IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC16:_____

RENALDO MCGIRTH,
Petitioner,

v.

JULIE L. JONES,
SECRETARY, FLORIDA
DEPARTMENT OF
CORRECTIONS,
Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel – North
Florida Bar No. 500674

KAREN L. MOORE
Assistant CCRC – North
Florida Bar No. 351652

STACY R. BIGGART
Assistant CCRC – North
Florida Bar No. 0089388

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL –
NORTH
175 Salem Court
Tallahassee, Florida 32301
COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

This Petition for Writ of Habeas Corpus will refer to the record on appeal that has been filed with the Court on direct appeal. References will be to the consecutive page numbers of the original record and will be by the symbol R followed by the appropriate record page number(s).

Petitioner ("Mr. McGirth") is currently represented by the undersigned counsel in post-conviction proceedings that include an appeal to the Court under Case No. SC15-953.

This is Petitioner's first habeas corpus petition in this Court. This petition for habeas corpus relief is being filed in order to preserve Mr. McGirth's claims arising under recent United States Supreme Court decisions and to address substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; claims demonstrating that Mr. McGirth was deprived of effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions violated fundamental constitutional guarantees.

REQUEST FOR ORAL ARGUMENT

Mr. McGirth has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural

posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty the State seeks to impose on Mr. McGirth.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), Florida Constitution. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Article I, Section 13, Florida Constitution. This petition presents issues which directly concern the constitutionality of Mr. McGirth's convictions and sentence of death.

Jurisdiction in this action lies in this Court, *see e.g. Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. McGirth's direct appeal. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors is warranted in this case.

PROCEDURAL HISTORY

Petitioner is Renaldo McGirth who has been convicted of first-degree murder and sentenced to death after a jury trial in Marion County, Florida. The conviction and sentence was affirmed on appeal to this Court in *McGirth v. State*, SC08-976, reported at *McGirth v. State*, 48 So. 3d 777 (Fla. 2010). The facts are before the Court in the briefs filed on the direct appeal and are set forth in the prior decision and in the record on appeal that has been filed with this Court. Additional specific facts pertaining to issues raised in this Petition will be set forth herein with appropriate references to the record.

No other petition for habeas corpus has been filed.

STANDARD OF REVIEW OF HABEAS CORPUS CLAIMS

The standard of review given to claims raised in a petition for writ of habeas corpus based on ineffective assistance of appellate counsel has been concisely stated in *Rutherford v. Moore,* 774 So. 2d 637, 643 (Fla. 2000):

> When analyzing the merits of the claim, "[t]he criteria for proving ineffective assistance of appellate counsel parallel the Strickland standard for ineffective trial counsel." Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985). Thus, this Court's ability to grant habeas relief on the basis of appellate counsel's ineffectiveness is limited to those situations where the petitioner establishes first, that appellate counsel's performance was deficient because "the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second, that

> the petitioner was prejudiced because appellate counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Thompson, 759 So. 2d at 660 (emphasis supplied) (quoting Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995)); see, e.g., Teffeteller, 734 So. 2d at 1027. If a legal issue "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994); see, e.g., Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998); Groover, 656 So. 2d at 425. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. See, e.g., Groover, 656 So. 2d at 425; Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

(Footnote omitted)

GROUND I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE *CALDWELL* ISSUE APPARENT ON THE RECORD IN THE DIRECT APPEAL.

Appellate counsel was ineffective for failing to raise on appeal the *Caldwell*[1] violation that occurred in Mr. McGirth's trial and sentencing. The issue was preserved at trial and apparent in the record on appeal. The jury instruction violated Mr. McGirth's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. If this issue had been argued on direct appeal it is probable that McGirth's case would remain in the "pipeline"

[1] *Caldwell v. Mississippi*, 472 U.S. 320, (1985).

where the decision in *Hurst v. Florida,* 136 S. Ct. 616 (2016), would automatically be applied to his case. Trial counsel filed a "MOTION IN LIMINE *AND* TO STRIKE PORTIONS OF "FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES" RE: CALDWELL V. MISSISSIPPI." R2, pp. 259 – 261. Counsel argued that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the propriety of a death sentence rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Defense counsel's motion also quoted the Florida Standard Jury Instruction in Criminal Cases:

> Final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury render to the court an advisory sentence as to what punishment should be imposed on the defendant.
>
> It is now your duty to advise the court as to what punishment should be I posed upon the defendant....As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence....

R2, pp. 259 – 261.

Defense counsel also noted "Undue repetition of the words 'advisory' and 'recommendation' in the standard jury instructions is misleading and the jury is not told that the trial court must give great weight to the jury sentencing determination and can deviate from the jury's determination only if it is wholly

unreasonable." R2, p. 260. The trial court denied the motion by written order dated October 26, 2007. R3, p. 364.

Even though the standard jury instruction itself violates *Caldwell*, the trial court compounded the constitutional violation when he minimized the jury's role in the sentencing process beyond the standard instruction by instructing the jury that:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient mitigating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

R6, p. 923.

This instruction not only minimized the jury's function, it was also confusing to the jury because it inaccurately tracks the standard jury instructions. Based on a plain reading of the jury instruction as given in this case, not only was the jury's decision advisory, it was also the judge's responsibility. This informed the jury that it not only had no responsibility for determining whether Mr. McGirth received the death sentence, it also did not have any responsibility for its own decision as to what sentence should be imposed.

The result of the court's misread of the jury instructions was that not only was the jury's role in what sentence Mr. McGirth received diminished, the jurors' role in what their own recommendation was to be was diminished.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the United States Supreme Court held that

> It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who had been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Id. at 328 – 29. If the jury's responsibility for its role in determining a death sentence has been diminished, the sentencing determination is unreliable and may bias the jury to make a decision for death on the mistaken belief that the courts have the ultimate authority on all matters including fact finding and will correct any mistake the jury may have made. This would deprive a defendant of his constitutional right to an individualized sentencing proceeding because the jury feels that any lack of consideration will be appropriately decided by another authority. *Id.* at 330 – 331. The jury might be unconvinced that death is the appropriate punishment but still recommend a death sentence to express disapproval for the defendant's acts or "send a message to the community," believing the courts can and will cure the harshness. *Id.* at 331.The Court added, "A defendant might thus be executed, although no sentencer had ever made a determination that death was the appropriate sentence." *Id.* at 331 – 32.

Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," *McGautha v. California*, 412 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. *Caldwell*, 472 U.S. at 332 – 33. As the *Caldwell* Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 332 – 33 (emphasis added).

McGirth's appellate counsel failed to raise this issue in his direct appeal. On January 12, 2016, the United States Supreme Court issued its decision in *Hurst v. Florida*. In *Hurst*, the United States Supreme Court in a vote of 8-1 concluded that Florida's capital sentencing statutes was unconstitutional: "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." 136 S. Ct. 616, 619 (2016).

In light of *Hurst*, it is clear that the limited role of the jury in Florida's capital sentencing scheme fail satisfy the requirements of the Sixth Amendment. Even if the jury's role was redefined under Florida law, it would not make Mr. McGirth's death sentence valid because it violated *Caldwell*. Appellate counsel's failure to raise this issue on McGirth's direct appeal deprived McGirth of his ability to challenge this issue post-*Hurst*.

GROUND II

IN LIGHT OF *HURST V. FLORIDA*, MR. MCGIRTH'S DEATH SENTENCE MUST BE VACATED AND HE MUST BE SENTENCED TO LIFE IMPRISONMENT.

The 8-1 decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), establishes that our most basic assumptions about the constitutional integrity of Florida's capital sentencing scheme were wrong.[2] *Hurst* also establishes that Mr. McGirth's trial and appellate counsel were correct in their arguments to the lower court (at trial) and to this Court (on direct appeal) that Florida's capital sentencing scheme was

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[2] Not only was this Court's decision in *Bottoson v. Moore* expressly overturned, the Supreme Court expressly held that its decisions in *Hildwin v. Florida* and *Spaziano v. Florida* had not survived *Apprendi* and *Ring*. *Hurst* also implicitly overturned *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), and every subsequent decision by this Court relying upon either *Mills* or *Bottoson*. It also overturned every decision by this Court resting upon *Spaziano* and/or *Hildwin*. The tectonic shift in Florida capital law engendered by *Hurst* is comparable only to that which was created by *Furman v. Georgia*, 408 U.2. 238 (1972). *See* Appendices A, B, C, and D to Reply to Response to Petition for Habeas Corpus, *Lambrix v. Jones*, No. SC16-56. Indeed, not since *Furman* has the Florida capital sentencing scheme been declared unconstitutional.

unconstitutional under the Sixth Amendment and that he should be sentenced to life imprisonment. In light of the foregoing arguments and authorities, Mr. McGirth submits he must be given the benefit of *Hurst* and be resentenced to life imprisonment under the mandatory language of §775.082(2), Fla. Stat. (2015).[3]

In *Hurst*, the Supreme Court held that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme unconstitutional." *Id.* at 619. Specifically, the Court held that "[t]he 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.* The *Hurst* Court identified what those critical fact-findings are, leaving no doubt as to how Florida's capital sentencing statute must be read:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible for death until "findings by the Court that such a person shall be punished by death.**" Fla. Stat. §775.082(1) (emphasis added). The trial court alone **must find "the facts...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating**

[3] This statutory provision provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of such determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

> **circumstances."** §921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only: The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Id. at 622 (emphasis added)(citations omitted).

Under Florida's statute, death eligibility is dependent upon the presence of certain statutorily-defined facts *in addition to* the verdict unanimously find the defendant guilty of first-degree murder. In unmistakably clear language, *Hurst* explained that the requisite additional statutorily-defined facts required to render the defendant death eligible are that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* §921.141(3); *Hurst*, 136 S. Ct. 616 at 622. *Hurst* identified these findings as the operable findings that must be made by a jury. Neither of these factual determinations was made by Mr. McGirth's jury despite a request to the trial court that the jury be required to make these requisite findings; because they were not, Mr. McGirth argued and argues here, that he was not death eligible and must be sentenced to life imprisonment.

Hurst's holding is girded on the principle that findings of fact statutorily required to render a Florida defendant death eligible are elements of the offense, separating first-degree murder from capital murder under

Florida law, and thereby forming part of the definition of the crime of capital murder in Florida. *See Apprendi*, U.S. at 476; *Jones v. United States*, 526 U.S. 227 (1999). In *Ring,* the Supreme Court applied the *Apprendi* rule to Arizona's capital sentencing scheme and found it violated the Sixth Amendment.[4] The Supreme Court in *Hurst* found that this Court's consideration in *Bottoson* of the potential impact of *Ring* on Florida's capital sentencing scheme had wrongly failed to recognize that the decisions in *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional. Much of the basis for this Court's erroneous conclusion that *Ring* and *Apprendi* were inapplicable in Florida was its continued reliance on *Hildwin*, which held that the Sixth Amendment "does not require that the specific findings authorized by the imposition of death be made by the jury." This Court's reliance in *Bottoson* upon the continued validity of *Hildwin* (and related findings in *Spaziano*) was misplaced and contrary to *Apprendi* and *Ring*:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific

[4] In Arizona, the factual determination required by Arizona law before a death sentence was authorized was the presence of at least *one* aggravating factor. *Ring v. State*, P. 3d 1139, 1151 (Ariz. 2001). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination *by the court* that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** §921.141(3) (emphasis added).

> findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640 – 641. **Their conclusion was wrong, and irreconcilable with Apprendi.** Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre *Apprendi* decision – *Walton*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of *Apprendi*.' 536 U.S., at 603. *Walton*, for its part, was a mere application of *Hildwin's* holding to Arizona's capital sentencing scheme. 497 U.S., at 648.

Hurst, 136 S. Ct. 616 at 623 (emphasis added).

Mr. McGirth's jury was repeatedly told that its role in determining the sentence to be imposed was merely advisory and that it was only required to provide the court with an "advisory opinion" or "recommendation." *See*, e.g. (R6, p. 921). The form signed and returned to the court after the jury's deliberation merely state that " a majority of the jury, but a vote of 11 to 1, *advise and recommend to the court that it impose the death penalty*" on Mr. McGirth. The jury made no findings as to the eligibility facts necessary to make Mr. McGirth death eligible and the State "cannot not treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst,* 136 S. Ct. 616 at 622; *Caldwell v. Mississippi*. Mr. McGirth's death sentence unquestionably violates the Sixth Amendment.

Hurst is undoubtedly a "development of fundamental significance" within the meaning of *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980), and fairness dictates that *Hurst* be given retroactive effect in this case. *See Falcon v. State*, 162 So. 3d

954, 962 (Fla. 2015); *James v. State*, 615 So. 2d 668 (Fla. 1993). Only a "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval" will qualify under *Witt*, *see Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) (brackets omitted) (citation omitted), and *Hurst*, perhaps more so than virtually another case decided since *Furman v. Georgia*, 408 U.S. 238 (1972), satisfies this standard. On the basis of *Furman*, this Court ordered life sentences imposed on all capital defendants who had been under a sentence of death. *Anderson v. State*, 267 So. 2d 8, 9 – 10 (Fla. 1972).[5] There was no question, no statutory interpretation, no retroactivity analysis, no harmless error analysis, no recalcitrance, and no attempts to save prior death sentences and still go forward with undeniably unconstitutional executions. Under § 775.082(2), Fla. Stat., a life sentence *must* be imposed on Mr. McGirth, as this Court has no discretion to do otherwise. *Anderson*, 267 So. 2d at 9 (finding that §775.082(2) requires "an automatic sentence and a reduction from the sentence previously imposed," because "[t]he Court has no discretion").

However, if §775.082(2) is not applied here when the capital sentencing scheme has been held to be unconstitutional and a retroactive analysis is deemed

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[5] In *Anderson*, this Court explained that after *Furman* issued, the Attorney General of Florida filed a motion asking that life sentences be imposed in 40 capital cases in which the defendant was under a death sentence. 267 So. 2d at 9 ("The position of the Attorney General is, that under the authority of *Furman v. Georgia*, ...the death sentenced imposed in these cases is illegal.")

necessary, *Hurst* must be found to apply retroactively under Florida law. *Hurst*, unlike *Furman*, states unequivocally that "[w]e hold [Florida's] sentencing scheme unconstitutional." *Hurst v. Florida*, 136 S. Ct. 616 at 619. *Hurst*, unlike *Furman*, directly assessed Florida's scheme and found it unconstitutional. *Hurst*, unlike *Furman*, did not fragment the United States Supreme Court at all. On the contrary, *Hurst* was an 8-1 resoundingly unified pronouncement from the Supreme Court that Florida's sentencing of capital defendants has long been unconstitutional. In Florida, *Hurst* is just as much a sweeping jurisprudential upheaval of fundamental significance as was *Furman*. In Florida, *Hurst*, just as *Furman* was, must be retroactively applied.

In other scenarios, when less momentous decisions have been handed down by the Supreme Court, this Court has applied those decisions retroactively. For example, after the decision was handed down in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), this Court, applying *Witt*, ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987). This Court also recognized that it had been previously misapplying *Locket v. Ohio*, 438 U.S. 586, 604 (1978), and

that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress ...*Locket* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)).[6]

While the fallout from the *Locket/Hitchcock* scenario in Florida was significant, there is no comparison—except *Furman*—to the ramifications of *Hurst*. In *Locket/Hitchcock*, at no time was there a determination that Florida's capital sentencing scheme was unconstitutional. In *Locket/Hitchcock*, no Supreme Court decision upholding Florida's capital sentencing scheme was declared overruled by the U.S. Supreme Court, and no legislative fix was required. The Court's determination that *Hitchcock* warranted retroactive application means that under *Witt* the substantially great upheaval in Florida law created by *Hurst* certainly must be applied retroactively. Moreover, unlike other errors identified by the Supreme Court in past decisions on Florida's capital scheme, the error identified in *Hurst* is structural and not amenable to any harmless-error analysis. *See generally Arizona v. Fulminante*, 499 U.S. 279. 307-09 (1991); Amicus Brief

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[6] *Espinosa v. Florida*, 505 U.S. 1079 (1992) presented a scenario in line with *Hitchcock*. *Espinosa* held "if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." *Espinosa*, 505 U.S. at 1082. In *James v. State*, this Court applied retroactively a claim based on *Espinosa*. 615 So. 2d 668, 669 (Fla. 1993). This Court conducted no *Witt* analysis in *James* but Mr. James received the benefit of *Espinosa* even though his conviction was final years before *Espinosa* was issued in 1992. *Hurst* is a much great upheaval in the law than *Espinosa* was.

of the CHU, filed in *Lambrix v. Jones*, No. SC16-56 (arguing that *Hurst* error is structural because it "infect[s] the entire trial process"). *See also Riley v. Wainwright*, 517 So. 2d 656, 659 (Fla. 1988) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, the entire sentencing process necessarily is tainted by that procedure").

Based on the foregoing arguments and in light of *Hurst v. Florida*, the Court should vacate Mr. McGirth's unconstitutional sentence of death and/or Mr. McGirth should be permitted to file a Rule 3.581 Motion to raise claims pursuant to *Hurst.*

GROUND III

MR. MCGIRTH'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED BECAUSE MR. MCGIRTH MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (1986).

Mr. McGirth acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. McGirth acknowledges that before a judicial review may be held in Florida, the prisoner must first submit his claim in accordance with Florida

Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and *Martin v. Wainwright*, 497 So. 2d 872 (1986) (If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in Section 922.07, *Florida Statutes* (1985)).

This claim is necessary at this stage because federal law requires that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Accordingly, Mr. McGirth raises this claim now.

CONCLUSION

WHEREFORE, Mr. MGirth respectfully requests that the Court grant his petition for writ of habeas corpus and order a new sentencing phase proceeding and grant any other relief that this Court deems just and proper.

Respectfully submitted,

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel – North

KAREN L. MOORE
Assistant CCRC – North

Florida Bar No. 351652
Karen.Moore@ccrc-north.org

STACY R. BIGGART
Assistant CCRC – North
Florida Bar No. 0089388
Stacy.Biggart@ccrc-north.org

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL -
NORTH
175 Salem Court
Tallahassee, Florida 32301
Tel. 850-487-0922
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ Of Habeas Corpus has been furnished by electronic service to Bradley King, Assistant State Attorney, (eservicemarion@sao5.org, bking@sao5.org); Stacey Kirker, Assistant Attorney General, (Stacey.Kircher@myfloridalegal.com); Clerk, and by U.S. Mail to Renaldo McGirth, DOC #U33164, Union Correctional Institution, 7819 N. W. 228th Street, Raiford, FL 32026, on this date, February 11, 2016.

Attorney

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that this Petition has been prepared with Times New Roman 14-point font.

Attorney