Middle presented a Motion to Determine Competency based on their perception of McGirth's "increasingly bizarre behavior." R33, p. 6. The evidentiary hearing was converted to a hearing on CCRC-Middle's motion. R33, pp. 5 – 72. The court issued an Order Appointing Experts to Evaluate Defendant for Competency on June 6, 2014. R7, pp. 1326 – 1328.

On September 26, 2014, the state filed a Motion to Set Competency Hearing. R9, pp. 1347 – 1350. The court issued an Order Setting Competency Hearing for November 24, 2014. R11, p. 1357.

McGirth appeared pro se for the competency hearing on November 24, 2014, and signed a Waiver of Right to Lawyer. R13, p. 1370; R34, pp. 1 – 91. The court conducted a *Faretta* hearing to determine McGirth's competency to proceed pro se at the hearing. R34, pp. 7 – 19. The court found McGirth had made a knowing and voluntary choice to proceed pro se with the assistance of standby counsel at the competency hearing. R34, p. 19. The court heard testimony from Dr. Berland and Dr. Prichard, and found McGirth competent to proceed. R34, p. 84.

On December 8, 2014, the court issued an Order Adjudicating Defendant Competent to Proceed and a contemporaneous Order Rescheduling 3.851 Evidentiary Hearing for February 16, 2015. R18, pp. 1393 – 1399. McGirth was also ordered to provide to standby counsel Gemmer and prosecutor King the names and addresses of all lay witnesses that he wanted to testify at his evidentiary hearing by January 15, 2015. R18, pp. 1393 – 1394.

On January 16, 2015, pro se defendant McGirth filed a Motion to Amend Motion to Vacate Judgment of Conviction and Sentence. R18, pp. 1414 – 1423. McGirth proposed to expand Claim III of his original Rule 3.851 Motion to include a claim for ineffective assistance of trial counsel because counsel failed to renew his motion for severance of the trial of the defendants after co-defendant's counsel defended his client by placing all blame for the crimes on McGirth. R18, p. 1420 – 1421. McGirth proposed an additional amendment to Claim III to include a claim of ineffective assistance of counsel for trial counsel's failure to present expert testimony to refute the state's claim that Ms. Miller was in pain after she was shot in the chest. R18, pp. 1421 – 1422.

On January 29, 2015, McGirth filed a Motion for Order to Transport Inmate Witnesses for Evidentiary Hearing of 2/16/15. R18, pp. 1425 – 1427. On January 28, 2014, he filed a Motion for Emergency Order Allowing Defendant to Bring Legal Materials and Personal Hygienes to County Jail. R18, pp. 1429 – 1431. The

court granted McGirth's motion to take his legal materials and hygiene products to the jail. R18, pp. 1434 – 1436.

On February 4, 2014, the court also ordered the state to respond to McGirth's proposed Amended Motion to Vacate Conviction and Sentence. R18, 1446 – 1447. The state filed its response on February 6, 2015. R18, pp. 1448 – 1488. The court granted Defendant's Pro Se Motion for Leave to Amend. R18, pp. 1530 – 1532.

On February 5, 2015, pro se defendant McGirth filed a Motion for Continuance, and in support thereof informed the court that CCRC-Middle had notified him that his experts had refused to testify and he needed time to personally consult with them. R18, pp. 1497 – 1500.

On February 9, 2015, pro se defendant McGirth filed a composite Motion to Appoint Conflict-free Co-Counsel, or in the Alternative, Motion to Appoint Conflict Counsel. R18, pp. 1501 – 1504. He also filed a Motion to Stay Transport of Witnesses, pending the determination of his various motions before the court. R18, pp. 1505 – 1507. The state filed an Objection to Defendant's Pro Se Motion for Continuance on February 11, 2015. R18, pp. 1508 – 1521.

McGirth appeared pro se at the hearing on his various motions on February 13, 2015. R35, pp. 1 – 44. David Gemmer for CCRC-Middle appeared by phone. R35, p. 3. McGirth asked the court to appoint co-counsel or in the alternative,

conflict-free counsel to represent him. R35, p. 5. He advised the court that he had a continuing conflict with CCRC-Middle. R35, p. 5. McGirth complained that CCRC-Middle, as standby counsel, had refused to help him secure his expert witnesses, but the court reiterated to McGirth that it was his responsibility to prepare his case and standby counsel did not have any duty to help him. R35, p. 6. McGirth also complained to the court that he had to go through CCRC-Middle to communicate with his investigator, and the process was hampering his ability to communicate with witnesses and prepare his case. R35, p. 10. Gemmer advised the court they had provided McGirth a list of all lay witnesses they had served with subpoenas, and they were having issues with McGirth's expert witnesses who did not want to testify without counsel conducing the direct examinations. R35, p. 11. The state offered to facilitate a conference call with McGirth and his expert witnesses. R35, p. 26. The court denied McGirth's motions for continuance and the appointment of co-counsel or conflict-free counsel. R35, p. 28. McGirth then filed a Motion to Disqualify Judge Lambert, which was denied by the court. R35, pp. 33 – 35; R18, pp. 1533 – 1534.

McGirth appeared pro se at the evidentiary hearing on February 16, 2015. R36, pp. 1 – 29. Gemmer from CCRC-Middle appeared as McGirth's standby counsel. R36, p. 5. McGirth informed the court he did not want CCRC-Middle reappointed to represent him in his post-conviction relief action and moved to

waive the evidentiary hearing. R36, p. 5. Gemmer advised the court that he still believed McGirth was incompetent to represent himself. R36, p. 6. The court swore McGirth as a witness and conducted a *Faretta* inquiry regarding McGirth's competency to proceed pro se and waive his evidentiary hearing. R36, pp. 9 – 26. The court ultimately found that McGirth "freely and voluntarily waived his right to an evidentiary hearing." R36, p. 26.

On February 20, 2015, the court issued an Order on Submitting Written Closing Arguments and Transcripts. R19, pp. 1765 – 1766.

On March 2, 2015, pro se defendant McGirth filed a Motion for Rehearing and/or Reconsideration of Orders Denying Defendant's Composite Motion to Appoint Conflict-Free Co-Counsel or to Appoint Conflict-free Counsel and Motion for Continuance. R20, 1846 – 1863.

On March 3, 2015, pro se defendant McGirth filed a Motion for Rehearing and/or Reconsideration of Defendant's Waiver of 3.851 Post-Conviction Evidentiary Hearing. R19, pp. 1778 – 1792; R20, pp. 1793 – 1817. In support of his motion, McGirth informed the court that all of his witnesses were not subpoenaed by CCRC-Middle, and "those that were subpoenaed were almost solely for the purposes of the mitigating mental health claims." R19, p. 1777.

On April 15, 2015, the court issued its Final Order Denying Defendant's Rule 3.851 Motion for Post-Conviction Relief, As Amended. R21, pp. 2040 –

2068. On the same date, the court issued its Order Denying Defendant's Motion for Rehearing and/or Reconsideration of Defendant's Waiver of 3.851 Post-Conviction Evidentiary Hearing. R21, pp. 2069 – 2072. On the same date, the court also issued its Order Denying Defendant's Motion for Rehearing and/or Reconsideration of Order Denying Defendant's Motion to Appoint Conflict-free Co-Counsel or to Appoint Conflict-free Counsel and Denying Defendant's Motion for Continuance. R21, pp. 2073 – 2075.

On May 11, 2015, pro se defendant McGirth timely filed his Notice of Appeal to the Supreme Court of the State of Florida. R21, pp. 2076 – 2078.

On May 11, 2015, pro se defendant McGirth also filed a Motion to Appoint Conflict-free Counsel for Purposes of Appeal. R21, pp. 2079 – 2080.

On May 27, 2015, the Supreme Court of Florida ordered that jurisdiction be temporarily relinquished to the Circuit Court of the Fifth Judicial Circuit in and for Marion County for 30 days for appointment of counsel. R21, pp. 2084 – 2085.

On June 10, 2015, the circuit court issued an Order appointing CCRC-Middle to represent McGirth in his appeal. R21, pp. 2086 – 2088.

On June 19, 2015, CCRC-Middle filed a Motion to Reconsider and Motion to Withdraw, and claimed that CCRC-Middle had a conflict with representation and must withdraw. R21, pp. 2089 – 2090.

On June 22, 2015, pro se defendant McGirth filed a Motion Objecting to the Court's Order Appointing CCRC-Middle, as Counsel to Represent Appellant, McGirth, before the Florida Supreme Court and Request's a Rehearing and/or Reconsideration. R21, pp. 2095 – 2098.

On June 23, 2015, the Florida Supreme Court granted McGirth's request to remand to the circuit court for a hearing on the conflict with CCRC-Middle and request for conflict-free counsel. R21, pp. 2099 – 2100.

On June 29, 2015, the state filed its Response to Defendant's Motion for Conflict-Free Counsel and CCRC-Middle's Motions for Appointment of Counsel and for Rehearing. R21, p. 2101.

On July 15, 2015, the court held a hearing to address the motions regarding McGirth's representation by Gemmer of CCRC-Middle in his collateral relief appeal before the Florida Supreme Court. R38, pp. 1 – 24. Gemmer told the court an actual conflict existed with regards to the *Nelson* hearing that occurred on September 23, 2013. R38, p. 5. Gemmer admitted to the court that he was "ignorant of the *Woods* proceedings as the claims were made as far as *McCleskey* by the charging decision or death penalty seeking decision." R38, p. 6. Gemmer admitted that although he had represented to the court at the original *Nelson* hearing that he had not received the materials sent out by the attorney for Mr. Woods, he informed the court that "it's possible actually that I may have received

it and not recognized the nature of it or how it would be applicable in this particular case." R38, p. 6. Gemmer's failure to address the *Woods* issue was one of the issues McGirth cited at the *Nelson* hearing on September 23, 2013, to support his argument that Gemmer and CCRC-Middle were ineffective. R30, pp. 11-13.

Gemmer also admitted that he was unfamiliar with the *McCleskey* claim. R38, p. 7. The *McCleskey* issue was also cited by McGirth in his claim that Mr. Gemmer and CCRC-Middle were ineffective. R30, p. 11.

Gemmer also admitted he "may have been incompetent in developing Detective Stroup. We were totally surprised a week or two before the hearing when we talked about Detective Stroup and she advised, one that Sheila had admitted or made a statement, by the state's argument, that she had shot her mother." R38, p. 8. Gemmer also admitted that he was made aware from Detective Stroup that "she had also been instructed by higher-ups not to pursue that theory of the case or not to pursue any further incriminating evidence or whatever regarding Sheila." R38, p. 8.

The court conceded that if he had found Gemmer and CCRC-Middle ineffective at the *Nelson* hearing on September 23, 2013, he would have granted McGirth's request and appointed different counsel. R38, p. 9.

McGirth testified at the hearing, and told the court that he had been faced with a Hobson's choice at the hearing on September 23, 2013. R38, pp. 11 – 12. He had been forced to choose between unwanted, ineffective counsel and proceeding pro se. R38, p. 12.

McGirth also testified that he had been forced to waive his evidentiary hearing because although the state and Gemmer agreed at the competency hearing on November 24, 2014, to subpoena his witnesses if he got the list to them within 30 days of the hearing, only 21 witnesses had been subpoenaed. R38, pp. 13 – 14. The court refused to grant McGirth's request for a continuance, and he was faced with the decision of proceeding pro se with only 21 witnesses, which were not the witnesses he need for his guilt-phase issues, or go forward with unwanted counsel. R38, p. 14.

The court granted McGirth's Motion for Conflict-Free Counsel and CCRC-Middle's Motions for Appointment of Counsel, and appointed Capital Collateral Regional Counsel – North ("CCRC-North") to represent McGirth in his appeal. R38, pp. 22 – 23; R21, pp. 2109 – 2110.

STANDARD OF REVIEW

The claims presented in this appeal are subject to review for abuse of discretion, and the trial court's resolution will be upheld if supported by competent, substantial evidence. *Larkin v. State*, 147 So. 3d 452, 464, quoting

McCray v. State, 71 So. 3d 848, 862 (Fla. 2011), *cert denied,* 132 S. Ct. 1743 (2012).

SUMMARY OF ARGUMENT

McGirth should be granted an evidentiary hearing on his Rule 3.851 motion because of numerous due process violations that occurred in this post-conviction proceeding.

I. McGirth should have been granted new counsel after the *Nelson* hearing on September 23, 2013. The court conducted an insufficient inquiry of McGirth's post-conviction counsel, David Gemmer of CCRC-Middle. Gemmer failed to admit several critical errors he committed in the course of his representation of McGirth, and had he admitted those errors, the court should have appointed new counsel.

II. McGirth should not have been permitted to represent himself in his post-conviction proceeding. At the *Faretta* hearing, he did not evince an unequivocal desire to represent himself. McGirth wanted conflict-free counsel, but the court insisted that his only choices were Gemmer and CCRC-Middle or proceeding pro se. The court should also have ordered a competency evaluation given the ample evidence presented at the hearing and in the claims before the court that McGirth might suffer from a mental illness or brain injury.

III. The court should not have appointed Gemmer and CCRC-Middle as standby counsel without hearing from McGirth on the merits. The court had made it clear to McGirth at the hearing on September 23, 2013, that he was his own counsel and responsible for his own defense, and it was a violation of McGirth's right to self-representation and due process for the court to appoint standby counsel after being advised by only the state and McGirth's former counsel.

IV. The court also should not have allowed McGirth to represent himself at his own competency hearing. He should have been represented by conflict-free counsel at his competency hearing who could have effectively presented evidence of McGirth's mental health issues as they related to his competency to proceed.

V. The court also should not have denied McGirth's motion to disqualify. It was facially sufficient, and the court should have granted the motion and recused itself.

VI. McGirth's waiver of counsel and waiver of his evidentiary hearing were not intelligently, knowingly or voluntarily made. He was given the impossible choice of proceeding with incompetent counsel or representing himself. He asked for conflict-free counsel, and the court denied his request. He faced unreasonable deadlines set by the court throughout the proceeding. He was also faced with proceeding at his evidentiary hearing without his witnesses and the resources necessary to present his case.

VII. Notwithstanding all the arguments, McGirth's death sentence should be vacated and his case should be remanded to the circuit court to be resentenced to life in prison without parole in accordance with §775.082(2), Florida Statutes. In the alternative, McGirth should be granted a new sentencing proceeding.

ARGUMENT

I. MCGIRTH'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 16 OF THE FLORIDA CONSTITUTION WAS VIOLATED WHEN THE TRIAL COURT DENIED MCGIRTH'S MOTION TO DISCHARGE HIS POST-CONVICTION COUNSEL AFTER AN INSUFFICIENT *NELSON* HEARING.

On September 23, 2013, shortly after the circuit court convened McGirth's evidentiary hearing on his Rule 3.851 motion, McGirth asked the court to remove and replace his attorneys from CCRC-Middle or allow him to represent himself. R30, p. 9. This request triggered an inquiry by the court under *Nelson v. State*, 274 So. 2d 256 (Fla. 1973), after which the court ruled that Gemmer and CCRC-Middle had no conflict of interest with McGirth and counsel's representation was not deficient. R30, p. 61.[1]

A. The *Nelson* Hearing.

1. The *Nelson* standard.

[1] *See also* the written order issued by the court on September 27, 2013. R5, pp. 967 – 971.

Under the *Nelson* test, the court must inquire of the defendant as to his reasons for the request to discharge counsel, and if the defendant alleges counsel is incompetent, the court must inquire of the defendant and his counsel "to determine whether or not there is reasonable cause to believe that court appointed counsel is not rendering effective assistance to the defendant." *Id.* at 258 – 259. If the court finds reasonable cause that counsel is not effectively representing the defendant, then the court must appoint a substitute attorney. *Id.* at 259. *See also Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). The standard of review on appeal is abuse of discretion. *Larkin v. State*, 147 So. 3d 452, 464, quoting *McCray v. State*, 71 So. 3d 848, 862 (Fla. 2011), *cert denied,* 132 S. Ct. 1743 (2012).

2. The court's inquiry into McGirth's complaints regarding Gemmer and CCRC-Middle's representation.

McGirth raised multiple concerns about counsel's representation. He complained that Gemmer was focused on "frivolous" issues when he should have been focused on other issues. R30, p. 9. He was concerned that Gemmer was too concerned with mental health issues. R30, p. 11.

McGirth also pointed to three claims Gemmer had not raised that concerned him. First, McGirth cited Gemmer's failure to raise a claim under *Alleyne v. United States*, 133 S. Ct. 2151 (2013). R30, p. 10. When asked by the court how the *Alleyne* decision could help him, McGirth replied that the state should have had to identify the aggravating circumstances in his indictment because, under *Alleyne,*

they were elements that had to be pled and proved. R30, pp. 10 – 11. McGirth said he brought the case to the attention of Gemmer, who refused to argue it because other lawyers were not arguing it. R30, p. 10.

Next, McGirth was concerned that Gemmer had not raised a *McCleskey v. Kemp*[2] claim. R30, pp. 11 – 13. McGirth was aware of a murder case in Marion County presided over by the same judge where the defendant had raised a racial discrimination claim based on a statistical study that proved racial discrimination in the imposition of the death penalty. *Id.* McGirth was concerned that Gemmer never mentioned the study or the case to him. R30, p. 11 – 12. McGirth wanted Gemmer to explore a potential claim under *McCleskey*, but Gemmer never did. R30, p. 12.

Finally, McGirth was concerned that Gemmer had not raised a *Brady/Giglio* claim that prosecutor Hodges withheld information that would have proved the victims' daughter, Sheila Miller, was a perpetrator, not a victim, a fact that would also have supported a *McCleskey* claim. R30, p. 31. McGirth was also concerned

[2] In *McCleskey v. Kemp*, 481 U. S. 279 (1987), McCleskey presented a statistical study conducted by law professor David Baldus that showed that blacks that killed whites in Georgia were 4.3 times more likely to receive the death penalty. Justice Powell, writing for the five-four majority, accepted the study as valid but denied the claim because McCleskey had not proved he was personally discriminated against on the basis of race by the prosecution.

that Gemmer had not located another witness, Roxanna Baker, who would have offered impeachment evidence against Sheila Miller. R30, pp. 19 – 20.

3. The court's inquiry of Gemmer.

The court then conducted a brief inquiry of Gemmer regarding the concerns raised by McGirth. The court asked Gemmer about the extent of his investigation of the facts in the case. R30, p. 41. Gemmer advised that CCRC-Middle had reviewed records received under Rule 3.852, Fla. R. Crim. P, and developed claims, and that they continued to investigate. R30, p. 42.

The court's focus of inquiry with Gemmer was primarily about the applicable standard for McGirth to represent himself if he discharged counsel. R30, pp. 42 – 46. The prosecutor reminded the court that he needed to make inquiry of Gemmer about his investigation of issues raised by McGirth. R30, p. 46.

The court then inquired further of Gemmer. Gemmer said he decided to "back burner" the *Alleyne* issue to possibly raise it in a habeas petition. R30, 46 – 47.

Gemmer mentioned that he added a witness McGirth wanted to the list. R30, p. 50. Counsel explained that he could not possibly investigate all possible witnesses, but could not name any witnesses he rejected. R30, p. 51.

Gemmer stated that there was not enough time to investigate all possible claims, but that the *McCleskey* claim might have value. R30, p. 52. When asked by the court about whether he considered raising a *McCleskey* claim, Gemmer responded that he was looking into it, especially as it related to the fact that the victims' daughter, a white woman, was not charged in the murder where there was evidence to suggest that she was involved. R30, pp. 18 – 19. The court explained to Gemmer, who admitted little to no knowledge of the issue, that the statistical study was complete and the results were obtainable. R30, pp. 7, 37.

Gemmer was not asked about McGirth's concern that he had not raised a *Brady/Giglio* claim on the issue of the victims' daughter's involvement in the murder. Had he been asked or had he been more forthcoming, he might have acknowledged that he knew days or weeks *before* the evidentiary hearing that the victims' daughter had admitted to prosecutor Hodges and Detective Stroup that she shot her mother and that Detective Stroup had been advised not to pursue any investigation of the daughter's culpability.[3]

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[3] *See* Gemmer's Notice of Providing Specific Documents to Defendant filed on January 3, 2014 R6, pp. 1013 – 1015, where Gemmer stated that in addition to the records already provided to McGirth by his office, McGirth wanted records related to Sheila Miller's admission that she shot her mother, that Gemmer knew of the statements before the evidentiary hearing and believed that the court should give McGirth time to develop the claim; Gemmer's statement during the January 21, 2014, status conference that he knew before the evidentiary hearing that Sheila Miller admitted shooting her mother and that Stroup was told not to pursue that investigation (R32, pp. 8 – 9); and Gemmer's statements during the July 15, 2015,

B. The court's ruling that Gemmer's representation was not deficient was error.

At the end of the hearing, the court found that Gemmer and CCRC-Middle were not ineffective and would not be discharged. R30, p. 61. The ruling was in error.

First, the court's inquiry of Gemmer was insufficient. Gemmer spoke of the limitations of his investigation, but the court did not press for specific details. Nor did the court press for information about an *Alleyne* claim or whether Gemmer rejected investigating the claim because other lawyers were not raising it, as McGirth asserted. R30, p. 10. The court did not inquire into what Gemmer had done to investigate whether Sheila Miller was a perpetrator in her mother's murder and the robbery of her parents' home. R30, pp. 41 – 54. Had the court done so, Gemmer might have acknowledged facts that should have compelled him move to amend to file a *Brady/Giglio* or ineffective assistance of counsel claim. The claim should have been filed prior to the hearing, and Gemmer later admitted he knew about the issue prior to the hearing.

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hearing on his motion to withdraw that his office "may have been incompetent" in failing to develop a claim through Detective Stroup that Sheila Miller admitted shooting her mother and that Stroup was told not to pursue an investigation into Miller's involvement. R38, p. 8.

The court instructed Gemmer on the *McCleskey* racial discrimination issue that McGirth wanted to raise after Gemmer admitted he was unfamiliar with it. R30, pp. 56 – 60. Gemmer stated it was interesting and he wanted to develop it. R30, p. 52. No inquiry was made of Gemmer as to when he learned McGirth wanted to raise the *Alleyne* or *McCleskey* issues or the failure to develop *Brady/Giglio* claims.

More importantly, Gemmer could not raise the *Alleyne, McCleskey* or *Brady/Giglio* issues at the September 23, 2013, evidentiary hearing. He had not moved to amend the motion to add the claims prior to the hearing, and for the brief time he was reappointed to represent McGirth in the midst of a *Faretta* hearing later that day,[4] he did not move to amend to add the claims or move to continue to investigate the claims further. Pleading requirements under Rule 3.851 are strict; the defendant must plead claims with specificity for which he seeks an evidentiary hearing and allege detailed facts in support of those claims. Rule 3.851(e)(1) and (e)(1)(D), Fla. R. of Crim. P.

Gemmer's admission to the court that he had not investigated potentially viable claims for consideration in the 3.851 proceedings was ample evidence of

[4] Gemmer and McGirth reached a "compromise" for Gemmer's continued representation of McGirth during a recess after the *Nelson* hearing on September 23, 2013. R30, p. 81.

deficient representation and the court should have discharged Gemmer and appointed new counsel to represent McGirth.

Looking at the record as a whole, the court had several subsequent opportunities to correct its failure to discharge Gemmer and appoint substitute counsel to represent McGirth. Under Fla. Stat. §27.711(12) (2012), the trial court has a duty to monitor the performance of counsel representing defendants in capital collateral proceedings.

During the *Faretta* hearing that followed the *Nelson* hearing, the court declined to appoint Gemmer and CCRC-Middle as standby counsel. R30, pp. 105 – 106. Indeed, he appointed CCRC-South as standby days later. R5, p. 970.

At the status conference on January 21, 2014 when Gemmer acknowledged late delivery of the case files to McGirth and that he knew before the evidentiary hearing about the Sheila Miller admission to shooting her mother (R32, pp. 8 – 9), the court could have found Gemmer deficient and appointed new counsel for McGirth.

McGirth continued to raise his dissatisfaction with Gemmer with the court. After the court appointed CCRC-Middle as standby counsel (after discharging CCRC-South), McGirth filed a motion for reconsideration and complained that CCRC-Middle had not delivered the case records in a timely manner and that

Gemmer should have been discharged at the September 23rd hearing. R6, 995 – 1005.

At the next scheduled evidentiary hearing on May 27, 2014, against McGirth's wishes and contrary to the court's order forbidding him from filing motions for McGirth, Gemmer filed a motion alleging McGirth was incompetent. R33, p. 6.

Again, at the competency hearing on November 24, 2014, McGirth renewed his request for new counsel. R34, pp. 11 – 12.

At the emergency hearing on February 13, 2015, on McGirth's motions to continue and motions to appoint conflict free counsel or co-counsel, the court heard that experts for McGirth that Gemmer had agreed to produce for the evidentiary hearing were refusing to testify. R35, p. 11. Gemmer had not informed the court of the problem, McGirth did. *Id.* McGirth's request for new counsel was denied. R35, p. 28.

C. Conclusion.

Each time McGirth asked for new counsel, the court denied his request without taking further evidence or considering the admissions by Gemmer that he knew that there were grounds for a new claim related to Sheila Miller's involvement in her mother's murder prior to the evidentiary hearing and did not raise them.

Gemmer's glaring failure to inform the court of his knowledge of facts supporting a new claim for *Brady/Giglio* violations or ineffective assistance of counsel claim surrounding the involvement of Sheila Miller in the shooting of her mother was evidence of deficient performance that Gemmer had a duty to report to the court at the September 23, 2013, hearing. His failure to do so deprived the court of information vital to his decision on whether Gemmer was competently representing McGirth. Indeed, the court announced at the July 15, 2015 hearing that he would have discharged Gemmer at the *Nelson* hearing had he determined Gemmer's performance was deficient. R38, p. 9. As a result, McGirth was denied his right to competent counsel during his post-conviction proceedings.

II. MCGIRTH WAS NOT COMPETENT TO REPRESENT HIMSELF IN HIS CAPITAL POST-CONVICTION PROCEEDING.

At the conclusion of the *Nelson* hearing, the court determined that Gemmer and CCRC-Middle were not ineffective.[5] R30, p. 61. The court refused to appoint new counsel for McGirth and McGirth was asked if he wanted to keep attorney Gemmer from CCRC-Middle or proceed on his own. *Id.* McGirth opted to represent himself. R30, p. 62. Without any further inquiry, the court found McGirth competent to make that decision. R30, p. 62.

A. The *Faretta* hearing.

[5] See discussion in Argument 1, *supra.*

The prosecutor then asked the court to make an inquiry into McGirth's "educational background, his mental health background and those things." R30, p. 62.

When asked by the court about his own mental health status, McGirth responded, "My understanding is that I'm healthy" and asked if the court was going to appoint a legal advisor for him. R30, p. 62 – 63.

After the prosecutor voiced concerns about the issues Gemmer had raised about McGirth's "brain injuries and hallucinations" and whether McGirth saw those as "an impediment to his self-representation," the court asked McGirth about his mental state.[6] R30, p. 63. McGirth responded that he wanted a continuance so he could drop mental health issues from his motion. R30, p. 64.

McGirth denied being on any medication except for ibuprofen for headaches, and denied having current auditory hallucinations. R30, p. 65, 66 – 67. When the prosecutor asked him if he had a significant brain injury, McGirth replied, "Not to my understanding. They say I have a hole or mass in my brain but it don't seem to be affecting me." *Id.*

[6] Upon motion by McGirth's counsel, a Positron Emission Tomography Scan was given to McGirth that indicated brain insults or injuries. R2, pp. 375 – 398. The prosecution had filed a motion to exclude the evidence as unreliable. R3, pp. 562 – 564.

Responding to another question by the prosecutor, McGirth said he understood what had happened in court that day [at the *Nelson* hearing]. R30, p. 66. McGirth acknowledged that he could read and write and understand case law and pleadings, and denied being on any medication or refusing medication. R30, p. 67. The prosecutor offered to the court that it was his understanding that McGirth had not been given any medication at the Department of Corrections except for ibuprofen. R30, p. 68.

McGirth was then asked by the prosecutor if there was any reason he could not "honestly and intelligently decide for yourself what you want to do with your case?" R30, p. 68. McGirth replied, "No." *Id.*

The court then remarked that McGirth had been "non-disruptive" and "followed along" during his trial in 2008 that lasted several weeks. *Id.* The court warned McGirth that there were disadvantages to representing himself and that he would get no special treatment from the court "because he would be representing himself." R30, p. 69. McGirth stated he understood. *Id.* The court further cautioned McGirth that he would have to follow criminal law and procedure and not be disruptive. *Id.* The court told McGirth, "In other words, you have to act just like a lawyer would in court." *Id.*

The court listed advantages of having a lawyer such as calling witnesses, cross-examining witnesses, giving advice, challenging evidence, and preserving error. R30, p. 73.

Next, the court discussed the disadvantages of not having counsel such as limited and restricted access to legal resources. R30, pp. 69 – 70. McGirth replied that inmates on death row had access to the law library and a law clerk. R30, p. 70.

The court told McGirth that even though he was not an attorney he would have to abide by the "laws of criminal law and criminal procedure." R30, p. 71. McGirth was told that if he represented himself, he could not complain that he was ineffective if he lost the Rule 3.851 motion. R30, pp. 71 – 72.

The court confirmed from McGirth that he was 25 years old, could read and write, had no physical limitations, had graduated from high school, was not under the influence of drugs or alcohol, and that no one had threatened him to make him give up a lawyer. *Id.*

Almost all questions asked by the court and prosecutor called for yes or no answers.

McGirth acknowledged that he wanted to represent himself. *Id.* R30, p. 75.

The court asked the prosecution and defense if they wanted to inquire further. R30, pp. 74 – 75. Gemmer asked no questions but wanted to offer

argument, depending on the ruling. R30, p. 75. The court advised that he was prepared to find McGirth competent unless counsel had argument to offer. *Id.*

Gemmer cited to *Lambrix v. State,* 124 So. 3d 890 (Fla. 2013) as holding that there was no right of self-representation in post-conviction proceedings. R30, pp. 75 – 76. Gemmer acknowledged that he had not yet read the case as it had just been emailed to him, but he believed that was the holding. R30, p. 76. The prosecutor and court disagreed with Gemmer's argument and there was discussion about whether Florida law would allow McGirth to represent himself on the Rule 3.851 motion. R30, pp. 76 – 79. A recess was called to allow Gemmer time to read cases on self-representation. R30, p. 80.

B. McGirth's decision to retain Gemmer and CCRC-Middle as counsel in his Rule 3.851 hearing.

When the hearing resumed, the court announced that McGirth had asked for and been granted a conference with his attorneys during the recess. *Id.*

Gemmer informed the court that McGirth had requested that CCRC-Middle continue to represent him. R30, p. 81. Gemmer announced that they had worked out a compromise that if McGirth disagreed with what they were arguing, McGirth "could file his own closing argument addressing his concerns." R30, p. 81.

The court advised McGirth and his lawyers that McGirth could not file "stuff" on his own while represented by counsel. R30, p. 82.

McGirth's understanding of the "compromise" representation was that if he and his lawyers disagreed about something, they would discuss it with him and listen to him and "come to a compromise on what suits me." R30, pp. 81 – 82.

More discussion followed about whether McGirth could represent himself in the proceedings and whether *Lambrix* applied to self-representation in original 3.851 proceedings or to self-representation in appeals of post-conviction proceedings. R30, pp. 82 – 84.

C. McGirth's second request to discharge counsel after Gemmer called Dr. Berland as the defense's first witness at the evidentiary hearing.

Subsequently, the evidentiary hearing started with McGirth represented by Gemmer and CCRC-Middle. R30, p. 85. Gemmer's first witness was Dr. Robert Berland, a forensic psychologist. *Id.* Dr. Berland was qualified as an expert in forensic psychology without objection. R30, pp. 85 – 87. Dr. Berland testified that based upon interviews he had with McGirth and McGirth's mother, sister, and some ex-girlfriends, and the results of psychological tests (MMPI II) he administered to McGirth, it was his opinion that McGirth was mentally ill and suffered from a "psychotic disturbance." R30, pp. 87 – 92. When a hearsay objection was raised when Dr. Berland was asked about statements made to him by McGirth, McGirth interrupted the proceeding and asked that the witness be removed so as not to hear what he had to say about him. R30, p. 93. After the

witness left the courtroom, McGirth denied that he was "crazy and psychotic" and asked to represent himself again. R30, p. 93.

McGirth asked the court to tell him whether he could represent himself and "continue my case because I'm not going along with I'm crazy psychotic crap." R30, p. 94.

The prosecutor asked McGirth if he unequivocally wanted to waive his right to counsel and discharge his attorneys, to which McGirth said, "Your honor, along with the legal advisor, will you grant me a brief continuance to snatch out all of this out of the motion and add in what I want --." R30, p. 95.

D. The continuance of the hearing and the appointment of standby counsel.

The court was not inclined to continue the case but was willing to appoint standby counsel. R30, p. 95, 102. McGirth wanted a continuance to confer with standby counsel "so we can argue what we want to argue properly?" R30, pp. 95 – 96. He wanted to remove the mental health "stuff" from the motion and track down an impeachment witness, Christina Daniels. R30, pp. 96 – 97.

Then the court asked McGirth if he wanted to unequivocally discharge his counsel with "no ifs, ands or buts about it?" R30, p. 98. McGirth agreed. *Id.*

When asked for clarification by Gemmer, the court stated he was not going through the *Faretta* inquiry again, that McGirth simply disagreed with his lawyers' plans for his case, that he knew what he was doing, and that under *Indiana v.*

Edwards, 554 U.S. 164 (2008), he could allow McGirth to represent himself. R30, p. 98 – 100. He found McGirth competent to make the decision to represent himself. R30, p. 100.

A discussion followed about who might act as standby counsel. R30, p. 103 – 104. The court declined an offer by CCRC-Middle to act as standby counsel. R30, pp. 105 – 106. McGirth agreed, stating, "I just want the proper opportunity to prepare and be ready for it when I come before you; that's all I'm asking for, my fair chance, and I don't feel like I'm getting it with them." R30, p. 107.

E. The court should not have permitted McGirth to represent himself in his Rule 3.851 proceedings.

In *Faretta v. California,* 422 U.S. 806, 807 (1975), the United States Supreme Court held that a defendant in a criminal case has a right to self-representation when he intelligently and voluntarily elects to do so, and that a state may not force a lawyer upon him. For an effective waiver of counsel, a defendant must unequivocally "knowingly and intelligently" forego the benefits of counsel and "be made aware of the dangers and disadvantages of self-representation." *Id.*at 835.

In the instant case, McGirth evinced no unequivocal desire to represent himself. In fact, he evinced the opposite. He requested discharge of his CCRC-Middle lawyers and appointment of new counsel to represent him. R30, p. 8 – 9.

That request for discharge of the CCRC attorneys was denied in the *Nelson* hearing held immediately before this *Faretta* hearing. R30, p. 61. *See* Argument I, *supra.*

It was apparent McGirth did not understand the role of standby counsel. During a discussion about adding witnesses and whether to continue the hearing and release the witnesses in attendance, McGirth asked the court to allow him and his new "legal advisor" an opportunity to interview the witnesses who were present for the hearing to find out what they would testify to in the case. R30, p. 109. The court responded that standby counsel would not be his new lawyer. R30, p. 110. In an attempt to clarify the role and duties of standby counsel to McGirth, the court explained:

> They're going to be here to help you if you have questions. They're not here to sit down with you and interview or interrogate witnesses to see what they're going to say. I mean, when you represent yourself, the ball then becomes in your court literally as to who you want as witnesses or not have as witnesses.
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> R30, p. 110.

The defendant then asked, "But the standby counsel is also able to question the witness when I'm not able to, because I'm in jail so I can't get up and go to a witness if I have them come to the office but they can go see the standby counsel." R30, p. 110.

The court then explained that standby counsel would be in court to answer questions about the case, but he cautioned McGirth that standby counsel would not

conduct investigations or take over for his lawyers from CCRC-Middle. R30, p. 111.

The court considered going forward with the hearing then and allowing McGirth sixty days to amend the motion to add claims under *Alleyne* and *McCleskey.*[7] McGirth wanted a continuance to add a newly discovered evidence claim in addition to the *Alleyne* and *McCleskey* claims, delete claims, add and delete witnesses from his list, and consult with his new "legal advisor" on what to argue. R30, pp. 107 – 114. The prosecutor initially opposed appointment of standby counsel but suggested a continuance was in order if the witnesses McGirth wanted to testify had not been subpoenaed by CCRC-Middle. R30, p. 114 – 115. He asked that the court direct McGirth to give him a list of the witnesses "so they can be found and subpoenaed." R30, p. 114 – 115.

The court then discussed the appointment of standby counsel again and asked McGirth if he understood that if he appointed standby counsel, McGirth would still be responsible for the organization and presentation of the case; that it would be McGirth's entire responsibility. R30, p. 115. McGirth agreed and asked for ninety days to track down his witnesses and take their depositions. R30, p. 116. He agreed to have his family hire an investigator for that purpose. R30, p. 115 –

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[7] *See* discussion of these issues in the *Nelson* hearing argument in Argument I, *supra.*

116. The prosecutor wanted the hearing in late November or after January 1st. R30, p.p. 116 – 117. McGirth asked for six months, which the court said was too long. R30, p. 117 – 118. McGirth asked the court to direct CCRC-Middle to get all the case records to him so he could be prepared for the December 2nd hearing. R30, p. 119. CCRC Middle agreed to deliver the records within two weeks. *Id.*

F. The court should have ordered a competency hearing after Dr. Berland's testimony.

In *Hernandez-Alberto v. State*, 126 So3d 193, 200 (Fla. 2013), this court held that a competent defendant may waive his right to collateral counsel in capital post-conviction proceedings so long as the waiver is knowing, intelligent, and voluntary (citing *Durocher v. Singletary,* 623 So.2d 482, (Fla. 1993)). Under *Durocher,* the trial court must conduct a detailed *Faretta*-type inquiry to ensure the waiver is knowing, voluntary, and intelligent. *Durocher,* 623 So. 2d at 485. If the *Faretta* inquiry "raises questions in the judge's mind about the defendant's competency, the judge may order a mental health evaluation and make a competency determination thereafter. *Id.*

The record before the court at the time of the *Faretta* hearing was replete with evidence suggesting McGirth suffered from mental illness and/or a brain injury. The testimony by Dr. Berland regarding McGirth's mental illness at the hearing (R 31, pp. 88 – 89), the court's knowledge of the existence of the PET scan

purportedly showing McGirth's brain injury[8] (R3, 557 – 558), references by the state that Gemmer had alleged McGirth had received brain injuries and suffered hallucinations (R30, p. 65), McGirth's acknowledgement that he had a mass or hole in his head during the *Faretta* hearing (R30, p. 65), the 3.851 claims of ineffective assistance of counsel in the penalty phase for failing to investigate Dr. Legum's report that McGirth was sexually abused as a young child (R2, pp. 247-281), that he suffered from seizures and hallucinations (Dr. Wood's letter at R2, pp. 381 – 383, and affidavit at R3, pp. 406 – 407), and other indicia of mental health issues of record should have prompted the court to have McGirth examined for competence to proceed under Fla. R. of Crim. P. 3.851(g)(3).

G. Conclusion.

McGirth did not evince an unequivocal desire to represent himself. He simply wanted counsel who would listen to him and consult with him about his defense, which any client deserves. He clearly did not understand what the new "legal advisor" or standby counsel was permitted to do for him. He thought

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[8] *See* court's Order Granting state's Motion to Compel Discovery wherein the court granted the state's motions to compel calculations from Dr. Wood who interpreted McGirth's PET Scan as showing brain abnormalities. R3, pp. 557 – 558. The defendant's motion for a PET was supported by an affidavit by Dr. Frank Wood who had examined McGirth and documented the existence of a seizure disorder in McGirth's infancy that was "prima facie evidence of brain damage or disease." R3, pp. 406 – 407. *See also* defense motion for PET scan with letter from Dr. Wood attached at R2, pp. 375 – 397, and Wood affidavit at R3, pp. 406 – 407. The court granted the defendant's motion for a PET scan (R3, pp. 437 – 446).

standby could help him argue his case, interview witnesses, and add and delete witnesses, despite the court's efforts to explain the role of standby counsel to him. His obvious discomfort at his attorneys' focus on his mental health issues spoke to his desire to deny any problem, whether or not it existed. Finally, the court should have ordered an evaluation for competency given the ample evidence presented at the hearing and in the record before him that McGirth might suffer from a mental illness or brain injury.

III. THE COURT VIOLATED MCGIRTH'S RIGHT TO SELF-REPRESENTATION WHEN IT GRANTED A MOTION FROM MCGIRTH'S DISCHARGED COUNSEL ASKING FOR APPOINTMENT AS STANDBY COUNSEL WITHOUT AFFORDING MCGIRTH THE OPPORTUNITY TO BE HEARD.

At the conclusion of the *Nelson* and *Faretta* hearings held on September 23, 2013, Gemmer and CCRC-Middle were discharged as McGirth's counsel and McGirth officially represented himself. R30, p. 119; R5, p. 969. Gemmer and CCRC-Middle were not appointed as standby counsel. R5, p. 970. The evidentiary hearing was rescheduled for December 2, 2013. *Id.* McGirth was given until November 12, 2013, to amend his Rule 3.851 motion. *Id.* CCRC-Middle was ordered to deliver all records to McGirth within two weeks.[9] R30, p. 119; R5, p. 969.

[9] Gemmer was ordered to provide CCRC-Middle's records on McGirth's case to him by October 12, 2013. R5, pp. 967 – 973. Those documents were not provided until

A. The state's motion to clarify appointment and role of standby counsel.

On September 26, 2013, prosecutor King filed a motion seeking clarification of the appointment and duties of standby counsel. R5, p. 965 – 966. King asserted that CCRC-Middle should be appointed as standby counsel because the court found that no conflict existed between CCRC-Middle and McGirth. R5, p. 966. The state asked for a hearing on the matter to be attended by representatives from CCRC-Middle and the local Regional Counsel's conflict office. *Id.* King did not request the presence of McGirth at the proposed hearing nor did he certify service of his motion to McGirth, even though McGirth was proceeding pro se. *Id.* Instead, he provided service to McGirth's discharged counsel. *Id.*

B. The court's order on the September 23, 2013, hearing.

On September 28, 2013, the court entered an order on several matters heard at the September 23rd hearing.[10] R5, pp. 967 – 973. In the order, *inter alia,* the court affirmed its findings that CCRC-Middle was not deficient in its

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October 29th and critical evidence contained on CDs was not turned over to McGirth for months after that. R6, pp. 1013 – 1016.

[10] See Order Granting Defendant's Motion to Discharge Counsel, Order Appointing Standby Counsel, Order Granting state of Florida's Motion to Clarify Appointment and Role of Standby Counsel, Order Providing Defendant Leave to Amend Rule 3.851 Motion, Order Rescheduling 3.851 Evidentiary Hearing, Order to Turn Over Documents to Defendant and Order Directing Defendant to Narrow Issues for Consideration. R5, 967 – 973.

representation of McGirth, that McGirth was competent to represent himself in the proceedings, affirmed his discharge of CCRC-Middle, and appointed CCRC-South as standby counsel. *Id.*

C. CCRC-South's motion for rehearing or reconsideration of appointment.

On October 11, 2013, attorneys for CCRC-South filed a motion for rehearing or reconsideration of their appointment as standby counsel for McGirth. R5, pp. 975 – 978. CCRC-South advised that it had received no notice of the appointment until a copy of the court's order was received. R5, p. 975. Citing to Fla. Stat. §27.702(1), CCRC-South argued that the enabling statute for the agency did not specifically provide for appointment of another collateral counsel office if CCRC-Middle had no conflict with McGirth and its performance had not been found deficient. R5, p. 977. It urged the court to relieve it of any responsibility for representing McGirth and suggested that CCRC-Middle be appointed as standby counsel. *Id.*

D. Gemmer and CCRC-Middle's motion to be appointed as standby counsel.

On October 29, 2013, Gemmer, who had been discharged as counsel for McGirth, filed a motion on behalf of McGirth asking that CCRC-Middle be appointed as standby counsel. R5, pp. 979 – 986. Gemmer asserted that he had met with McGirth and spoken to him by telephone and that he was authorized to

represent that McGirth wanted CCRC-Middle appointed as standby counsel. R5, p. 980. Gemmer advised that McGirth had expressed this desire in writing and that Gemmer would attach McGirth's written consent to the motion as soon as he received it. *Id.* No written consent executed by McGirth was attached to Gemmer's motion, nor was one ever filed. R5, pp. 979 – 986.

E. The court rescinded its appointment of CCRC-South and appointed CCRC-Middle as standby counsel without giving McGirth, who was acting as his own attorney, an opportunity to be heard.

Without a hearing, and without hearing from McGirth, who was acting as his own attorney, the court issued an amended order on October 31, 2013, and replaced CCRC-South as standby with CCRC-Middle, among other things.[11]

F. McGirth's motions for reconsideration of appointment of CCRC-Middle as standby counsel and motion for reconsideration of *Nelson* hearing ruling.

On December 10, 2013, McGirth filed a motion objecting to the appointment of CCRC-Middle as his standby counsel and asked for a hearing on the matter. R5, pp. 995 – 1000, R6, pp. 1001 – 1005. McGirth expressed his dissatisfaction with its CCRC-Middle's representation of him and cited to various provisions of Fla.

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[11] See Order Granting Motion for Rehearing and/or Reconsideration, Order Appointing Capital Collateral Regional Counsel – Middle as Standby Counsel, Order Rescheduling 3.851 Evidentiary Hearing and Order Extending Defendant Leave to Amend Rule 3.851 Motion. R5, pp. 988 – 989.

Stat. Chapter 27 governing capital collateral representation. R5, pp. 995 – 1000, R6, pp. 1001 – 1005.

In a separate motion for extension of time filed on the same date, McGirth alleged a new and serious complaint against CCRC-Middle that it had not complied with the court's order to provide him with copies of all records as directed in the September 27th order. R5, pp. 990 – 994. McGirth requested a hearing on the matter. R6, p. 1002. McGirth's evidentiary hearing was scheduled for January 21, 2014 and his deadline to file his amended motion was December 12, 2013. R5, pp. 988 – 989.

G. The court denied McGirth's motion objecting to the appointment of CCRC-Middle as standby counsel.

The court entered orders denying McGirth's motions objecting to the appointment of CCRC-Middle as standby counsel and requesting reconsideration of the *Nelson* ruling on December 23, 2013, without a hearing despite suggestions by the state, CCRC-Middle, and the request by McGirth.[12]

H. Conclusion.

Central to the Supreme Court's ruling in *Faretta* is the right of a defendant to represent himself under the Sixth Amendment. *Faretta v. California*, 422 U. S.

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[12] *See* Order Denying Defendant's Request for Hearing Regarding CCRC-Middle Appearing as Standby Counsel and Order Denying Defendant's Request for Effectiveness of Counsel. R6, pp. 1008 – 1010.

806, 821 ("The Sixth Amendment, when naturally read, thus implies a right of self-representation.")

When McGirth left the courtroom on September 23, 2013, he did not know who would be appointed as his standby counsel, but he knew that CCRC-Middle had been discharged and that the court had declined to appoint CCRC-Middle as standby counsel during the discussion at the hearing. R30, pp. 105 – 106.[13]

The court instructed McGirth that the ball was in his court, that he was to act as his own lawyer, and that he had to follow the rules. R30, pp. 69, 91, 110 – 111, 114 – 115, 119. The state, Gemmer, and the court then chose to ignore McGirth.

The state's motion for clarification was sent to Gemmer, who had been discharged, and not McGirth. R5, pp. 965 – 966. Gemmer and CCRC-Middle, who had no authority to act for or file any motion on McGirth's behalf, filed a motion on McGirth's behalf asking for appointment as standby counsel. R5, pp. 979 – 986. The court should have struck the motion as a nullity.[14] Even if the

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[13] The court declined an offer by CCRC-Middle to act as standby counsel. R30, pp. 105 – 106. McGirth agreed, stating, "I just want the proper opportunity to prepare and be ready for it when I come before you; that's all I'm asking for, my fair chance, and I don't feel like I'm getting it with them." R30, p. 107.

[14] Indeed, when CCRC-Middle and McGirth reached a compromise that CCRC would continue to represent McGirth, but McGirth could file a separate closing argument if he disagreed with counsel, the court properly struck that agreement stating that McGirth had no right to file his own arguments while represented by counsel. R30, pp. 81 – 82. *See also,* the court's Order on Motion to Clarify Role of Standby Counsel dated May 6, 2014, where the court instructed McGirth and Gemmer that McGirth had no right to hybrid representation. R7, pp. 1242 – 1244.

court assumed that CCRC-Middle filed the motion as a courtesy and with the full consent of McGirth, then it should have set the matter for hearing upon receiving McGirth's unequivocal objection to the appointment of CCRC-Middle as his standby counsel. Additionally, McGirth, as his own counsel, had a right to be heard on when the evidentiary hearing was to be held, discovery issues, and his request for an extension to amend his motion.

The court should not have told McGirth to act as his own lawyer and then ignored that charge when it was convenient for the court in the race to get the case to a hearing. The court, the state, and CCRC-Middle violated McGirth's right to self-representation under the Sixth Amendment and *Faretta*, and corresponding Florida constitutional provisions.

IV. MCGIRTH'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN THE CIRCUIT COURT ALLOWED MCGIRTH TO REPRESENT HIMSELF AT HIS COMPETENCY HEARING.

McGirth represented himself at a hearing on standby counsel's motion to determine his competence to proceed in this 3.851 proceeding in violation of the Sixth Amendment to the United States Constitution and corresponding provisions of the Florida Constitution. As set forth in Arguments I and II, *supra*, the circuit court made a determination on September 23, 2103, that McGirth was competent

to represent himself in his Rule 3.851 proceeding.[15] R5, pp. 967 – 974. On November 1, 2013, the circuit court appointed CCRC-Middle as standby counsel for McGirth, over McGirth's objection and without giving McGirth an opportunity to be heard. R5, pp. 988 – 989, R6 pp. 995 – 1005, R6, pp. 1008 – 1010. See Argument III, *supra*. McGirth's new evidentiary hearing was scheduled for May 27, 2014, after various delays. R6, pp. 1049 – 1051.

A. The May 27, 2014, hearing.

At the beginning of the May 27th hearing, Gemmer, standby counsel from CCRC-Middle, filed a written motion to determine McGirth's competency. R7, pp.1322 – 1323. The motion set forth concerns of standby counsel that McGirth was incompetent as the result of his lack of "a rational understanding of the claims raised, the witnesses to address the claims, or the exhibits necessary to support the claims," that McGirth was experiencing "increasingly severe headaches in the front part of his brain, consistent with brain injuries," his exhibition of "inappropriate and bizarre behavior" in Gemmer's presence, an inability to focus on topics and present a clear plan for conducting the evidentiary hearing, and other concerns. *Id.*

Gemmer represented that Dr. Berland, who had examined McGirth previously, and who had briefly testified at the aborted evidentiary hearing on

[15] See Argument II challenging the sufficiency of the *Faretta v. California* inquiry and ruling, supra.

September 23, 2013, believed McGirth was incompetent at the September hearing and was currently incompetent. R33, pp. 13, 43.

Well into the hearing, the state asked the court to swear McGirth in and ask him if he wanted to proceed pro se or accept Gemmer as his attorney. R33, p. 24. McGirth spoke up and said he had not asked for Gemmer or CCRC-Middle to be reappointed as standby counsel. R33, pp. 24 – 25. Much later, McGirth was sworn and asked if he wanted to be represented by CCRC-Middle. R33, p. 47. He shook his head, indicating no. R33, p. 47. The court then asked the state if he needed to ask McGirth anything else. R33, p. 47. No *Faretta* inquiry was conducted.

Near the conclusion of the hearing when the court was discussing whether to permit standby counsel to conduct the competency hearing, the court remarked that the case was unique, and speculated about a Catch-22 scenario where "Dr. Berland opines that McGirth is incompetent then Mr. McGirth is going to be asking questions of the doctor about why..." R33, pp. 69 – 70. The state suggested that "there was authority to actually overcome the defendant's objection and appoint counsel to move the proceedings along and have them done in an orderly fashion, and at some point we may have to consider that as well." R33, p. 70. The court responded with these comments:

> Well, yeah, and then I guess to try to save some time, and it may be a unique usage of the word in this case, if Mr. Gemmer perhaps should

> be at the evaluations then if he ends up being the person who may actually have to ask the questions of each expert on behalf of Mr. McGirth because the Supremes' going to be looking down on us saying why do you have a person that one of the doctors opines incompetent asking questions of people? Ultimately, it's my call but that may raise some concerns in their minds in Tallahassee about the process too, so.

Id. at 70.

Quite reluctantly, the court agreed to appoint two experts to examine the defendant and scheduled the competency issue for hearing. R11, p. 1357.[16]

B. The November 24, 2014, competency hearing.

At the beginning of the competency hearing on November 24, 2014, the court asked McGirth if he wanted a lawyer appointed to represent him. R34, p.10. McGirth asked if the court would have to appoint CCRC-Middle and the court replied that he would reappoint CCRC-Middle "unless there's something that's going on that suggested they had been ineffective, but I mean, they've been acting as your standby counsel and there's a difference between acting as counsel and standby counsel." R34, p. 11.

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[16] The court questioned the ability of Gemmer, as standby counsel, to raise the issue. R33, pp. 57 – 58. The court made the following remark to Gemmer, "You seem to take the position that even though I had a *Faretta* hearing to determine competency to proceed back in September and there's been nothing that's been suggested to me until today that he's not competent, that as standby counsel if you put this issue out, that summarily requires me to grind the proceedings to a halt and then have a competency proceeding based upon the representation in your motion." R33, p. 31. In the same vein, the prosecutor suggested that Gemmer be made to sit in the back as standby counsel and that he had no right to act as McGirth's lawyer. R33, pp. 61.

McGirth then asked if there was a conflict under the Confrontation Clause because he had a right to confront Gemmer as a witness because Gemmer filed the motion to determine his competence. *Id.* The court responded, "Well, I don't know that that's necessarily, you know, a black and white rule in that regard. So do you want –you do not want them appointed?" R33, p. 12.

McGirth then asked, "If they going to be appointed, I represent myself. But if you give me somebody from the Public Defender Office, then I may consider having an attorney represent me in this hearing." R34, p. 12. The prosecutor stated that the public defender had represented a co-defendant at trial and had a conflict. *Id.* There was no offer to appoint conflict-free counsel and no *Nelson* hearing was held.

The court conducted a *Faretta* inquiry and found McGirth was competent to represent himself at his hearing to determine his competence to proceed in the Rule 3.851 proceedings. R34, p. 19.

McGirth clearly did not want the court to find him incompetent and conducted the "direct" exam of Dr. Berland, the psychologist appointed at the suggestion of Gemmer at the May 27th hearing. The court asked McGirth if he wanted the court to ask preliminary questions; McGirth declined the court's offer of assistance. R34, p. 21.

McGirth confronted Dr. Berland and attempted to refute Berland's findings and opinion that McGirth was incompetent to proceed on the Rule 3.851 claims and incompetent to represent himself in the instant competency hearing. R34, pp. 8 – 45. As a result, McGirth did not develop the basis for Berland's findings and opinion that McGirth was incompetent.

The prosecution's cross-examination attempted to point out that the conduct of McGirth that concerned Berland – needing notes to refresh his memory as evidence of his refusal to work with his lawyer—was common for anyone. R34, p. 47.

The court's inquiry of Dr. Berland was brief. R34, pp. 48 – 51. The court asked if Dr. Berland had anything to add to explain his opinion. R34, p. 48. Dr. Berland discussed McGirth's loose associations and gave an example when the court asked for an explanation. R34, p. 49. The court asked if McGirth understood the facts of his case. R34, p. 48. Dr. Berland responded that McGirth had a factual appreciation of his case, but not a rational appreciation. R34, p. 48.The court did not ask what other evidence Dr. Berland relied upon in reaching his opinion.

Berland's report was entered into evidence. R34, p. 44.

The prosecution called Dr. Prichard, who had examined the defendant and found him competent. Dr. Prichard's report was entered into evidence. R 34, p. 51. Dr. Prichard had reviewed reports from Drs. Legum, Krop, Wood, and

Cunningham, and reports from school, DOC, and DJJ. R34, p. 58 – 61. He did not interview family or friends, as he found that information to be generally unreliable. R34, p. 69. It was unclear whether he reviewed the information on the brain injury discerned in the PET scan, but was not asked about it and offered no testimony on it. McGirth refused to see Prichard the first time Prichard went to the prison to evaluate him. R34, p. 74. When he did meet with McGirth, he found him to be well informed about his case, able to assist his lawyer, and bright enough to represent himself. R34, pp. 63 – 71. He found no evidence of hallucinations and diagnosed McGirth with Anti-Social Personality Disorder. R34, pp. 66, 71.

McGirth's "cross-examination" of Dr. Prichard, who had been appointed at the suggestion of the prosecutor (R33, p. 63), consisted of questions designed to demonstrate his competence and cast doubt upon Dr. Berland's opinion. R34, pp. 73 – 75.

The court ruled at the end of the hearing that McGirth was competent to proceed and represent himself in future proceedings. R34, pp. 83 – 84. He declined to view the recorded evaluations of the defendant by Drs. Berland and Prichard or any other evidence of record regarding McGirth's mental health. R34, p. 82.

C. Federal law and Florida law protect a criminal defendant from proceeding while incompetent.

Under Florida and federal law, a criminal defendant has a due process right not to be proceeded against while incompetent. *See Cooper v. Oklahoma*, 517 U.S. 348 (1996) and *Lane v. State*, 388 So. 2d 1022 (Fla. 1980).

In Florida, a defendant is incompetent to proceed in a capital collateral proceeding if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether the defendant the defendant has a rational as well as factual understanding of the pending collateral proceedings." Rule 3.851(g)(8)(A), Fla. R. Crim. P.

Procedural safeguards are in place to protect the right not to be proceeded against. Collateral counsel may file for a competency determination "in good faith and on reasonable grounds to believe that the death-sentenced defendant is incompetent to proceed." Rule 3.851(g)(2), Fla. R. Crim. P. If the court determines that those grounds exist in a proceeding in which factual matters are at issue that require the defendant's input, the court must appoint no less than or greater than three experts to evaluate the defendant. Rule 3.851(g)(5), Fla. R. Crim. P. After receipt of the experts' reports, the court must hold a hearing to determine whether the defendant is competent. Rule 3.851(g)(10), Fla. R. Crim. P. If the court finds the defendant competent to proceed, the order must contain findings of fact supporting the determination, copies of the experts' reports, and copies of

other reports, psychiatric, psychological, or social work, submitted to the court that are relevant to the defendant's mental state. Rule 3.851(g)(12) (A-C), Fla. R. Crim. P.

A criminal defendant also has a constitutional right to assistance of counsel at all critical stages of a criminal proceeding under the Sixth Amendment to the United States Constitution and Article 1 § 16 of the Florida Constitution. *See Estelle v. Smith,* 451 U.S. 454 (1981) and *Kirby v. Illinois*, 406 U. S. 682 (1972).

A criminal defendant also has a constitutional right to waive assistance of counsel and act as his own attorney. *See Faretta v. California*, 422 U. S. 806 (1975). Before a court may accept a waiver, the court must determine that the defendant is competent and that he is intelligently, knowingly and voluntarily waiving that right. *Faretta* at 835. The standard for competency to waive counsel is the same as the standard for competency to stand trial. *Godinez v. Moran,* 509 U. S. 389, 400 (1993).

The issue here is when a defendant's competence to proceed in a capital collateral proceeding is reasonably in question, may he represent himself in that competency proceeding?

The federal courts have consistently held that when the defendant's competence to stand trial is reasonably in question, the court must appoint counsel

and counsel must serve until the competency issue is decided, regardless of the defendant's attempt to waive counsel.

In *United States v. Purnet,* 910 F. 2d 51, 55 (2d. Cir. 1990), the defendant's request to proceed pro se was granted by the court after defendant's second appointed counsel withdrew. The court had expressed concerns about the defendant's competency and granted a motion by the government's to have him examined. The court appointed a psychiatrist to examine the defendant who filed a report finding Purnet competent. *Id.* at 53. The defendant believed the report was fabricated but told the judge to do "whatever they want to do." *Id.* The court accepted the findings of the psychiatrist and found Purnet competent to proceed without a hearing. Purnet challenged his waiver on appeal because it was made prior to a valid determination of his competency. *Id.* The Second Circuit reversed, and stated:

> The trial court should not accept a waiver of counsel unless and until it is persuaded that the waiver is knowing and intelligent. Logically, the trial court cannot simultaneously question a defendant's mental competence to stand trial at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel.

Id. at 55.

In *U. S. v. Klat,* 156 F. 3d 1258 (D. C. Cir. 1998), the D.C. Circuit addressed the same issue. At a hearing on defense counsel's motion to withdraw, the defendant exhibited bizarre behavior. The court allowed counsel to withdraw and

then ordered the defendant examined for competency. The expert concluded that the defendant was competent. Klat appeared pro se at the competency hearing. The court found her competent and ordered her to stand trial. She examined two witnesses and told the court she could not continue. Standby counsel took over and Klat was convicted. The D. C. Circuit found that the trial court violated Klat's Sixth Amendment right to counsel, and stated:

> We find support for our conclusion from the [United States Supreme] court decision in *Pate v. Robinson*, 383 U. S. 375 (1966), where it found that a defendant could not waive his right to a competency hearing when a there was a question as to his competency to stand trial. "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384. Likewise, we find it contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel. Such a defendant may not reasonably appear pro se until her competency to stand trial has been resolved.

Id. at 1263 (footnote omitted). The court also cited to *Godinez*, in which the court held the standard for competency to waive counsel is the same as the standard for competency to proceed. 509 U. S. at 400.[17]

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[17] *See also United States v. Frazier-El*, 204 F. 3d 553, 559 (4th Cir. 2000) (trial court properly refused to hear defendant's *Faretta* motion before determining his competence to stand trial); *United States v. Boigegrain,* 155 F. 3d 1181, 1186 (10th Cir. 1998) (trial court properly waited to rule on defendant's motion to dismiss counsel until issue of defendant's competency to stand trial had been resolved); *State v. Taylor*, 2008 WL 624913 (Tenn. Crim. App. 2008) (failure to appoint

Under the federal cases, a court cannot logically question a defendant's competence to stand trial while at the same time find the defendant competent to waive counsel.

D. *Larkin v. State* and this Court's recent analysis of competency and self-representation.

This court recently decided the case of *Larkin v. State,* 147 So. 3d 452 (Fla. 2014). Larkin was charged with the first-degree murder of his parents in Nassau County, convicted, and sentenced to death. *Id.* On appeal, he argued that his Sixth Amendment right to counsel was violated when the trial court failed to appoint counsel for him during a hearing regarding his competence to proceed after the guilt phase and before the penalty phase. *Id.* at 460, 464.

Larkin was appointed a public defender, Brian Morrissey, to represent him on all charges after his arrest. *Id.* at 454. He moved to discharge his attorney for conspiring against him and the court denied his motion. *Id.* Larkin decided to keep counsel. *Id.* Larkin then retained private counsel who subsequently withdrew. *Id.* at 455. In October 2011, Larkin decided to represent himself and the trial court conducted an extensive *Faretta* hearing. *Id.* At the hearing, Larkin was advised of his right to counsel and the limitations and disadvantages of self-representation. *Id.* Larkin was 38 years old at the time of the hearing, understood English, had two

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counsel to represent defendant at competency hearing deprived defendant of his right to counsel), *et al.*

years of community college, was not impaired, had never previously represented himself, but had read some of the books in the law library. *Id.* He had been living in Costa Rica, managing his family's dive shop for many years. *Id.* at 456.

The court determined that Larkin was competent to represent himself under *Faretta* but appointed Morrissey as standby counsel. *Id.* at 455. Over the course of several months, Larkin attended three hearings, affirming each time he wanted to represent himself during *Faretta* inquiries. *Id.* At a suppression hearing on January 5, 2012, the court conducted another *Faretta* inquiry and determined Larkin was competent to represent himself. *Id.* Larkin then argued the motion and lost. *Id.*

Larkin represented himself at the trial that started on January 9, 2012. *Id.* He allowed the state to select the jury, but made an opening statement, presented witnesses, offered argument for a judgment of acquittal, called four witnesses, and made a closing argument. *Id.* He was found guilty of both murders. *Id.* at 460. After the verdict, the court offered counsel to Larkin again who said he would consider it. *Id.*

On January 12, 2012, the court renewed the offer of counsel, which Larkin declined, and conducted another *Faretta* hearing. *Id.* Morrissey, as standby counsel, advised the court that he believed Larkin suffered from a delusional

disorder based upon his observations of Larkin at trial. *Id.* at 460-461. Without more, the court ordered an evaluation by an expert. *Id.*

The expert, Dr. Meadows, interviewed Larkin and conducted an MMPI II. *Id.* He concluded although Larkin did not suffer from a psychotic disturbance, he did suffer from a delusional disorder under the DSM-IV-TR. *Id.* Meadows reported that Larkin had an unacceptable understanding of the adversarial nature of the criminal trial process, and could not disclose pertinent facts or testify relevantly. *Id.*

A hearing was held on January 19, 2012 on Dr. Meadows report. *Id.* at 461. Larkin waived counsel again after another *Faretta* hearing. *Id.* The court called Dr. Meadows as a witness. *Id.* Meadows repeated his diagnosis of delusional disorder resulting in a finding of incompetence to proceed, but acknowledged that he did not know how much of the trial Larkin conducted. *Id.* The court stated that his observations did not square with Dr. Meadows'. *Id.* Larkin asked questions of the expert. *Id.* Standby counsel Morrissey declined an offer from the court to question Dr. Meadows. *Id.* at 462.

The court ordered a second evaluation from Dr. Waldman, a psychiatrist. *Id.* At a hearing held to accept Dr. Waldman's report, he testified that Larkin fully appreciated the charges against him and penalties he faced, understood the process,

could disclose pertinent facts, knew what could exculpate him, and could challenge the state's witnesses. *Id.*

Because of the split opinions, the court ordered a third report from Dr. Mhatre, another psychiatrist. *Id.* He found no psychosis and concluded Larkin was competent in his report. *Id.* The court held another hearing to receive Dr. Mhatre's testimony. *Id.* Larkin declined representation after another *Faretta* inquiry. *Id.* The court found Larkin competent to represent himself. *Id.* Following his conviction, Larkin appealed.

This court rejected Larkin's Sixth Amendment argument that the trial court should have appointed counsel for him during his competency hearings, and found that Dr. Meadows and standby counsel Morrissey did not raise a reasonable doubt as to Larkin's competence to conduct his competency hearing. *Id.* at 464.

E. McGirth's case is easily distinguished from the facts of *Larkin*.

The facts in *Larkin* are distinguishable from those in McGirth's case. Larkin grew up in a comfortable home with an intact family, attended college for two years, and then managed the family's dive shop in Costa Rica for many years. He was well traveled.

Larkin tried to discharge his court-appointed counsel. When the court refused to discharge counsel, Larkin retained private counsel. That attorney subsequently withdrew in September 2011. Larkin argued motions to exclude

evidence and conducted his double-homicide trial. His diagnosis from Dr. Meadows was that he suffered from a delusional disorder. This Court carefully noted in its opinion each of the eight times Larkin's trial court renewed the offer of counsel and conducted an extensive *Faretta* hearing. In an abundance of caution because it was a death penalty case, Larkin's trial court ordered a third evaluation after the first two doctors split on their opinions of whether Larkin was incompetent. Larkin never asked for new counsel; he simply wanted to represent himself.

The facts in Renaldo McGirth's case are much different. McGirth did not know who his father was, grew up in relative poverty, was sexually battered at eight or nine by an older female relative, was committed to the Department of Juvenile Justice at age ten for one year, and again at twelve for a sexual battery, obtained his high school degree at the Lake County jail, received multiple serious head wounds, had a discernible injury to the frontotemporal and/or subcortical areas of his brain that affect judgment, and was diagnosed as suffering from a psychotic disturbance by Dr. Berland. R2, pp. 381 – 385.

McGirth was 18 at the time of the offenses and 24 at the time of the competency hearing. TR1, p. 1; R30, p. 24. He made clear to the court why he wanted to discharge counsel; he wanted his CCRC-Middle lawyers to focus more on guilt phase issues. R30, p. 23 – 61. During a recess at his *Nelson/Faretta*

hearings, he tried to compromise with counsel so that he could have representation, asking that they simply listen to him and discuss their plans with him, but that compromise failed when the first witness called by counsel, Dr. Berland, described the defendant as suffering from a psychotic disturbance. R30, pp. 81 – 82.

The court then found McGirth competent to proceed under *Faretta* and an evidentiary hearing date was set. R30, p. 75, 121. The *Faretta* inquiry was conducted at the urging of the prosecutor. R30, p. 62.

On the date of the evidentiary hearing, standby counsel Gemmer filed a motion to determine McGirth's competency, citing his observations of McGirth in the weeks leading up to the hearing. R33, p. 6. A *Faretta* inquiry was conducted at the urging of the prosecutor again. A competency hearing was scheduled for November 24, 2014. R11, p. 1357.

At the competency hearing, the prosecutor asked the court to inquire who would be representing the defendant. R34, p. 6. McGirth said he wanted to represent himself if he could not get new counsel. R34, p. 7. The court asked the prosecutor if he had to conduct a *Faretta* inquiry. *Id.* McGirth asked for new counsel and his request was denied.

McGirth always wanted new counsel. McGirth did not wish to conduct his competency hearing but was not given the option of a new lawyer. The court's

speculation about a Catch – 22 came to fruition: McGirth had to conduct a direct examination on Dr. Berland.

The court ruled at the end of the hearing that McGirth was competent.

F. Conclusion.

The court discounted the testimony of Dr. Berland and accepted the testimony of Dr. Prichard. Unlike the court in Larkin, McGirth's judge did not question Dr. Berland extensively about the basis for his opinion that McGirth was incompetent and relied heavily on the testimony of Dr. Prichard. It was unclear if Dr. Prichard had reviewed McGirth's PET scan for a brain injury or knew that he suffered from seizures and hallucinations, had multiple head injuries, and meningitis as a child. He did not testify to McGirth's childhood difficulties and what affect they might have had on McGirth's mental status. He had reviewed Dr. Wood's report on McGirth's mental health status and Dr. Legum's report that McGirth had been sexually abused as a young child, but did not remark upon them. He stated that family reports were generally unreliable because of inherent bias. R34, p. 67. Neither McGirth nor the prosecution had any interest in developing any of that testimony, as it would have raised serious questions about McGirth's mental competence. The court did not inquire, either.

The court did not seek a third opinion, as he did not feel it was necessary. The court did not review the videotaped evaluations by the experts with McGirth.

The court summarily ruled at the conclusion of the hearing that McGirth was competent to represent himself at the competency hearing and on the 3.851 claims. R34, pp. 82 – 84.

If the court finds the defendant competent to proceed, Fla. R. Crim. P. 3.851 (g) (12) requires the court to make findings of fact in the order in support thereof, attach the experts' reports to the order, and attach "copies of other psychiatric, psychological, or social work reports" relevant to the inquiry. The experts' reports that testified at the hearing were not attached, nor were the reports from Dr. Wood, Dr. Legum, Dr. Krop, Dr. Cunningham and the PET scan results.

McGirth should have been represented by conflict-free counsel at his competency hearing, who could have effectively presented evidence of McGirth's mental health issues as they related to his competency to proceed. As conducted, the competency hearing was deficient.

V. THE COURT SHOULD HAVE GRANTED MCGIRTH'S FACIALLY SUFFICIENT, VERIFIED MOTION TO DISQUALIFY THE COURT.

On February 13, 2015, McGirth filed a motion to disqualify the circuit court under Rule 2.160, Fla. R. Jud. Admin. (renumbered as Rule 2.330.)

A. The requirements of Rule 2.330, Fla. R. Jud. Admin.

Rule 2.330 requires that a motion to disqualify be in writing, allege specifically the facts and reasons upon which the movant relies, that it be sworn to,

and that it include the dates of all previously granted motions and orders disqualifying in the case.

A motion to disqualify a trial court is legally sufficient when "the facts alleged would place a reasonably prudent person in fear of not receiving a fair trial." *Diaz v. State*, 132 So. 3d 93 (Fla. 2013) (citing to *Griffin v. State*, 866 So. 2d 1, 11 (Fla. 2003)) and a mere subjective fear of bias is not enough to warrant disqualification. *Lynch v. State,* 2 So. 3d 47, 78 (Fla. 2008) (quoting *Arbelaez v. State*, 898 So. 2d 25, 41 (Fla. 2005)).

B. McGirth's motion to disqualify the court satisfied the technical requirements of Rule 2.330, Fla. R. Jud. Admin.

McGirth satisfied the technical pleading requirements of the rule: His motion was in writing, was verified, and cited with specificity incidents that led him to believe the court was biased in favor of the state and against him. McGirth recited the following examples of bias by the court against him or in favor of the state or standby counsel:

- The court's refusal to set for hearing the appointment of CCRC-Middle as standby counsel after naming CCRC-South as standby in an earlier order.
- The court's refusal to reconsider the standard for appointing new counsel under *Nelson.*

- The court's denial of McGirth's motion to extend time for filing an amended 3.851 motion when CCRC-Middle did not deliver all records in a timely manner and after the state objected to the defendant's motion.
- The court's granting of an extension on McGirth's January 2, 2014 motion to extend time only after the state filed a response suggesting that the evidentiary hearing date be converted into a status conference to set up a realistic schedule to avoid an undue burden on the state.
- The court's refusal to assist McGirth in gaining access to viewing the CDs delivered to the prison by CCRC-Middle by dismissing his writ of mandamus and the court's statement that McGirth's difficulty viewing the evidence was not good cause for an extension of time.
- The court's denial of McGirth's motion for reconsideration of his motion to extend time for filing an amended motion given the difficulties McGirth had in viewing the evidence in the short time period allowed. The defendant also complained that the state had misrepresented the facts in its opposition to the motion.[18]

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[18] At the January 21, 2014, status conference, Gemmer advised the court that he had turned over to McGirth more than 30,000 pages of documents copied four pages to the sheet of paper, making them difficult to read, and prosecutor Brad King advised there were several dozen CDs or other media files to be viewed by McGirth. R32 pp. 6 – 7, 13. Gemmer had the documents and media files delivered to the prison on January 22, 2014. R6, pp. 1074 – 1078. McGirth attached copies Gemmer's inventory of items delivered to the prison for McGirth's review, a copy of a

- The court's April 8, 2014 denial of defendant's motions filed for appointment of a defense expert on mental health issues, for a continuance of the evidentiary hearing, for amendment of the post-conviction motion and other motions.
- The court's May 2, 2014 denial of McGirth's motion for continuance.

McGirth further alleged in his motion to disqualify the court's granting of motions for the state, denial of McGirth's motions unless the state agreed, and the reappointment of CCRC-Middle to McGirth's case as standby counsel without a hearing. McGirth also voiced concern that the court "ruled and based his orders off of what the state said and requested." McGirth complained that the court held him to a higher standard than CCRC-Middle or the state.

McGirth alleged that the court failed in its duties to "monitor the performance of assigned counsel" under Fla. Stat. 27.711 and to properly review the allegations of deficient performance that led McGirth to ask for new counsel at his aborted September 27, 2013 evidentiary hearing.

C. Conclusion.

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grievance he filed at the prison for restricting his time to review the evidence along with time logs for when he had been permitted to view the evidence to his Writ of Mandamus that the court denied. R6, pp. 1064 – 1097.

McGirth's fear that he would not receive a fair and impartial hearing was objectively reasonable and McGirth's motion was facially sufficient. The trial court should not have denied the motion as facially insufficient.

VI. MCGIRTH'S WAIVER OF COUNSEL AND WAIVER OF HIS EVIDENTIARY HEARING WERE NOT INTELLIGENTLY, KNOWINGLY OR VOLUNTARILY MADE AFTER THE COURT DENIED MCGIRTH'S MOTION FOR APPONTMENT OF CONFLICT-FREE COUNSEL, MOTION FOR CONTINUANCE, AND MOTION TO DISQUALIFY THE PRESIDING JUDGE IN VIOLATION OF HIS RIGHT TO COUNSEL AND RIGHT TO A FAIR ADVERSARIAL PROCESS.

A competent defendant may waive his right to counsel and his right to trial or hearing so long as the waiver is unequivocal and knowingly and intelligently made. *Faretta v. California*, 422 U. S. 806, 807 (1975), *Hernandez-Alberto v. State*, 126 So. 3d 193, 200 (Fla. 2013); *et al.* McGirth's waiver of counsel and subsequent waiver of his evidentiary hearing on February 16, 2015, were not voluntarily and freely made for the reasons set forth below.

A. The February 16, 2015, hearing.

McGirth's evidentiary hearing was scheduled to start on February 16, 2015. At the beginning of the hearing, McGirth declined the court's offer to reappoint standby counsel David Gemmer to represent him. R36, p. 5. McGirth then waived his right to an evidentiary hearing. R36, p. 5. He gave no explanation for his decision at that time. R36, p. 25.

The court asked if McGirth had to execute a written waiver. R36, p. 7. The state did not believe a written waiver was necessary, but suggested taking a brief recess to research the issue. *Id.*

Standby counsel Gemmer asked the court for assurances that McGirth would still be able to appeal the court's prior rulings, mentioning specifically the order denying appointment of co-counsel, the order denying recusal, and the order denying a continuance, and offered McGirth's waiver as "bizarre behavior" that indicated that McGirth "continues to be incompetent to go forward and/or represent himself." R36, p. 6.[19]

The court and prosecutor conducted an inquiry on the voluntariness of McGirth's waiver of counsel and the hearing. R36, pp. 8 – 26. McGirth answered yes, or no, or "I understand" to all questions and had no questions for the court or standby counsel. *Id.* He acknowledged that he was giving up the right to offer evidence on all of his claims in his motion and amended motions to set aside his judgment and sentence and that the court would deny the claims as a result. R36, pp. 16 – 17.

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[19] Gemmer added, "And also to make clear that my understanding in giving him advice is that this is not turning into a volunteer situation where there would be a full colloquy and going immediately to warrant eligibility, that he still wishes to appeal the prior ruling." R36, p. 7.

The prosecutor asked McGirth if CCRC-Middle had issued subpoenas for him. R36, pp. 22 – 23. The state advised that nearly all of the 21 witnesses listed were available and that McGirth's mental health experts Drs. Wood and Cunningham would be available later in the week to testify. R36, p. 23. The names of the witnesses in attendance were not announced for the record.

The court did not inquire as to whether McGirth had received advice and counsel from Gemmer. The court accepted McGirth's waivers of counsel and the hearing. R36, p. 26.

On March 6, 2015, McGirth filed a motion for reconsideration of his waiver, arguing his due process rights had been continuously violated by the court, alleging he had inadequate time to prepare, and that only mitigation witnesses were present on the morning of the hearing due to the failure of Gemmer to subpoena the guilt-phase witnesses. R19, pp. 1778 – 1792, and R20, pp. 1793 – 1816. That motion was denied. R21, pp. 2069 – 2072.

B. McGirth's faced extraordinary and unreasonable challenges in subpoenaing and preparing his expert and lay witnesses for the evidentiary hearing.

At the close of McGirth's competency hearing on November 24, 2014, the court found McGirth competent to proceed. R34, pp. 83 – 84. The evidentiary hearing was set for February 16, 2015, and there was discussion about compelling the attendance of witnesses for McGirth. R34, p. 84, 88. The court recalled that

McGirth had asked the prosecutor to subpoena witnesses for the evidentiary hearing set for May 27, 2014, that was postponed when standby counsel Gemmer filed a motion to determine McGirth's competence to proceed. R34, p. 84. McGirth reminded the court that he made the request because he had no power to issues subpoenas. R34, p. 84. The prosecutor offered to issue subpoenas for the new evidentiary hearing if McGirth would provide him with a witness list. R34, p. 85. The court asked standby counsel Gemmer and the state to help with the witnesses, adding that McGirth, as the pro se litigant had control of his presentation. R34, p. 85.

The prosecutor then advised the court that he had no control over the experts previously retained by CCRC-Middle. R34, p. 89. McGirth advised the court that he would have to "go through Gemmer" to get the experts to court. R34, p. 89. The court asked McGirth to send a witness list to the prosecutor or Gemmer within 30 days for lay witnesses to be subpoenaed for the hearing. R34, p. 89.

In his written order setting McGirth's evidentiary hearing for February 16, 2015, the court directed McGirth to "provide the names and addresses to David Gemmer and Brad King of any lay witnesses that he may want to have testify at this evidentiary hearing." R21, pp. 1393 – 1394. The order was silent on who McGirth should notify to produce his expert witnesses for the hearing. *Id.*

C. McGirth diligently prepared for his evidentiary hearing and filed various motions requesting additional time to prepare his case.

Over the next two and a half months, between the competency hearing and evidentiary hearing scheduled for February 16, 2015, McGirth diligently prepared for his evidentiary hearing as evidenced by his filing the following pleadings:

- Witness list on December 23, 2014[20]
- Motion to amend his 3.851 claims dated January 16, 2015 (adding ineffective assistance of counsel claims for all previous claims made related to prosecutorial misconduct claims under *Brady/Giglio* that were previously filed) R18, pp. 1419 – 1427.
- Motion for transport of prisoners/witnesses Derreck Hubbard, Jarrod Roberts, and Theodore Houston on February 2, 2015.
- Emergency motion for permission to bring his legal files and hygiene products to the Marion County Jail on February 2, 2015. R18, pp. 1412 – 1432.

The court accepted the motions to amend and ordered the state to respond by February 11, 2015. R18, pp. 1446 – 1447, which it did. R18, pp. 1448 – 1488.

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[20] The witness list is not found in the record. The court directed the defendant to send the list to the prosecutor and Gemmer. The state acknowledged receipt of a witness list on December 23, 2014, in its response to McGirth's motion to continue. See state's response, R18, p. 1511.

On February 9, 2015, McGirth filed a motion to continue. R18, pp. 1497 – 1499. On February 11, 2015, he filed a motion to appoint conflict-free co-counsel or, alternatively, conflict-free counsel under 3.112, Fla. R. Crim. P. and Fla. Stat. § 27.53, and a motion to halt the transportation of three state prisoners to Marion County for the hearing. R18, pp. 1500 – 1507. The motion to continue was dated stamped "received" at Union Correctional Institution on February 5, 2015, where McGirth was housed and was clocked into the Marion County clerk's office February 9, 2015.

McGirth requested a continuance because standby counsel Gemmer notified him that his mental health experts would refuse to testify if McGirth was representing himself. R18, p.1497 – 1499. McGirth asked for additional time to consult with the experts or find replacements. *Id.* McGirth asserted that the experts' evidence regarding his mental health issues would be offered to "rebut factors in aggravation and present factors in mitigation" that had not been presented at the penalty phase at trial. *Id.* McGirth stated that he "had every intention of exercising his right to present evidence and testimony in support of all the mitigating claims that the defendant has been granted an evidentiary hearing on." *Id.*

D. McGirth continued to object to Gemmer and CCRC-Middle's incompetent representation and requested conflict-free co-counsel or conflict-free counsel.

Prior to the February 16th evidentiary hearing, McGirth also requested appointment of conflict-free co-counsel or for conflict-free counsel and alleged an "ongoing conflict... manifested by CCRC throughout the Defendant's post-conviction proceedings." R18, pp. 1501 – 1504. He requested appointment of an attorney who "would provide straightforward answers and assistance" and conduct the examinations of the witnesses who would refuse to testify if McGirth proceeded pro se. R18, pp. 1501 – 1504.

The state filed its response to McGirth's motion and asked the court to deny the motion. R18, pp. 1508 – 1521. The state questioned McGirth's allegation that the witnesses would refuse to testify if McGirth questioned them. R18, p. 1514. However, in an email prosecutor King attached in support of the motion from his investigator Tamara Perry stated:

> Dr. Cunningham's general policy is not to accept pro se defendants, and that at the time this started, McGirth was represented by counsel. Normally he would withdraw from the situation, but he understands the court may not even allow him to withdraw and he has indicated to counsel he will not abandon the defendant. He would not defy a subpoena or court order... He agrees with the wording of the Motion to Continue in part, the credibility issue is that as a witness that someone with legal experience be able to raise objections and to ask appropriate questions. He had not received a subpoena.

R18, p. 1521.

Regarding the attendance of Dr. Robert Berland, Ms. Perry wrote that he "[h]as issue coming and testifying. He said the issue was coming from Cunningham. He has not been subpoenaed and would like a subpoena or court order." R18, p. 1521.

The state was not privy to the conversation between McGirth and standby counsel Gemmer, who was responsible for getting the experts to the hearing.[21] Regardless, the state's own investigation confirmed that there was a problem with at least two of the doctors testifying for a pro se defendant. Furthermore, McGirth had no ability to personally speak to his experts from death row.

E. The February 13, 2015, hearing.

The court convened a hearing on Friday, February 13, 2015, to consider McGirth's motions. R35, pp. 1 – 44. Gemmer appeared by telephone. R35, p. 3.

When asked by the court if McGirth wanted Gemmer from CCRC-Middle reappointed, McGirth said he had a continuing conflict with his standby counsel

[21] At the end of the competency hearing on November 24, 2014, the prosecutor offered to subpoena lay witnesses for McGirth for the hearing. The court mentioned that this had been done before the evidentiary hearing scheduled for May 27, 2014, when standby counsel moved for a determination of McGirth's competence to proceed. Mr. King did not want responsibility for securing the attendance of McGirth's experts. McGirth said he "would go through Gemmer" and the court directed him to do so. Gemmer was present at the competency hearing. *See* R34, pp. 84 – 89.

and wanted appointment of a different attorney. R35, pp. 5 – 12. The court advised McGirth that he had not found a conflict at the *Nelson* hearing[22] and had discharged CCRC-Middle, and therefore there could be no continuing conflict. R35, p. 6. McGirth responded, "Right. But it's a conflict because the things that they're supposed to help me with they won't do. That's why I filed a motion to continue pertaining to the expert witnesses." R35, p. 6.

The court advised McGirth that it was not Gemmer's responsibility as standby counsel to make arrangements for conferences with witnesses. R35, pp. 9 – 10, 23. McGirth replied that he had no choice but to go through Gemmer because the court appointed a CCRC-Middle investigator to assist McGirth with locating and interviewing witnesses, adding, "In every turn, my hands are being tied."[23] R35, p. 10.

Gemmer stated that he told McGirth to get his experts appointed by the court because CCRC-Middle was no longer counsel of record and the "ball was in McGirth's court as far as the experts." R35, p. 3, 11. McGirth disputed Gemmer's

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[22] The *Nelson* hearing took place on September 23, 2013.

[23] *See* McGirth's Motion for Appointment of Investigator filed January 8, 2014, R6, pp. 1038 – 1040, and the transcript of the January 21, 2013. R32, pp. 16 – 17. The court granted the motion at a status conference held on January 21, 2014. McGirth asked if he could use CCRC's investigator. At that same hearing, McGirth confirmed that he was going forward with the mental health claims and would include them in his amended claims. R 32, pp. 19 – 20.

account and said Gemmer told him the witnesses had to go through CCRC-Middle. R35, pp. 11 – 12.

McGirth told the court that he asked Gemmer and CCRC-Middle for help because the state would not pay for the experts' travel and he needed someone who could get approval from JAC for his experts' costs. R35, pp. 19 – 20. McGirth said Gemmer had refused to help him after promising him he would. R35, p. 20. McGirth was distressed that he would not be able to exercise his "due process" by interviewing his experts in advance. R35, pp. 18, 22 – 23. McGirth added:

> ...I filed my witness list, I filed my amendments, I met every deadline you gave me, even when I approached the court and said it's gonna be burdensome, they didn't let me see my records, my file, the court wouldn't give me no leeway. So I filed my motions, I've been doing everything within my power....
>
> So, only thing I'm saying, Your Honor, is I'm trying to protect my due process. Only thing I can do is bring it up and let you rule on it. Like I said, Your Honor, I show good cause why I should get a continuance; I need it. They haven't let me talk to my witnesses.

R35, p. 20, 22.

The following exchange then occurred between the court and McGirth:

Court: Do you think it was within my discretion simply to have denied way back when your request for an investigator?

McGirth: I don't know.

Court: I could have done that and then, you know, we wouldn't be having this conversation.

McGirth: Probably be having a totally different discussion.

Court: Probably be having a different discussion and I guess that would be up to the higher court, depending on how your case turns out, after the conclusion of hearing and my order, so.

R35, pp. 23 – 24.

The court told McGirth that once he decided to represent himself, "it's your job to run the case. See, standby counsel's not just for your benefit, it's for the court's benefit to facilitate the orderly process of the case." R35, p. 25. McGirth then reminded the court that prosecutor King agreed to subpoena witnesses for McGirth. R35, p. 25.

The prosecutor offered to arrange a telephone conference for McGirth and his experts later that day, and McGirth accepted the offer. R35, pp. 26 – 28.

The court then denied McGirth's motions to continue and for appointment of counsel or co-counsel. R35, p. 28. McGirth then filed a motion to disqualify, which the court denied. R35, pp. 34 – 35. *See* discussion of the motion to disqualify in Argument V, *supra.*

There was further discussion between the state and McGirth about the location and availability of McGirth's witnesses. R35, pp. 37 – 40. McGirth did

not have his witness lists with him at the hearing. R35, pp. 37 – 38. King asked if McGirth was referring to the most recent list. R35, p. 38. McGirth replied that he had given Gemmer two lists, including the original witness list, and that he had asked Gemmer to include all names in previous lists filed with the court. R35, p. 38. No inquiry was made of Gemmer as to which witnesses he had subpoenaed for the hearing. He was asked by the prosecutor what time the witnesses were subpoenaed to appear, but was not asked who he had subpoenaed. R35, pp. 40 – 41. The hearing concluded, and the court proceeded with the evidentiary hearing on February 16, 2015, as discussed above.

F. McGirth's waiver of counsel at his evidentiary hearing was not involuntary.

McGirth was faced with a choice of proceeding with incompetent counsel, Gemmer and CCRC-Middle, or representing himself at a critical hearing that would determine whether he lived or died. Gemmer had demonstrated to McGirth consistently throughout the duration of McGirth's post-conviction claim that Gemmer and CCRC-Middle would not offer McGirth competent representation. As discussed in Argument I, *supra*, Gemmer was not knowledgeable of several key matters in McGirth's case, specifically the *McCleskey* and *Alleyne* issues. Gemmer also failed to investigate and develop the evidence that Sheila Miller admitted she shot her mother and Detective Stroup was ordered not to pursue Miller as a suspect. As discussed in Argument III, *supra,* Gemmer filed motions against

McGirth's interest and made unsupported statements about McGirth's preferences when he was not McGirth's counsel or standby counsel, and got himself appointed as standby counsel over McGirth's objections. Gemmer's role as standby counsel was very limited and his only court-ordered obligation to McGirth was to subpoena McGirth's witnesses for his evidentiary hearing, and he did not even perform that task competently. McGirth arrived at his evidentiary hearing to find that Gemmer had only subpoenaed some of his witnesses. In light of all of Gemmer's failings, McGirth requested conflict-free counsel or conflict-free co-counsel instead of Gemmer and CCRC-Middle, and the court refused his request.

G. Reviewing the record as a whole, McGirth's waiver of his evidentiary hearing on February 16, 2015, was not voluntary.

Clearly, McGirth's waiver was involuntary. McGirth was eager to conduct the hearing, evidenced by his request that his files and personal hygiene items be sent to Marion County in advance of the hearing. It was only when Gemmer informed him that his experts were unwilling to testify for a pro se defendant that McGirth asked for the continuance and renewed his request for replacement of counsel. At the hearing on McGirth's motions, there was general discussion about witness lists and subpoenas, but no announcement of the names of witnesses subpoenaed by the state or Gemmer was ever made. According to the court, that responsibility lay with Gemmer and the prosecutor, Brad King.

Furthermore, throughout the course of the case, the court unreasonably denied McGirth's motions to continue hearing dates so he could adequately prepare his case. McGirth faced numerous challenges, including a massive record on appeal, no access to his witnesses through the investigator provided by CCRC-Middle, and no control over the witnesses subpoenaed on his behalf. McGirth was told he was responsible for his own presentation of his case, yet the court set unreasonable deadlines and obstacles.

For example, at the September 23, 2013 hearing, the court wanted McGirth to proceed to hearing that day, even after McGirth said he wanted to amend his claims and add witnesses. R30, p. 108. It was only at the urging of the prosecutor that the hearing was continued. R30, pp. 114 – 115.

After the court discharged Gemmer at the September 23, 2013 hearing, McGirth's evidentiary hearing was rescheduled for December 2, 2013. R30, pp. 118 – 119. Gemmer did not provide copies of the records to McGirth within two weeks as ordered. R5, pp. 980 – 981. The court denied McGirth's motion to continue after being advised that the records had not been timely provided to McGirth and that there were in excess of 30,000 pages of records for review. R6, pp. 1041 – 1042. The court later continued the hearing at the request of the state. R6, p. 1042.

At the January 21, 2014 status conference, the court was advised again by Gemmer of the enormous volume of written records provided to the defendant and of his need to receive and review dozens of audio and audio-visual CDs and DVDs. R32, pp. 5 – 24. The court set the evidentiary hearing for May 27, 2014.

The court denied the defendant's motion to continue the May 27th hearing and his subsequent petition for writ of mandamus. R6, pp. 1164 – 1165. The court's repeated refrain to McGirth was he knew that he would encounter problems as a prisoner in preparing his case, but that was the tradeoff for choosing to represent himself. CCRC-Middle had more than a year to review the records under optimal circumstances. McGirth, a death row prisoner with serious restrictions on access to records, had four months to prepare, no access to witnesses except through an investigator with CCRC-Middle, and no ability to subpoena witnesses.[24]

McGirth appended a list of the CDs, videotapes and DVDs he received from CCRC-Middle and proof of his lack of access to his records to his petition for writ of mandamus. R6, pp. 1064 – 1097. Included within those records is a notice dated February 10, 2014, to McGirth from DOC supervisor D. J. Andrews that McGirth had exceeded his storage space and would have to mail home all CDs and

[24] Death row inmates who have filing deadlines imposed by a court order "shall be permitted to visit the unit's law library at least once per week up to two hours..." Fla. Admin. Code R. 33-501.301(4)(d), and (11)(a)-(e).

DVDs within 30 days. R6, p. 1084. According to DOC, McGirth had12 cassette tapes and 92 CDs at the prison. R6, p. 1089. The court dismissed that petition. R6, pp. 1062 – 1063.

McGirth filed a Motion for a Writ of Prohibition with this Court on April 23, 2014, asking for a continuance of the evidentiary hearing and notified the circuit court of its filing on May 14, 2014. R7, pp. 1248 – 1251. The court then denied the defendant's motion to continue the May 27, 2014 evidentiary hearing. R6, pp. 1164 – 1165.

McGirth's requests to continue the May 27, 2014, and April 16, 2015 evidentiary hearings were reasonable, and the court abused his discretion by not granting them. Under the unfair and onerous conditions the court set for McGirth's self-representation, McGirth's waiver of his evidentiary hearing was not voluntary.

VII. THE PLAIN LANGUAGE OF FLORIDA STATUTE SECTION 775.082(2) REQUIRES THAT THIS COURT VACATE McGIRTH'S DEATH SENTENCE AND REMAND HIS CASE TO THE CIRCUIT COURT IN THE FIFTH JUDICIAL CIRCUIT TO BE RESENTENCED TO LIFE IN PRISON WITHOUT PAROLE.

Notwithstanding other issues raised in this appeal, McGirth's sentence should be reduced to life without parole after the United States Supreme court ruled in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that sections 921.141(2) and (3) of

Florida's death penalty sentencing scheme violate the Sixth Amendment to the United states Constitution.

Specifically, the *Hurst* court found that Florida's death penalty sentencing scheme violated the Sixth Amendment's right to trial by jury because it required the judge, not the jury, to make the critical findings needed for imposition of the death penalty. *Id.* at 621 – 622. Writing for the eight to one majority, Justice Sotomayor stated: "We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619.

Florida Statute §775.082(2) (2015) provides:

> In the event that the death penalty in a capital case is found 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). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the state Constitution or the Constitution of the United States.

Under the plain language of §775.082(2), this court should vacate McGirth's death sentence and remand his case to the circuit court of the Fifth Judicial Circuit for imposition of a life without parole sentence. In the alternative, McGirth should be granted a new sentencing proceeding.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing Mr. McGirth respectfully requests this Court to reverse and remand this cause for an evidentiary hearing, vacate McGirth's death sentence with directions that he be resentenced to life in prison without parole, grant a new sentencing proceeding, or any other relief this Court deems proper.

Respectfully submitted,

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Counsel certifies that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief is typed in Times New Roman 14-point font.

KAREN L. MOORE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic service to Bradley King, Assistant State Attorney (eservicemarion@sao5.org, bking@sao5.org); Stacy Kircher, Assistant Attorney General (Stacey.Kircher@myfloridalegal.com); and by U.S. Mail to Renaldo McGirth, DOC#, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026; on this date, February 24, 2016.

Respectfully submitted,

KAREN L. MOORE