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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This reply will refer to the record on appeal from the post-conviction record 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. Appellant will be referred to as Mr. McGirth or the defendant and Appellee will be referred to as the State or Appellee.

Appellee has filed its answer to Mr. McGirth's initial brief, and this reply follows. References to the Appellee's Answer Brief are made with the letters AB, followed by a "p," followed by the page number. This reply will address only the most salient points argued by the Appellee. Mr. McGirth relies upon his initial brief in reply to any argument or authority argued by Appellee that is not specifically addressed in this reply.

REPLY TO ARGUMENT I

MR. 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*[1] HEARING.

[1] *Nelson v. State*, 274 So. 2d 256 (Fla. 1973).

The State argues that Mr. McGirth is procedurally barred from challenging the sufficiency of the *Nelson* inquiry conducted by the trial court because counsel or Mr. McGirth never challenged it below. AB, p. 27. CCRC-Middle had no standing to challenge the sufficiency of the *Nelson* hearing after the court discharged the agency as counsel at the close of the hearing on March 23, 2013.

The record is clear that Mr. McGirth challenged the trial court's ruling. First, near the close of the *Nelson* hearing on September 23, 2013, and after the court commented that he found no ineffective assistance of post-conviction counsel, Mr. McGirth stated,

> "...[i]f he come in with these frivolous motions and you deny me, and then I try to come back later and say hey, I want to raise this, Mr. King or Mr. Nunnelley or whoever, they gonna say well, why didn't you raise that in post-conviction and he'll be somewhere else representing somebody else getting another paycheck, and I'll be sitting on death row stuck, all because, all because I couldn't get the issues in the motion because me and my attorney was at a clash on how best to represent me."

R30, pp. 54-55.

Furthermore, on December 10, 2013, Mr. McGirth filed a motion for reconsideration of the court's ruling denying him new counsel, in which he complained that the court employed the wrong standard[2] at the hearing on

[2] Mr. McGirth argued that Fla. Stat. §§ 27.710-.711 was the sole mechanism for assuring competent representation for death-sentenced defendants in post-conviction proceedings and that *Nelson* did not apply in post-conviction cases. R5,

September 23, 2013 hearing. The court denied Mr. McGirth's motion without affording him the opportunity to be heard. R6, pp. 1008-1010. Mr. McGirth then asked for replacement counsel at the May 27, 2014 evidentiary hearing where his standby counsel moved to have Mr. McGirth declared incompetent,[3] at the ensuing competency hearing held on November 24, 2014,[4] and at the hearing on his motion to continue and motion for appointment of conflict-free counsel or co-counsel on February 13, 2015.[5]

Thus, the objection to the *Nelson* inquiry was properly preserved for appeal.

Next, the State "rejects" the argument that the trial court had a duty to monitor the performance of post-conviction counsel. AB, p. 26, n.7. Capital defendants are entitled to effective assistance of counsel at the State post-conviction stage. *See Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988), § 27.702(1), Fla. Stat. (2013) and *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993, and Florida Rule of Judicial Administration 2.050*, 797 So. 2d 1213, 1215 (Fla. 2001) (Harding, J., finding four requirements for a "balanced post-conviction system," including prompt appointment of post-conviction counsel, who is given "reasonable time and adequate resources" and

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p. 995 to R. 6, p. 1004. Mr. McGirth also objected to the court's appointment of CCRC-Middle as standby counsel. *Id.*

[3] R33, pp. 29-30 and 46-47.

[4] R34, p. 12.

[5] R35, p. 5.

timely access to all information related to the defendant's case, and "there must be active and reasonable judicial oversight of the post-conviction process to ensure that the defendant's claims are timely investigated and fairly and efficiently processed once presented.")

The State's argument that Mr. McGirth's request to discharge counsel was equivocal is not supported by the record. AB, p. 27. At the evidentiary hearing on September 23, 2013, McGirth unequivocally expressed his desire that his post-conviction lawyers be removed from his case, stating:

> "Sir, first of all and foremost, I would like to ask that you remove these lawyers from my case. I would like to ask that you remove these lawyers from my case and appoint new counsel or allow me to go pro se and appoint a legal advisor because we have issues of conflict between how they want to represent me..."

R30, p. 9.

Mr. McGirth repeated his request for replacement of CCRC-Middle in his Motion Requesting a Hearing to Address the Improper Standard, *Nelson*, Utilized in Assessing Allegations Made Regarding the Representation of CCRC-Middle and Appropriateness of CCRC-Middle Appearing as Standby Counsel in Accord with Sections 27.7001-27.702, Florida Statutes,[6] at the status conference held on January 21, 2014,[7] at the evidentiary hearing on March 24, 2014 when attorney

[6] R5, pp. 995-1000, R6, p. 1001-1005.
[7] R32, pp. 1-25.

Gemmer filed a motion requesting a competency hearing,[8] at the competency hearing on November 24, 2013,[9] in his motion for appointment of conflict-free co-counsel or counsel filed on February 9, 2015 and heard on February 13, 2015,[10] after the evidentiary hearing on February 16, 2015,[11] in his motion for conflict-free counsel for appeal of the denial of his post-conviction claims,[12] and at the hearing on the motion held July 15, 2015.[13] Mr. McGirth's requests were unequivocal.

The State next argues that Mr. McGirth's complaints were too general to warrant replacement of counsel and cites to Mr. McGirth's refusal to answer the trial court's question about which witnesses listed by his counsel he did not want called. AB, p. 33. Mr. McGirth did not refuse to answer the question and the passage is taken out of context. Mr. McGirth said they did not need to go into details about witnesses and strategy if CCRC-Middle agreed there was a conflict, citing to a Miami case as support. R30, pp. 29-30. Mr. McGirth seemed to be asking the court to discharge CCRC-Middle if CCRC-Middle agreed there was a conflict to avoid discussing strategy and witnesses in the presence of the State.

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[8] R33, p. 6.
[9] R34, pp. 1-91.
[10] R18, pp. 1501-1504; R35, pp. 1-35.
[11] R36, pp. 1-29.
[12] R20, pp. 1846-1863.
[13] R38, pp. 1-24.

The court declined to discuss the Miami case, stating that he wanted to follow *Nelson.* R30, pp. 29-30.

Mr. McGirth laid out other specific complaints. He wanted an ineffective assistance of counsel claim raised for trial counsel's failure to raise an *Alleyne v. United States*[14] argument that the State should have been required to plead the aggravating circumstances it intended to prove in the indictment[15] and a racial discrimination claim under *McCleskey v. Kemp*[16] and local case *State v. Michael Woods*. R30, pp. 11-15. McGirth also objected to the *Ring* argument raised by CCRC-Middle in his post-conviction motion. R30, pp. 27-28.

When asked by the court what his attorneys were disregarding that he wanted raised, Mr. McGirth said he needed to review the motion, but that when he spoke to counsel about his concerns about issues raised or not raised, counsel would not discuss the issues with him and would move on to the next topic. R30, pp. 28-29. He also said that his attorney had advised him that he would not raise the *Alleyne* issue because other lawyers were not raising it. R30, pp. 40-61. Additionally, Mr. 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

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[14] 133 S. Ct. 2151 (2013).
[15] See R30, pp. 9-11, 14-15, 25-27 regarding the *Alleyne* claim.
[16] 481 U.S. 279 (1987).

that would also have supported a *McCleskey* claim. R30, p. 31. Mr. McGirth was also concerned that Gemmer had not located another witness, Roxanna Baker, who would have offered impeachment evidence against Sheila Miller. R30, pp. 19-20.

Counsel for the State next argues that the *Nelson* inquiry conducted by the court was sufficient. The record indicates otherwise. The court questioned Mr. McGirth about his specific complaints but had to be prompted by the prosecution to question Gemmer about the complaints made by Mr. McGirth. R. 30, p. 46. Gemmer stated that there was not enough time to investigate all claims and witnesses. R. 30, pp. 50-52. When asked about the *Alleyne* claim, Gemmer said he decided to possibly raise it in a habeas petition. R. 30. Pp. 46-47. When asked about the *McCleskey* claim, Gemmer admitted he knew little about it, but that it sounded interesting and might be viable. R. 30, pp. 18-19. The court never asked when Gemmer intended to investigate or raise the issue and Gemmer never asked for more time to investigate the claim to determine whether it was viable.

The court never asked Mr. McGirth or Gemmer when Mr. McGirth raised the *Alleyne* issue with Gemmer or whether Gemmer told Mr. McGirth that he would not investigate or raise claims because no one else was raising them. R. 30, pp. 40-61.

Most critically, the court did not inquire of Gemmer about whether he investigated possible impeachment evidence against Sheila Miller, the victims'

daughter, about her involvement in the robbery and murder. Gemmer knew about Miller's statement to the police admitting she shot her mother and Detective Stroup's statement that she had been advised not to investigate Sheila Miller's culpability in the crimes prior to the evidentiary hearing. *See* Gemmer's Notice of Providing Specific Documents to Defendant filed on January 3, 2014[17], where Gemmer stated that in addition to the records already provided to Mr. McGirth by his office, Mr. 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 Mr. 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,[18] and Gemmer's statements during the July 15, 2015, 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 State seems to equate volume with substance or quantity with quality regarding the number of transcript pages devoted to the *Nelson* inquiry. AB, p. 33.

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[17] R6, pp. 1013-1015.
[18] R32, pp. 8-9.

It should be noted that the court's instruction of Gemmer on the *McCleskey* issue comprised more than ten pages of the fifty-three pages of the *Nelson* hearing transcript, the first 16 pages of which were devoted to whether Mr. McGirth could proceed pro se and whether he had a right to effective counsel at the post-conviction stage. R30, pp. 9-24. Mr. McGirth raised his objection on page 8 and the hearing concluded on page 61. The court commenced the actual *Nelson* inquiry on p. 24. Nearly 20 pages of the *Nelson* inquiry was a discussion of the *Alleyne* and *McCleskey* issues between the court and Mr. McGirth.

Finally, Gemmer's failure to investigate potentially viable claims under *McCleskey* and *Alleyne* and his failure to further investigate and raise a *Brady/Giglio* claim or an ineffective assistance of counsel claim related to the admission by Sheila Miller that she shot her mother and that Detective Stroup was instructed not to pursue charging Miller was deficient performance that warranted discharge of Gemmer and appointment of new counsel. According to various pleadings and statements by Gemmer, he knew about the Miller admission and the Statement by Det. Stroup that she was told not to follow up prior to the September 23, 2013, evidentiary hearing and did not move to amend the 3.851 motion to raise

it.[19] The court was aware of Gemmer's statements and continued to deny Mr. McGirth's repeated requests for replacement counsel throughout the process.

REPLY TO ARGUMENT II

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

At the close of the *Nelson* inquiry, the court found that post-conviction counsel was not rendering ineffective representation and denied Mr. McGirth's motion. R30, p. 61. The court then asked Mr. McGirth if he wanted to represent himself or keep CCRC-Middle. *Id.* Mr. McGirth opted to represent himself and, without further inquiry, the court found Mr. McGirth competent to make that decision. R30, p. 62. It was then that the State urged the court to make inquiry into Mr. McGirth's "educational background, his mental health background, and

[19] Gemmer wrote in his Notice of Providing Specific Documents to Defendant that he knew of Miller's statement to police and Stroup's statement that she was instructed not to investigate Miller further days prior to the hearing and that it was not a frivolous claim. R6, pp. 1013-1015. At the status conference on January 21, 2014 Gemmer stated that he learned of the Statements a week or two before the evidentiary hearing. R33, pp. 8-9. At the hearing on Defendant's Motion to Appoint Conflict-Free Counsel for his appeal on July 15, 2015, Gemmer stated he was unfamiliar with the *McCleskey* and *Woods* racial discrimination arguments, that his office had received the *Woods* materials prior to the September 23, 2013 hearing, and that he and his office may have been incompetent in developing the claim regarding Miller's admission that she shot her mother and Detective Stroup's statements that she had been told not to further investigate Sheila Miller's involvement in the crimes. R33, pp. 7-11.

those things." *Id.* Only then did the court inquire further. Had the State not posed the question, it appears that the court would not have conducted a *Faretta* hearing.

Counsel for the State argues that post-conviction counsel did not object to the sufficiency of the trial court's *Faretta* inquiry and thus did not preserve the issue for appeal. AB, p. 34. Although post-conviction counsel was discharged after the *Nelson* hearing, he did object to the court allowing Mr. McGirth to represent himself because of his concerns that Mr. McGirth was not competent.[20] R30, pp. 42-43. The issue was preserved.

Counsel for the State argues that there was no credible evidence that Mr. McGirth was incompetent. AB, p. 47. To the contrary, there was ample credible evidence that Mr. McGirth suffered from multiple head injuries as a child and teenager resulting from abuse and accidents, that he suffered from seizures as a young child, that he suffered from physical, sexual, emotional, and psychological abuse as a young child, that he had evinced unusual behavior prior to the crimes for which he was convicted, and that he suffered from hallucinations in the past.[21]

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[20] Gemmer also argued that McGirth might not be permitted to represent himself in postconviction proceedings before the trial court under *Lambrix v. State*, 134 So. 2d 890 (Fla. 2013). R30, pp. 75-80.

[21] In the 3.851 motion before the court, Mr. McGirth's counsel had alleged a *Brady/Giglio* violation for the State's suppression of Dr. Louis Legum's 2002 "psychosexual" evaluation of Mr. McGirth that found he had been sexually abused by an adult female when he was 10 or 11. The report was addressed to Judge Sandra Edwards-Stephens and was filed in case no. 01-2323-CJ. See 3.851 motion, R2, pp. 227-234. There was an additional ineffective assistance of counsel

Before Mr. McGirth raised his motion for replacement of counsel at the September 23, 2013 hearing, the court and counsel had discussed the State's *Frye* or *Daubert* objection to the defense's offer of results of a Positron Emission Tomography testing (PET scan) that indicated Mr. McGirth had brain injuries and insults. R30, pp. 4-6; R2, pp. 375-398. The defense had raised claims related to mental health issues and mitigation in its motion for post-conviction relief and had filed a motion requesting a PET scan for Mr. McGirth supported by an affidavit by a well-qualified neuropsychologist, Dr. Frank Balch Wood, who, after examining McGirth and reviewing extensive documentation, found strong evidence of organic brain damage or disease and requested the PET scan to establish or rule out brain injuries. R2, pp. 375-397. The trial court granted the motion for the PET scan. R3, pp. 437-439. The results of the test indicated brain injuries or insults and the State was objecting to the admission of those results. The court was on notice of extensive evidence suggesting that Mr. McGirth suffered from mental health problems or brain injuries, or both.

Indeed, the court had just heard evidence from Dr. Berland during the briefly revived evidentiary hearing who was of the opinion that Mr. McGirth suffered

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claim for trial counsel's failure to investigate, discover, and fully develop at trial evidence from multiple witnesses to Mr. McGirth's head injuries, seizures, hallucinations, physical and sexual abuse, neglect, and other evidence that could have established statutory mitigators. *See* 3.851 motion, R2, pp. 256-274.

from a psychotic disturbance based upon his review of documentation, interviews of those who knew Mr. McGirth, and MMPI results. R30, pp. 88-93. His testimony was cut short by Mr. McGirth's objection to his testimony and renewed request for new counsel or to represent himself. R30, pp. 93-97.

Mr. McGirth did not want to be found incompetent but acknowledged he had been told that he had a "hole or mass or something in my brain but it don't (sic) seem to be affecting me." R30, p. 65. He obviously did not want mental health issues raised, which according to Dr. Berland, was common among patients facing the death penalty. R30, p. 89. Dr. Berland was still present (he had been sent to a jury room) and available to testify to Mr. McGirth's mental state, had the court asked for an expert's appraisal of Mr. McGirth's competence to represent himself under the *Faretta* standard.

The State cites to *McDonald v. State*, 952 So. 2d 484, 491 (Fla. 2006) to support its argument regarding the sufficiency of the *Faretta* inquiry, yet the *McDonald* case is a perfect example of the kind of *Faretta* inquiry the court should have conducted. In *McDonald*, the court went to great pains to explain to the defendant that his attorneys were well-trained and that he was in danger of waiving any federal review of "dead issues" that his attorneys had or would raise knowing they would lose those issues in state court to preserve them for federal review. *Id.* At no point in the trial court's *Faretta* inquiry did he discuss federal waiver issues

with Mr. McGirth. It is important to note that McDonald was 47 years old at the time of his *Faretta* hearing and had completed two years of college. *Id.* at note 6. Mr. McGirth was 25 at the time of his hearing and received his high school degree from the Lake County jail.

The court's inquiry, in the face of credible evidence of Mr. McGirth's inability to proceed as his own counsel, was clearly deficient.

REPLY TO ARGUMENT III

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

Counsel for the State misunderstands Mr. McGirth's argument in this section. AB, p. 42. At the September 23, 2013 hearing, the trial court denied Mr. McGirth's request for new counsel and found Mr. McGirth competent to represent himself and stressed to Mr. McGirth that he had to act as his own counsel. R30, p. 115. The court did not rule on who would be appointed as standby counsel, but declined to appoint CCRC-Middle. R30, p 105-106. The court issued an order appointing CCRC-South as standby counsel and then rescinded that order after hearing from the State, which did not serve Mr. McGirth with its objections, and after receiving an objection from CCCR-South. R5, pp. 967-974. The court then

entertained a motion filed by CCRC-Middle[22], which had been discharged and had no standing to file anything for Mr. McGirth. The court refused to set the matters for hearing after receiving Mr. McGirth's objections[23] and after receiving requests for hearing from all counsel involved. The court declined to set for hearing issues Mr. McGirth had a right to be heard on as his own counsel, and only agreed to an extension of time when the State requested it. R6, pp. 1041-1042. The court then permitted standby counsel, who had been advised that he could not file any pleadings on behalf of Mr. McGirth, to file a motion to determine Mr. McGirth's competence to proceed at the evidentiary hearing reconvened on May 27, 2014. R5, p. 5; R33, pp. 5-72. The State, the trial court, and Gemmer violated Mr. McGirth's right to self-representation.

ARGUMENT IV

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

The State argues that the trial court did not abuse its discretion in allowing Mr. McGirth to represent himself at his competency hearing. The State argues that there was no indication Mr. McGirth was incompetent and no credible evidence or facially sufficient evidence presented to suggest Mr. McGirth's incompetence.

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[22] R5, pp. 979-986.

[23] R5, pp. 995-1000; R6, pp. 1001-1005.

The State relies on the erroneous decisions of the trial court to adjudicate Mr. McGirth competent and allow him to represent himself to support its argument. Mr. McGirth has appealed those rulings in this proceeding. See Reply to Argument II, *supra.*

There was ample credible evidence and facially sufficient evidence before the trial court that Mr. McGirth's competency was at issue. His former attorney and standby counsel Gemmer filed a written motion with the court on May 27, 2014, challenging Mr. McGirth's competency, documenting his "inappropriate and bizarre behavior" and lack of "a rational understanding of the claims raised, the witnesses to address the claims, or the exhibits necessary to support the claims." R7, pp. 1322-1323. Dr. Berland opined that Mr. McGirth was incompetent and did not have a rational understanding of the process, and Mr. McGirth himself even admitted that he had "a mass or hole or something" in his brain. R30, p. 35.

The State dismisses federal authority on this issue and supports its argument with the fact that the trial court never questioned Mr. McGirth's competence. However, the trial court's lack of concern for Mr. McGirth's competence is one of the significant errors committed in this case. Further, Mr. McGirth's former attorney testified to Mr. McGirth's bizarre behavior at the May 27, 2014, hearing. The trial court was well aware of the objective evidence of Mr. McGirth's brain injury and the Rule requires him to review all of this evidence. Instead, the trial court conducted

an insufficient and unreliable competency hearing. The trial court ignored the reports of Dr. Wood, Dr. Legum, Dr. Krop, and Dr. Cunningham, and Mr. McGirth's PET scan results, and based its decision on the testimony of the State's witness and Mr. McGirth's unreliable assurances of his own competency.

ARGUMENT V

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

The State argues that the trial court was correct not to recuse itself because Mr. McGirth's motion failed to allege any specific grievance that could lead to a reasonable belief that the post-conviction judge could not be fair and impartial in presiding over his post-conviction case.

The State's summarizes Mr. McGirth's motion to disqualify as alleging the trial court made several adverse rulings. The State's argument ignores Mr. McGirth's detailed allegations of how the adverse rulings, some entirely based on the recommendations of the State and without even affording Mr. McGirth an opportunity to be heard on the matter, showed "a well-grounded fear that he will not receive a fair trial at the hands of the judge." *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983), *quoting State ex. rel. Brown v. Dewell*, 131 Fla. 466, 573, 179 So. 695, 697-98 (1938). "The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather

than the judge's perception of his ability to act fairly and impartially." *Livingston*, 441 So. 2d at 1086.

The trial court's denial of Mr. McGirth's motion to disqualify as facially insufficient merely continued the trial court's pattern of preferential treatment to the State and punishing Mr. McGirth for exercising his right to represent himself in his post-conviction proceeding. Mr. McGirth did not merely allege a litany of adverse rulings in his motion to disqualify. On the contrary, Mr. McGirth articulated an objectively reasonable fear that he would not receive a fair post-conviction proceeding at the hands of the trial court based on a repeated pattern of demurring to the prosecutor throughout the pendency of Mr. McGirth's case.

ARGUMENT VI

MR. 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.

Mr. McGirth's waiver of the evidentiary hearing was involuntary. Standby counsel Gemmer described Mr. McGirth's waiver of the hearing as "an indicator, in our belief, that he continues to be incompetent to go forward and/or represent himself because of what we believe to be bizarre behavior." R36, p. 6.

The court did not press Mr. McGirth on why he wanted to waive his hearing. When asked by the court if he wanted to explain why he was waiving the hearing, Mr. McGirth declined. R36, p. 25. The court did not inquire further.

Mr. McGirth was preparing in earnest for the hearing, as evidenced by his motions for transport of witnesses to the hearing and his motion to ensure that his documents and materials and even his hygiene products were transported to the Marion County jail where he was to be held during the hearing. R18, pp. 1425-1431.

When Mr. McGirth learned from standby counsel Gemmer that defense experts were refusing to testify because Mr. McGirth was pro se, he filed a motion to continue his hearing and a motion for appointment of conflict-free counsel or co-counsel. R18, pp. 1501-1504. The court scheduled a hearing on the motions for February 13, 2015, three days before the evidentiary hearing was scheduled to start. R36, p. 3-4. Mr. McGirth asked for appointment of counsel or co-counsel other than CCRC-Middle. R36, p. 5. The court found that CCRC-Middle could not have been deficient since it had been removed from the case in September of 2013. R36, p. 6. However, the court had appointed CCRC-Middle, over Mr. McGirth's objection, as standby counsel and had assigned CCRC-Middle the responsibilities of providing Mr. McGirth with an investigator to assist with his preparation of the case[24] and specifically directed CCRC-Middle to secure the presence of expert witnesses for

[24] R6, pp. 1049-1105; R32, p. 17.

McGirth's evidentiary hearing.[25] Mr. McGirth, not CCRC-Middle, alerted the court that there was a problem with the witnesses.

Mr. McGirth contends that it was error for the court not to have found CCRC-Middle deficient in September 2013, that it was error for the court not to have found CCRC-Middle deficient in January 2014 when Gemmer acknowledged that he was aware of Sheila Miller's statement that she shot her mother and that Det. Stroup stated that she was told not to investigate further prior to the September 2013 hearing, and did not attempt to raise a claim related thereto, and that it was deficient of CCRC-Middle to deliver the more than 30,000 pages of documents and media files to Mr. McGirth late.

Appellee argues that Mr. McGirth had three and a half years to prepare for his evidentiary hearing. That is incorrect. CCRC-Middle had more than two years and ten months to prepare for the evidentiary hearing. (CCRC-Middle was appointed on December 6, 2010 to represent Mr. McGirth. R1, p. 42-43. It filed the initial motion to set aside the judgment and sentence on April 10, 2012. R2, pp. 220-270. The evidentiary hearing was scheduled for September 27, 2013.) Mr. McGirth was given less than three months to prepare for the continued hearing. When Mr. McGirth was permitted to proceed pro se on September 27, 2013, the court set the new hearing for December 2, 2013, a little more than two months after the aborted

[25] R6, pp. 1049-1105; R34, p. 89

hearing. The court also directed CCRC-Middle to turn over all records to Mr. McGirth within two weeks. Mr. McGirth should have had the records by the second week in October, but CCRC-Middle did not turn over the written records until October 29, 2013, and the media files were not delivered to the prison until January 31, 2014. R6, pp. 1013-1015, 1052-1058. More than one hundred media files (CDs and DVDs) were delivered to the prison. R6, pp. 1052-1058.

Appellee argues that Mr. McGirth assured the court he had ready access to the prison library and legal resources. AB, p. 58. Mr. McGirth made that statement at the September 27, 2013 hearing. R30, p. 70. He learned later that access to the library and his files was not easy and filed a petition for mandamus for the court to direct the prison to give him sufficient time to study the records and listen to or view the CDs and DVDs, with supporting documents. R6, pp. 1064-1097. The court declined to do so and declined to continue the case to allow Mr. McGirth a reasonable length of time to prepare. Mr. McGirth received additional time only when standby counsel filed a motion to determine Mr. McGirth's competence at the evidentiary hearing scheduled for May 24, 2014.

At the end of the competency hearing on November 24, 2014, the court then directed CCRC-Middle to secure the presence of expert witnesses for Mr. McGirth's new evidentiary hearing set for February 16, 2015, which it did not do. Mr. McGirth

alerted the court to the problem in a timely fashion. R6, pp. 1049-1105; R34, p. 89; R18, pp. 1497-1500.

Mr. McGirth's requests for additional time were not unreasonable in late 2013 and early 2014. The denial of the requests was unreasonable.

Mr. McGirth's waiver of his evidentiary hearing was involuntary. He had been denied competent counsel and reasonable time to prepare. His choice was to proceed with counsel who failed him or go it alone. Reasonable requests to the court were denied and the only offer of services the court provided were through CCRC-Middle, the agency he believed failed him.

REPLY TO ARGUMENT VII

THE PLAIN LANGUAGE OF FLORIDA STATUTE SECTION 775.082(2) REQUIRES THAT THIS COURT VACATE MR. 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.

The State argues in its Answer Brief that Mr. McGirth's *Hurst*[26] claim is not properly raised on appeal. This Court has not rendered its decision on *Hurst* and it is unclear to Mr. McGirth the proper way to present this argument to the Court. Mr. McGirth has included the same argument in his Initial Brief in the appeal from the denial of Rule 3.851 relief, and in his petition for writ of habeas corpus. Since the two pleadings were filed simultaneously with this Court and he has no way of

[26] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

ascertaining this Court's view of which is the proper way to raise this issue before this Court, Mr. McGirth has decided in an abundance of caution that including the same argument in both pleadings is the best way to ensure that he does not make the wrong choice and waive his argument.

Mr. McGirth's death sentence should be commuted to a life sentence under Section 775.082(2), *Florida Statutes*.

The State argues that Mr. McGirth is not entitled to a life sentence under Section 775.082(2), Fla. Stat., because *Hurst* did not determine capital punishment to be unconstitutional. The State's position is that "*Hurst* merely invalidated Florida's procedures for implementation." However, *Furman v. Georgia*, 92 S. Ct. 2726 (1972), held that the procedures then in place in capital prosecutions did not comport with the Eighth Amendment. In *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), this Court acknowledged as much, writing, "[*Furman*] does not abolish capital punishment" and "[c]apital punishment is not, [p]er se, violative of the Constitution of the United States . . . or of Florida." *Id.* at 6-7; *see Breedlove v. State*, 413 So. 2d 1, 9 (Fla. 1983) ("Both the United States Supreme Court and this Court have found that the death penalty is not per se violative of either the federal or state constitutions."). When this Court determined that § 775.082(2) applied after *Furman*, it was after Florida's procedure for imposing death sentences had been found unconstitutional, not the death penalty itself. Accordingly, this Court

should vacate Mr. McGirth's death sentence and direct the trial court to impose a life sentence instead.

There are no "automatic" aggravating circumstances in Florida.

The State also argues that there is no Sixth Amendment violation in Mr. McGirth's case because he was convicted of a prior violent felony for the contemporaneous attempted first-degree murder of James Miller, and was engaged in the commission of a robbery at the time of the murder. The State contends that since Mr. McGirth entered the penalty phase already qualified for a death recommendation, any error could only be harmless, even if *Hurst* was found to retroactively apply.

The holding in *Hurst* "requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619. Ignoring the holding in *Hurst* and the statutory requirement that there must be a factual determination that "sufficient aggravating circumstances exist," the State claims that *Hurst* does not apply to Mr. McGirth because his case involves a conviction of a prior violent felony. The State bases this claim on the recidivist exception established in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The State argues that this Court, based on the exception, has repeatedly observed that *Ring*[27] does not apply to cases involving prior convictions. However, these statements regarding

[27] *Ring v. Arizona*, 536 U.S. 584 (2002).

Ring were based on the narrow holding in *Ring* addressing Florida's capital sentencing scheme. The holding in *Hurst* addressing Florida's statute was much more expansive. Because Florida requires the existence of sufficient aggravating circumstances, one aggravator by itself is not necessarily enough. The jury must determine if the aggravating circumstances are sufficient.[28]

The flaw in the State's argument is its failure to cite or reference Florida's statute, which does not authorize a death sentence based upon a single aggravating circumstance. Thus, the only support for the State's argument that the presence of a prior violent felony conviction renders a defendant death eligible are decisions where this court misconstrued *Ring.*

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[28] As support for its argument, the State relies on the fact that U.S. Supreme Court recently denied certiorari review without dissent in two pipeline cases involving prior convictions after *Hurst.* The State's reliance on denials of certiorari review of having precedential review is ridiculous. After *Ring* issued, certiorari review was denied in cases involving Linroy Bottoson and Amos King. From those denials of review, the Court erroneously concluded that *Ring* and *Apprendi* had no applicability to Florida's capital sentencing scheme. In the 13 years between *Ring* and *Hurst*, there were probably a hundred denials of certiorari review of Florida death sentences raising *Ring/Apprendi* challenges to Florida's capital sentencing scheme. Those denials of certiorari review meant nothing as to whether Florida's capital sentencing statute was constitutional when the United States Supreme Court granted review in *Hurst.*

The denial of a petition for writ of certiorari by the United States Supreme Court "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923); *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 403, 404 (1931); *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.*, 85 F. 2d 94, 98 (6th Cir. 1936).

Apprendi[29], *Ring*, and *Hurst* hold that the fact or facts necessary to render a capital defendant death eligible must be made by a jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—not matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602. Florida's statute requires a finding that sufficient aggravating circumstances exist to justify a sentence of death. The statutorily defined fact that is necessary for death eligibility is repeated to the jury in Florida' standard jury instructions as the issue to be resolved in the jury's penalty phase deliberations before returning an advisory verdict by a majority vote. The cases on which the State relies simply ignore the factual requirement set for in Florida's statute and in Florida's standard jury instructions.

Moreover, the fact that sufficient aggravating circumstances must be found under Florida law to render a capital defendant death eligible is unlike the Arizona law which was at issue in *Ring*, and has at least two important consequences in assessing *Hurst*'s scope and impact in Florida: (1) the finding of a prior violent felony does not cure *Hurst* error, and (2) a finding of the felony murder aggravator does not cure *Hurst* error. Before a death sentence can be imposed there must be a finding that those circumstances if present are sufficient in a given case to justify a death sentence. Not all prior violent felonies are equal. The sufficiency finding required

[29] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

by the statute means that there must be a case specific assessment of the facts of the prior crime of violence in conjunction with the factual basis for any other aggravating circumstance present in the case are sufficient to justify the imposition of a death sentence.

The *Hurst* error in Mr. McGirth's case defies harmless error analysis.

The State further argues that any *Hurst* error in Mr. McGirth's case could only be harmless. The *Hurst* violation in Mr. McGirth's case should not be subjected to harmless error analysis. The *Hurst* error in Mr. McGirth's sentencing—stripping the capital jury of its constitutional fact-finding role at the penalty phase—was a "defect affecting the framework within the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminate*, 499 U.S. 279, 310 (1991). Indeed, the *Hurst* error "infected the entire trial process" in Mr. McGirth's case, and deprived him "of basic protections without which a [death penalty] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder v. United States*, 527 U.S. 1, 8 (1999).

To the extent that the *Hurst* error in Mr. McGirth's sentencing is reviewed for harmlessness, this Court should not preform that analysis in the first instance. The trial court should review Mr. McGirth's *Hurst* claim first and evaluate harmlessness based on the facts of his case. Because harmless error analysis will

require fact-finding as to the impact of *Hurst* error on Mr. McGirth's sentencing, this Court should permit a trial court to make those findings.

The State's argument is simply contrary to *Hurst* and Florida statutes. Based on the facts and circumstances asserted herein and in the Initial Brief, Mr. McGirth's is entitled to relief under *Hurst*.

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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CERTIFICATE OF FONT

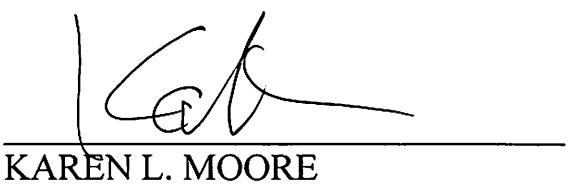
Counsel certifies that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief is typed in Times New Roman 14-point font.

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, P.O. Box 1000, Raiford, FL 32026; on this date, June 13, 2016.

Respectfully submitted,



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