IN THE SUPREME COURT OF FLORIDA
CASE NO. SC16-341

RENALDO MCGIRTH,

PETITIONER,

V.

JULIE L. JONES, SECRETARY,
DEPARTMENT OF CORRECTIONS,

RESPONDENT.

AMENDED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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RESPONSE TO PRELIMINARY STATEMENT

The "Preliminary Statement" found on page 1 of the petition correctly refers to the citation form and abbreviations used in the petition. The accompanying case number in McGirth's postconviction appeal is accurately reflected as SC15-953. The petition pleads claims involving fundamental constitutional error. These claims are denied. McGirth is not entitled to habeas relief.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

Respondent defers to the Court's judgment as to whether oral argument is necessary or justified in this case.

RESPONSE TO JURISDICTION

Petitioner raises a claim challenging the constitutionality of his convictions and sentences and the judgment of this Court. These claims are denied. Under Article V, Section 3(b)(9) of the Florida Constitution, this Court has jurisdiction. *See also* Fla. R. App. P. 9.030(a)(3), Fla. R. App. P. 9.100(a).

RESPONSE TO PROCEDURAL HISTORY

Petitioner's facts are incomplete and denied. Respondent relies on this Court's summary of the facts as detailed in its direct appeal decision affirming McGirth's conviction and death sentence:

> **Overview**
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> Renaldo McGirth was convicted of the 2006 first-degree murder of Diana Miller. McGirth, who was eighteen years old at the time of the

murder, was also convicted of the contemporaneous attempted first-degree murder with a firearm of Diana's husband, James Miller, robbery with a firearm of James and Diana Miller, and fleeing to elude a law enforcement officer operating a marked patrol vehicle. After the penalty phase proceeding, the jury recommended that McGirth be sentenced to death for the murder of Diana by a vote of eleven to one. We first discuss the factual and procedural history of the case. We then address the guilt phase and penalty phase issues raised by McGirth.

The Guilt Phase

The evidence at trial established that James and Diana Miller ("the Millers"), both in their sixties and married for forty-two years, lived in The Villages, a gated retirement community situated in Marion County, Florida. Their daughter, Sheila Miller, who was in her late thirties at the time, was residing with them while she recovered from injuries sustained in an automobile accident that left her confined to a wheelchair.

McGirth, a prior acquaintance of Sheila, Jarrord Roberts, and Theodore Houston, Jr., visited Sheila at the Miller home on the afternoon of July 21, 2006. Sheila greeted McGirth with an embrace at the front door, after which the three men followed her inside the residence. James Miller saw the three men enter his home and observed Sheila embracing one of them. He excused himself as it was near noon and he had to shower for a haircut appointment scheduled for 1:00 p.m. that day. Thereafter, McGirth, who had entered the home with a black backpack, set the bag down on the floor and the three men joined Sheila in the living room for some conversation. After some discussion, Sheila, McGirth, and Houston went into Sheila's bedroom, while Roberts remained in the living room with Diana. Once in the bedroom, McGirth pointed a small, silver gun in Sheila's direction and instructed Houston to tape Sheila's mouth and bind her wrists with duct tape that had been purchased at a Dollar General store on the way to the Miller residence. Diana was then called into Sheila's bedroom where McGirth pushed her onto the bed. Sheila told Diana to give McGirth all of her money. Diana responded that she only had seventy dollars and explained that she did not keep that kind of money at the house. McGirth, in turn, insisted she had

money because she lived in The Villages. After agreeing to get the money, Diana raised her hands in the air and was making her way toward the bedroom door to retrieve money when McGirth stood in front of the bedroom door and shot her once in the chest, causing her to fall on Sheila's bed. McGirth then instructed Houston to pick up the shell casing from the floor and wipe down any objects the men had touched to remove fingerprints. As she bled on Sheila's bed, Diana whispered to McGirth, "Please call 911; you just shot me in the heart." However, her pleas for help were ignored.

At some point, Roberts collected wallets and car keys belonging to the Millers and handed them to McGirth. In the meantime, James had just finished his shower when he was grabbed by the arm and dragged to Sheila's bedroom where he was forced to lie on the floor while one of the men pinned his head with a foot. After the men obtained the couple's credit cards and a personal identification number, Diana, still conscious, was taken to the computer room in an unsuccessful attempt to purchase cell phones online. A few minutes later Diana was able to crawl back into Sheila's bedroom.

McGirth and Houston removed Sheila from the home and Roberts placed her in the Millers' van. As Roberts and Sheila remained in the van, McGirth and Houston returned to the home. Soon thereafter, as Houston was leaving the house with some items, McGirth shot James and Diana in the backs of their heads as they lay on the bedroom floor. James survived the gunshot wound and was able to climb out of the bedroom window and summon the assistance of a neighbor.

McGirth, Roberts, and Sheila left in the Millers' van, while Houston followed in the silver Ford in which the men arrived. Following McGirth's orders, Sheila withdrew $500 from an automated teller machine (ATM) nearby and gave the money to McGirth, who subsequently divided the money into thirds. The four then drove to a K–Mart store in Belleview where McGirth and Sheila attempted to locate a particular type of cell phone. A few minutes later the men left the silver Ford in the K–Mart parking lot and took Sheila in the van to a mall in Gainesville. At the mall, efforts to withdraw money from various ATMs and purchase items from stores failed.

At the Miller residence, law enforcement officers secured the scene and issued a BOLO ("be on the lookout") alert for a red van occupied by three black males and a possible kidnap victim. A police officer spotted the van at a convenience store in Ocala where McGirth was observed getting out and leaving the passengers in the vehicle. When McGirth returned and drove the vehicle out of the parking lot, the police officer activated his siren and lights which prompted McGirth to pull over. As the officer approached the vehicle, one of the men in the van told McGirth to "just shoot the cop." McGirth responded that he had it handled. When the officer ordered the driver to shut the van off, McGirth sped away. A high-speed chase in excess of 100 miles per hour ensued. As he drove the vehicle while being pursued by the police, McGirth handed the gun to Houston and ordered him to shoot Sheila because she could identify them. Houston, however, did not do so. The police ultimately used stop sticks to slow the van and then disabled it by employing the PIT maneuver, which caused the van to roll several times. Sheila was found inside the van, and Houston was attempting to pull himself from underneath the van when police took him into custody. McGirth and Roberts were able to get out of the van and fled in opposite directions, but were apprehended and taken into custody shortly thereafter.

The police found bloody, folded money totaling $259 in McGirth's pocket, and his fingerprints were identified on two paper items from James's wallet.

Testimony was presented on the gunshot wounds inflicted on Diana. Dr. Julia Martin, the medical examiner, opined that the gunshot wound to the head would have rendered Diana immediately unconscious and dead soon thereafter, but that the wound to her chest would not. Dr. Martin concluded that Diana died as a result of the gunshot wound to her head.

The jury found McGirth guilty of first-degree murder of Diana Miller, attempted first-degree murder of James Miller, robbery with a firearm, and fleeing to elude law enforcement, and the case proceeded to the penalty phase.

The Penalty Phase

During the penalty phase, the State presented victim impact testimony from four witnesses who described Diana Miller as funny, playful, caring, a good friend, and an accommodating person who enjoyed traveling with her husband and friends and playing golf and softball. Their testimony revealed that Diana's softball team made tributes in her name and dedicated its fall season to her. A memorial service was held for Diana and, after a silent prayer, the team released balloons in the air in her honor. The softball team also placed Diana's retired team jersey along with her photograph and a medal she won in softball in a shadow box and brought it to softball games. A group of women in her community placed a quarter-page advertisement in a newspaper in memory of Diana, which expressed how much she was missed.

The State also presented evidence from Dr. Martin, the medical examiner, who estimated that anywhere from fifteen to thirty minutes passed between Diana's chest wound and head wound. She also testified that there was nothing in her examination which would lead her to conclude that Diana lost consciousness as a result of the chest wound before the infliction of the head wound. The medical examiner explained that as a result of her chest wound, Diana would have experienced pain, difficulty in breathing, and anxiety.

The defense presented mitigation testimony from McGirth's family members and pastor. The evidence showed that McGirth had a difficult time growing up because he did not know his biological father and had poor male role models throughout his life.

At the conclusion of the penalty phase, the jury recommended by a vote of eleven to one that McGirth be sentenced to death for the murder of Diana Miller. After conducting a *Spencer* hearing, the trial court entered its sentencing order in which it found five aggravators: (1) the murder was cold, calculated, and premeditated (CCP), to which it assigned great weight; (2) the murder was heinous, atrocious, or cruel (HAC), to which it assigned great weight; (3) McGirth had a prior violent felony, based on McGirth's contemporaneous conviction for the attempted first-degree murder of James Miller, to which it assigned great weight; (4) McGirth engaged in the commission of a robbery at the time of the murder, to which it assigned great weight;

> and (5) the murder was committed primarily to avoid arrest, to which it assigned moderate weight. As a statutory mitigating circumstance, the trial court found McGirth's age (eighteen), to which it assigned significant weight.
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> The trial court found fifteen of the eighteen nonstatutory mitigating factors proposed by McGirth: (1) McGirth had a close bond with his siblings, to which the court assigned very slight weight; (2) McGirth grew up in a financially poor family, to which the court assigned little weight; (3) McGirth grew up in an abusive home, to which the court assigned little weight; (4) McGirth was neglected by his custodial parents, to which the court assigned little weight; (5) McGirth's substance abuse, to which the court assigned very slight weight; (6) McGirth's intermittent exposure to positive role models, to which the court assigned some weight; (7) testimony which characterized McGirth as a follower and not a leader, to which the court assigned no weight; (8) McGirth's diagnosis of conduct disorder, to which the court assigned very little weight; (9) McGirth's diagnosis of antisocial personality disorder, to which the court assigned very little weight; (10) McGirth's exposure to people with criminal histories, to which the court assigned some weight; (11) McGirth's strong religious background, to which the court assigned little weight; (12) McGirth's good courtroom behavior, to which the court assigned slight weight; (13) McGirth suffered significant family losses, to which the court assigned little weight; (14) McGirth can benefit from a structured environment, to which the court assigned slight weight; and (15) McGirth was deprived of a relationship with his biological father, to which the court assigned some weight. The trial court concluded that the aggravating circumstances in this case outweighed the mitigating circumstances and sentenced McGirth to death.

McGirth v. State, 48 So. 3d 777, 781-85 (Fla. 2010) (footnotes omitted).

ISSUES RAISED ON DIRECT APPEAL

This Court described the issues raised on direct appeal in the following way:

> ISSUES ON APPEAL

> On direct appeal, McGirth raises the following eight issues: (1) whether the trial court erred in admitting *Williams* rule evidence in the guilt phase that had more prejudicial effect than probative value; (2) whether the trial court erred in its response to a jury question concerning the law on principals; (3) whether the trial court erred in admitting excessive and inflammatory victim impact evidence during the penalty phase; (4) whether a prosecutorial remark during the penalty phase closing argument warrants a new penalty phase trial; (5) whether the trial court erred in finding the cold, calculated, and premeditated aggravator; (6) whether the trial court erred in finding the heinous, atrocious, or cruel aggravator; (7) whether the trial court erred in finding the avoid arrest aggravator; and (8) whether Florida's death penalty statute violates *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and related cases.
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> [FN7] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

McGirth v. State, 48 So. 3d at 785.

This Court found each of these claims meritless. This Court also independently analyzed the sufficiency of the evidence and the proportionality of the death sentence, finding that there was sufficient evidence for a jury to find McGirth guilty and that his sentence of death was proportional, and upheld McGirth's convictions and sentence of death. *McGirth v. State*, 48 So. 3d at 796-797. McGirth's conviction was final on April 18, 2011, when the United States Supreme Court denied McGirth's Petition for Writ of Certiorari, *McGirth v. Florida*, 563 U.S. 940 (2011).

The Postconviction Proceedings and Relevant Procedural History

Pursuant to *Fla. R. Crim. P*. 3.851, McGirth's appointed counsel filed an initial motion for postconviction relief on April 10, 2012. (V2, R220-370).[1] The

[1] Cites to the postconviction appeal record are V_, R_. Cites to the direct appeal

State responded on June 7, 2012. (V3, R408-29). After reviewing the pleadings, the trial court held a case management conference on September 11, 2012. (V3, R465-81). After hearing argument, the court ruled that McGirth would be granted an evidentiary hearing on four of the nine claims raised. A week-long evidentiary hearing was scheduled for February 4, 2013. (V3, R462-64). The hearing was rescheduled to April 22, 2013, (V3, R482-83), and again rescheduled for September 23, 2013. (V3, R500-01, 533-34).

On August 21, 2013, McGirth's counsel filed amendments to the postconviction motion. (V3, R579-89). On September 5, 2013, the State filed its response. (V5, R892-93). On September 10, 2013, the Petitioner moved to quash a subpoena of a witness and moved to continue the hearing. (V5, R916-20). The State responded. (V5, R921-22). On September 13, 2013, a hearing was held (V29, R1-18) and McGirth's motions were denied. (V5, R934-35).

At the scheduled evidentiary hearing on September 23, 2013, the Petitioner moved to discharged his appointed counsel from Capital Collateral Regional Counsel ("CCRC") and represent himself. (V30, R8-10). Petitioner disagreed with appointed counsel about the claims that should be pursued in his postconviction motion. (V30, R10-13). McGirth specifically did not want to pursue any of the mental health claims CCRC was proposing for the evidentiary hearing. (V30, R93-4). The court conducted a *Nelson*[2] hearing, heard testimony and argument, and

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record are DAR, V_, R_.

[2] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).

found counsel was rendering effective assistance. (V30, R23-61). McGirth made an unequivocal request to represent himself and after the trial court conducted a lengthy *Faretta*[3] hearing, it determined McGirth was competent to make the choice to represent himself. (V30, R61-75). The court took a brief recess to determine the legality of McGirth representing himself in a postconviction proceeding. (V30, R80). When the proceeding resumed, McGirth and his counsel represented to the court that McGirth had changed his mind and wanted to proceed with the evidentiary hearing with CCRC-Middle as counsel. (V30, R81-2).

McGirth's counsel called Dr. Robert Berland, psychologist, as a witness. (R30, R85). Berland evaluated McGirth, administered testing, and spoke with lay witnesses. (V30, R88). In Berland's opinion, McGirth suffers from a psychological disturbance. (V30, R89). At this point, McGirth requested an opportunity to address the court outside the presence of Berland. (V30, R93). After Berland was excused, McGirth voiced his objections to Berland's assessment. McGirth stated, "I'm not crazy or psychotic but they [are] calling witnesses up here to talk about I'm crazy and psychotic." …" (V30, R93-4). McGirth renewed his request to proceed *pro se* with the assistance of standby counsel, requested time to amend his postconviction motion, and also requested a continuance. (V30, R94, 95, 96). The court informed McGirth of standby counsel's role to answer "any questions" and further informed McGirth, "You have that entire responsibility of your own

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[3] *Faretta v. California*, 422 U.S. 806 (1975).

defense." (V30, R110, 115). CCRC-Middle was not named as standby counsel. (V30, R103).

On September 26, 2013, the State filed a motion to clarify appointment and the role of standby counsel. (V5, R965-66). On September 27, 2013, the trial court issued an order discharging counsel, appointed standby counsel (CCRC-South) and clarified standby counsel's role. The order also allowed McGirth to amend his postconviction motion, and rescheduled the evidentiary hearing for December 2, 2013. (V5, R967-71). On October 4, 2013, CCRC-South Director William Hennis filed a motion for rehearing/reconsideration of the order appointing CCRC-South as standby counsel, arguing that the trial court found "no reasonable cause to believe that counsel [CCRC-Middle] was rendering ineffective representation." (V5, R975-79). On October 29, 2013, CCRC-Middle filed a motion and memorandum of law regarding appointment of standby counsel and represented that McGirth agreed with said motion and that McGirth would file a motion requesting appointment of CCRC-Middle as standby counsel. On October 31, 2013, the trial court granted CCRC-South's motion for rehearing, appointed CCRC-Middle as standby counsel, and scheduled the evidentiary hearing for January 21, 2014. (V5, R988-89).

On December 10, 2013, McGirth filed a *pro se* motion for extension of time to file an amended postconviction motion and informed the court he had not received all materials from standby counsel. He requested an extension of time to continue the evidentiary hearing and an extension to file his amended motion by

January 24, 2014. He again objected to CCRC-Middle's appointment as standby counsel and requested the court grant his motion to appoint substitute counsel, or conduct a hearing addressing the standard of ineffective counsel and allow McGirth to be present or appear by phone. (V5, R990-1000; V10, R1001-04). On December 20, 2013, the court denied McGirth's motion to continue the hearing but granted his motion for extension of time to file his amended motion up until January 2, 2014. (V6, R1006-07). On December, 23, 2013, the court further denied McGirth's request for hearing on the standard of ineffective counsel and also denied McGirth's request to dismiss CCRC-Middle appearing as standby counsel, stating "Defendant remains entirely responsible for his representation in these proceedings." (V6, R1008-10).

On January 2, 2014, McGirth filed *pro se* motions for extension of time and for an appointment of an investigator, claiming he still had not received all materials needed to file an amended postconviction motion. (V6, R1032-37; 1038-39). On January 7, 2014, the State filed a response and informed the court that not granting McGirth's motion for extension of time and not continuing the hearing would cause an undue burden on the State in light of the late submissions of materials to McGirth, and McGirth's failure to timely file an amended postconviction motion. Pursuant to McGirth's filings and the State's request, the trial court converted the January 21, 2014, evidentiary hearing to a status conference. (V6, R1043-44).

At the hearing, the court ordered CCRC-Middle to submit any remaining materials to McGirth (CDs and media files), (V32, R23), ordered McGirth to file his amended postconviction motion by March 21, 2014, along with a list of witnesses and exhibits, (V32, R18), appointed an investigator to assist McGirth, (V32, R17), and scheduled a four-day evidentiary hearing to commence on May 27, 2014. (V32, R20). Stand-by counsel filed a notice of compliance that McGirth's appointed investigator delivered all materials to UCI on January 31, 2014. (V6, R1052-58).

On March 11, 2014, McGirth filed a *pro se* Petition for Writ of Mandamus in the circuit court requesting the court issues an order compelling the Warden of Union Correctional Institution "UCI" to allow him time to view the CDs and media files. (V6, R1064-70). On March 17, 2014, the court dismissed the petition without prejudice on venue grounds[4] in order for McGirth to file in Leon County where UCI is located. (V6, R1062-63). McGirth also requested another extension of time to file his *pro se* amended postconviction motion and list of witnesses and exhibits, based on his struggles to view the remaining materials related to his case. (V6, R1104-06). On March 19, 2014, the court issued an order granting McGirth's motion for extension of time with a deadline of April 7, 2014, to file said amended motion, witness list, and exhibit list. (V6, R1107-08). McGirth's April 2, 2014,

[4] The trial court noted that the Department of Corrections/Union Correctional Institution is headquartered in Leon County and McGirth had filed the writ in Marion County.

pro se motion for reconsideration for addition time (V6, R1110-1117) was denied on April 8, 2014. (V6, R1109).

On April 23, 2014, McGirth filed a Petition for Writ of Prohibition in this Court, Case No. SC14-786. Pursuant to this Court's April 24, 2014, order, the State filed its response on April 28, 2014. On May 23, 2014, this Court issued its order denying the writ stating:

> The petition for writ of prohibition is hereby denied because petitioner has failed to demonstrate that a lower court is attempting to act in excess of its jurisdiction.

(Order at 1).

On April 21, 2014, the State filed a motion to strike subclaims (b), (c)(ii), (c)(iii), (c)(iv), of claim four of McGirth's original motion for postconviction relief filed on April 12, 2012, as well as a Notice of Non-Filing of any Responsive Pleading or Witness List. (V6, R1141-43). On April 23, 2014, the court ordered McGirth to file a response, (V6, R1144-45), which McGirth filed on May 25, 2014. (V6, R1182-85).

On April 28, 2014, McGirth filed a *pro se* motion to amend his postconviction motion, (V6 , R1155-56), a motion to appoint defense expert, (V6, R1157-59), a supplemental witness list and exhibit list, (V6, R1160-63), his *pro se* second amended postconviction motion, (V6, R1166-79), and a demand for additional public records. (V6, R1186-1200). The State filed its response on May 15, 2014. (V7, R1252-69).

On May 7, 2014, the court issued an order denying McGirth's motion for a continuance, granted his motion to amend, denied the State's motion to strike subclaims (b), (c)(ii), (c)(iii), (c)(iv), of claim four of McGirth's original motion for postconviction relief, and ordered the State to respond to McGirth's additional demand for public records. (V6, R1164-65). The court did not rule on McGirth's motion to appoint a defense expert but instructed McGirth to ensure the expert, Dr. Joy Degruy, was available for the scheduled hearing and to clarify the purpose of her anticipated testimony. (V6, R1165). On May 12, 2014, the State responded to McGirth's demand for public records. (V7, R1223-24).

On May 8, 2014, CCRC-Middle filed an amended motion to clarify its role as standby counsel, and asserted that McGirth wanted CCRC-Middle to be reappointed. (R7, R1225-26). On May 9, 2014, the court issued an order that CCRC-Middle was not re-appointed and 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 defendant." Standby counsel was available to "consult" with McGirth. (V7, R1242-44).

On May 27, 2014, the day the evidentiary hearing was to begin, McGirth's standby counsel filed a motion with the trial court to determine McGirth's competency. (V7, R1322-25). Counsel alleged that McGirth was not competent to proceed with his post-conviction proceedings, "as a *pro se* litigant or represented by counsel." The Court heard argument on this issue and subsequently issued an

order on June 6, 2014, appointing experts Dr. Gregory Prichard and Dr. Robert Berland to determine Defendant's competency, and directing them to file their reports with the clerk no later than 75 days. (V7, RV7, R1326-28). On August 3, 2014, Dr. Berland submitted his report memorializing his findings that McGirth was incompetent to proceed. (V12, R1360-65). On August 12, 2014, the State requested an extension of time to submit Dr. Prichard's report, (V7, R1330-33), which was granted on August 25, 2014. (V7, R1334-36). On September 5, 2014, Dr. Prichard submitted his report, memorializing his findings that McGirth was competent to proceed. (V8, 1337-46). On September 26, 2014, the State filed a motion to set a competency hearing. (V9, R1347-50). On October 9, 2014, the court issued an order setting a competency hearing for November 24, 2014. (V11, R1357). At this hearing, testimony was taken from both experts, trial counsel, and from McGirth. Nothing was mentioned during this competency hearing about filing another amended 3.851 motion. The court found McGirth competent to proceed and able to represent himself at the evidentiary hearing, *pro se*. (V34, R1-34). The court's order was issued on December 5, 2014. (V18, 1396-99). The court also issued an order rescheduling the postconviction hearing for February 16, 2015, lasting for five days. (V18, R1393-95).

McGirth filed his *pro se* third amendment on January 16, 2015, and his fourth and final *pro se* amendment was filed on January 29, 2015. (V18, R1414-24). On February 5, 2015, the State filed its response to the *pro se* January 16, 2015, amendment, (V18, R1448-61) and on February 6, 2015, the State filed its

final response to McGirth's *pro se* January 29, 2015, amendment. (V18, R1462-74).

On February 5, 2015, McGirth filed a *pro se* motion for continuance and informed the court that CCRC-Middle had informed him that his experts had refused to testify and McGirth needed time to consult with them or find replacements. (RV18, R1497-99). On February 9, 2015, McGirth filed a *pro se* "Composite – One - Motion to Appoint Conflict-Free Counsel, Or in the Alternative - Two- Motion to Appoint Conflict-Free Counsel."(V18, R1501-04). On February 11, 2015, the State filed its response and objection to a continuance. (V18, R1508-16). A motions hearing was held on February 13, 2015. McGirth appear *pro se* and CCRC-Middle appeared telephonically. (V35, R1-44). After hearing argument and discussion from all the parties, the court denied McGirth's motion for continuance and the appointment of conflict-free counsel. (V35, R28). McGirth's February 13, 2015, *pro se* motion to disqualify the trial judge was denied. (V18, R1535-49; V35, R33-35).

The court granted an evidentiary hearing on the following claims (as numbered in McGirth's postconviction motion):

> Claim I
> Ineffective Assistance of Counsel for failing to raise reasonable doubt that it might not have been Renaldo McGirth that committed the crimes by negating Sheila Miller's[5] credibility. The State violated *Brady v. Maryland*[6] when it failed to disclose material witness

[5] Sheila Miller is the adult daughter of the victim.

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

Roxanna Baker, and violated *Giglio v. United States*[7] when it allowed Sheila Miller to testify that she did not know Jerrod Roberts before July 21, 2006;

Claim II

(a) Defendant alleged counsel was ineffective for failing to sever Jarrod Roberts' trail because had the trials been severed, Robert could have been called to testify about Sheila Miller's substantial involvement in the case without admitting any further culpability of his own;
(b) Defendant alleges counsel was ineffective for failing to call Tamara Woods and Kenike Calvin as witnesses to testify that during a period of time in which Sheila miller has been incarcerated, she made admissions to these two individuals that she had killed her mother;
(c) Defendant alleges counsel was ineffective for failing to call a witness, Robin Smart, to testify that Sheila Miller had expressed a desire to kill her mother;
(d) In a *pro se* amendment to the motion, Defendant alleged that he had newly discovered evidence regarding Sheila miller, Jarrod Roberts, and Robin Smart and that counsel was ineffective for failing to discover this evidence;

Claim III

(a) Defendant alleged that his counsel was ineffective for (1) failing to locate a witness, Roxanne Baker, (2) not deposing the separate witness, robin Smart, and (3) failing to sufficiently impeach Sheila' Miller's testimony;
(b) Defendant alleged his counsel was ineffective for failing to present additional testimony from co-defendant Theodore Houston to the effect that Sheila Miller, after the murder, suggested they use her parents van to get away and to direct them to withdraw money from the specific ATM machine because it allegedly did not have a camera. Houston also would have testified that Miller wanted them to provide her with crack cocaine. Defendant also alleged his

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[7] *Giglio v. United States*, 405 U.S. 150 (1972).

counsel was ineffective for failing to detect Sheila Miller's alleged admission to killing her mother and for failing to effectively impeach Sheila Miller;

(c) Defendant alleged that his counsel was ineffective for not adequately moving for a mistrial when one of the jurors was dismissed, failing to object to alleged prejudicial photographs, failing to force the court to confiscate the jurors cell phones and failing to object to the court having asked counsel is she was satisfied with the jury instructions;

(d) In his *pro se* amendments, Defendant claimed counsel was ineffective for failing to adequately question Detective Stoup from the Marion County Sheriff's Office, either prior to or during the trial, regarding her conversations with Sheila miller during an emergency room visit and in not having these investigative reports transcribed;

Claim IV

(a)Defendant alleged counsel was ineffective for failing to call the co-defendant, Houston, during the penalty phase because Houston would have allegedly testified that Defendant had a startled or surprised look on his face when Diana Miller was shot the first time;

(b)Defendant alleged counsel failed to investigate substantial evidence of mitigation, for relying on one single expert that was presented in mitigation who was not adequately prepared, failing to present all available mitigation evidence and in failing to refute the State's case in favor of the imposition of the death penalty;

(c)Defendant alleged counsel was ineffective for failing to object to the State's penalty phase opening argument, for moving to strike juror Lee during the penalty phase and advising Defendant to agree to striking juror Lee from the panel; for failing to object and seek a curative instruction or mistrial on the state's closing argument in the penalty phase on the HAC aggravator, failing to present the new facts from Jarrod Roberts, Sheila Miller's post-trial admission of guilt, and additional testimony of Houston, al which would have established that Defendant (1) was under the substantial domination of another, (2) was suffering from extreme mental or emotional disturbance at the time of the murders, (3) had a substantial impairment in his ability to conform his conduct to

the requirements of the law, and, (4) had a decreased ability to appreciate the criminality of his conduct;

Claim X

(a)In his *pro se* amendment, Defendant alleges counsel was ineffective for failing to object to the State's discriminatory prosecution against him based upon his race.

McGirth appeared *pro se* at the February 16, 2015, evidentiary hearing scheduled for 5 days. CCRC-Middle appeared as standby counsel. (V36, R1-29). McGirth declined to have CCRC-Middle represent him for the postconviction proceedings. **Ultimately, McGirth moved to "waive the evidentiary hearing and preserve the right to appeal all rulings up to this point." (V36, R5).** Standby counsel advised the court that McGirth was "incompetent to go forward and/or represent himself because of what we consider to be bizarre behavior." (V36, R6). **The court conducted a *Faretta* hearing and ultimately found McGirth "freely and voluntarily waived his right to an evidentiary hearing." (V36, R8-26).**

On March 2, 2015, McGirth filed a *pro se* motion for rehearing and/or reconsideration of the orders denying his composite motion to appoint conflict-free counsel or to appoint conflict-free counsel and motion for continuance. (V20, R1846-63). On March 3, 2015, he filed a *pro se* motion for rehearing and/or reconsideration of Defendant's waiver of 3.851 postconviction hearing. (V19, R1778-1817). On April 15, 2015, the trial court denied all of McGirth's pending *pro se* motions and issued its final order denying McGirth's 3.851 postconviction motion. (V21, R2040-68; 2069-72; 2073-75).

On May 11, 2015, McGirth timely filed his *pro se* notice of appeal. (V21, R2076-78). On May 27, 2015, this Court ordered that jurisdiction be temporarily relinquished to the circuit court for thirty (30) days for appointment of counsel. (V21, R2084-85). On June 10, 2015, the circuit court appointed CCRC-Middle to represent McGirth in his appeal. (V21, R2086-88). On June 19, 2015, CCRC-Middle filed a motion to reconsider and motion to withdraw, claiming a conflict with representation. (V21, R2089-2090). On June 22, 2015, McGirth filed a *pro se* motion in this Court objecting to the circuit court's order appointing CCRC-Middle and requested a rehearing or reconsideration. (V21, R2095-98). On June 23, 2015, this Court granted McGirth's request to remand his case back to the circuit court for a hearing on the conflict with CCRCF-Middle and request for conflict-free counsel. (V21, R2099-2100). On June 29, 2015, the State filed its response to McGirth's motion for conflict-free counsel and CCRC's motion for appointment of counsel and for rehearing. (V21, R2101). On July 15, 2015, the circuit court held a hearing and addressed both McGirth's motion and CCRC's motion. (V38, R1-24). After hearing arguments and discussion, the circuit court granted McGirth's motion for conflict-free counsel and CCRC-Middle's motion for appointment of counsel and appointed CCRC-North to represent McGirth for this appeal. (V21, R2109-10; V38, R22-23).

McGirth filed his *Initial Brief* appealing the post-conviction court's denial of his motion to vacate along with a *Petition for a Writ of Habeas Corpus* on

February 24, 2016. This *Response* follows.[8]

RESPONSE TO STANDARD OF REVIEW

The state agrees that ineffective assistance of appellate counsel claims are reviewed under *Strickland v. Washington*, 466 U.S. 668, 688 (1984) and that *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000), citing *Strickland et al*, is instructive.

ARGUMENT

LEGAL STANDARD FOR STATE HABEAS PETITIONS

In raising a state habeas claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman* v. *State*, 761 So. 2d 1055, 1069 (Fla. 2000) (citing *Knight* v. *State*, 394 So. 2d 997, 1001 (Fla. 1981)).

> Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel. *See Thompson* v. *State*, 759 So. 2d 650, 660 (Fla. 2000); *Teffeteller* v. *Dugger*, 734 So. 2d 1009, 1026 (Fla. 1999).
>
> 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

[8] The State's *Answer Brief* on appeal from the denial of post-conviction relief in Case No. SC15-953 is being submitted along with the instant response.

> 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).

Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). Stated differently:

> In order to grant habeas relief on the basis of ineffective assistance of appellate counsel, this Court must determine "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)); *see, e.g., Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999).

Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000).

Appellate counsel need not raise every conceivable claim on appeal to be effective. *Freeman*, 761 So. 2d at 1070; *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990).

Habeas relief based on appellate counsel's ineffectiveness "is limited to those situations where the petitioner establishes first, that appellate counsel's performance was deficient 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." *Davis v. State/Crosby*, 928 So. 2d 1089, 1126 (Fla. 2005). "The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman*, 761 So. 2d at 1069.

> A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction or sentence on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. State*, 457 So. 2d 1380 (Fla. 1984).

Johnson v. Wainwright, 463 So. 2d 207, 209 (Fla. 1985). Further, in order to grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in

performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Simmons v. State*, 105 So. 3d 475, 512 (Fla. 2012) (citing *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla.1986)).

GROUND I: MCGIRTH WAS ACCORDED EFFECTIVE APPELLATE COUNSEL; A *CALDWELL*[9] CLAIM WOULD HAVE BEEN MERITLESS. (*PETITION* 4-9, RESTATED).

In his first ground for relief, McGirth argues that he is entitled to a new direct appeal because his appellate counsel failed to raise a claim based upon *Caldwell v. Mississippi*, 472 U.S. 320 (1985). McGirth argues that had appellate counsel argued a *Caldwell* claim, McGirth would have been entitled to relief under the recently decided *Hurst v. Florida*, 136 S. Ct. 616 (2016).

To the extent McGirth is arguing the underlying jury instruction component of this claim (*Petition* at 6-7), this issue was not properly presented in this habeas petition. Florida law is settled that "'habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.' *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989)." *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994).

This issue was not preserved for appeal because there was no contemporaneous objection during the delivery of the jury instructions. (DAR, V47, R3508-19). This Court made clear in *Coday v. State*, 946 So. 2d 988, 995 (Fla. 2006) that "[i]ssues pertaining to jury instructions are not preserved for

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

appellate review unless a specific objection has been voiced at trial." *Overton v. State*, 801 So. 2d 877, 901 (Fla. 2001); *see also State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991) (holding that instructions are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred). Here, like in *Coday*, trial counsel argued a motion before trial and renewed his objections generally but failed to raise a contemporaneous objection, so the *Caldwell* issue was not preserved. (*See* V47, R3508-10, 3523). Trial counsel argued a *Caldwell* pre-trial motion which was denied. The trial court followed the law from this Court in denying the motion. (DAR, V2, R259-61; R363-68). There can be no ineffective assistance of appellate counsel where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000).

To the extent that McGirth alleges ineffectiveness on the part of his direct appeal counsel, that claim has no legal or factual basis. Lack of preservation aside, appellate counsel cannot be ineffective for failing to raise a meritless claim. *Simmons v. State*, 105 So. 3d at 512. Regarding instructing the jury on its advisory role in recommending a sentence, this Court maintained in *Snelgrove v. State*, 107 So. 3d 242, 255 (Fla. 2012), *as revised on denial of reh'g* (Jan. 31, 2013) that jury instructions that track the standard, approved jury instructions and adequately address the role of the penalty phase jury are proper, *citing Phillips v. State*, 39 So. 3d 296, 304 (Fla. 2010), which held:

> This Court has repeatedly rejected claims that the standard jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence or that these instructions unconstitutionally denigrate the role of the jury in violation of *Caldwell v. Mississippi* [, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)]." *Chavez v. State*, 12 So. 3d 199, 214 (Fla. 2009) (citing *Taylor v. State*, 937 So. 2d 590, 599 (Fla. 2006)) (citing *Elledge v. State*, 911 So. 2d 57, 79 (Fla. 2005); *Mansfield v. State*, 911 So. 2d 1160, 1180 (Fla. 2005); *Sweet v. Moore*, 822 So. 2d 1269, 1274 (Fla. 2002)). As this Court has stated, "[T]he standard jury instructions fully advise the jury of the importance of its role, correctly state the law, and do not denigrate the role of the jury." *Reese v. State*, 14 So. 3d 913, 920 (Fla. 2009) (quoting *Barnhill v. State*, 971 So. 2d 106, 117 (Fla. 2007).

Phillips, at 304 (quoting *Reese v. State*, 14 So. 3d 913, 920 (Fla. 2009)).

As stated by this Court in *Rigterink v. State*, 66 So. 3d 866, 897 (Fla. 2011):

> Given this Court's prior rulings in this area, instructing the jury in accordance with Florida's standard penalty-phase instructions did not result in error and, consequently, this claim is without merit. This Court has consistently rejected similar claims. *See, e.g., Mansfield*, 911 So. 2d at 1180; *Sochor*, 619 So. 2d at 291; *Turner*, 614 So. 2d at 1079. Informing the jury that its recommended sentence is "advisory" is a correct statement of Florida law and does not violate *Caldwell*. *See, e.g., Combs v. State*, 525 So. 2d 853, 855–58 (Fla. 1988).

Rigterink v. State, 66 So. 3d at 897. *Accord Brown v. State*, 126 So. 3d 211, 221 (Fla. 2013), *reh'g denied* (Nov. 13, 2013), *cert. denied*, 134 S. Ct. 2141, 188 L. Ed. 2d 1130 (2014); *Patrick v. State*, 104 So. 3d 1046, 1064 (Fla. 2012). Petitioner is not entitled to relief because the jury was properly instructed.

Instructing the jury that its sentencing recommendation was advisory and that the judge would be the ultimate sentencer was an accurate statement of Florida law at the time McGirth was convicted and sentenced. This Court has consistently

held that the standard penalty phase jury instructions fully advised the jury of the importance of its role, correctly stated the law, did not denigrate the role of the jury, and did not violate *Caldwell*. *See Jones v. State/McNeil*, 998 So. 2d 573, 590 (Fla. 2008); *Brown v. State*, 721 So. 2d 274, 283 (Fla. 1998); *Perez v. State*, 919 So. 2d 347, 368 (Fla. 2005); *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001); *Sochor v. State*, 619 So. 2d 285, 291 (Fla.1993); *Combs v. State*, 525 So. 2d 853 (Fla.1988). Had appellate counsel raised this issue on direct appeal, this Court would have rejected it, as it has consistently rejected similar claims. "We have also repeatedly rejected objections based on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), to Florida's standard jury instructions." *Mansfield v. State*, 911 So. 2d 1160, 1180 (Fla. 2005) (internal citations omitted).

Moreover, appellate counsel is not required to argue every preserved issue on appeal, particularly when that issue is meritless. In *Simmons v. State*, 105 So. 3d 475, 512 (Fla. 2012) (citing *Davis v. State*, 928 So. 2d 1089, 1126–27 (Fla. 2005)), this Court recognized that appellate counsel cannot present every conceivable claim on direct appeal. Merely because the *Caldwell* claim was preserved does not mean it was a meritorious claim for appeal, and certainly does not follow that appellate counsel was ineffective for raising other claims instead. Appellate counsel challenged McGirth's death sentence *supra*, at pages 7-8. This Court recognized that a defendant is better served by an appellate advocate advancing only the strongest issues, stating, "[m]oreover, appellate counsel is not required to present every conceivable claim. *See Atkins v. Dugger*, 541 So. 2d 1165, 1167

(Fla. 1989) ('Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.')

To the extent McGirth is claiming his appellate counsel's failure to raise a *Caldwell* claim precluded him from relief under *Hurst*, *Hurst* would not have applied to McGirth because his conviction was final on April 18, 2011, almost six years before *Hurst* was decided on January 12, 2016. "There is no requirement that counsel, to be reasonably effective, must anticipate changes in the law." *Knight v. State*, 394 So. 2d 997, 1003 (Fla. 1981) (citing *Parker v. North Carolina*, 397 U.S. 790 (1970)). For approximately 30 years, this Court has consistently rejected claims that the standard jury instructions diminish the jury's responsibility under *Caldwell*, and had appellate counsel raised the claim on direct appeal it would have similarly been rejected so there can be no ineffectiveness. Appellate counsel cannot be ineffective for failing to raise a meritless claim. *Simmons v. State*, 105 So. 3d at 512.

As for the ancillary argument that appellate counsel's failure to raise this claim on direct appeal precludes McGirth's ability to raise it in Federal Court, that argument is meritless because, "[i]t is hornbook AEDPA law that the only Supreme Court decisions against which a state court decision is to be measured are those on the books at the time the state court decision was issued. *Evans v. Sec'y*,

Florida Dep't of Corr., 699 F.3d 1249, 1266 (11th Cir. 2012) (citing *Greene v. Fisher*, —– U.S. ——–, 132 S.Ct. 38, 45, 181 L.Ed.2d 336 (2011)).

Moreover, Petitioner would not have been entitled to any relief even if appellate counsel had raised the claim on direct appeal under *Hurst* – which merely extended *Ring* to Florida's sentencing procedure –because the Supreme Court specifically excluded from consideration cases in which one of the aggravators was a conviction for a prior violent felony. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (noting *Ring* does not challenge *Almendarez-Torres*, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); *Alleyne*, 133 S. Ct. at 2160 n.1 (affirming *Almendarez-Torres* provides valid exception for prior convictions). In *Franklin v. State*, 965 So. 2d 79, 101-02 (Fla. 2007), this Court held:

> Additionally, *Ring* did not alter the express exemption in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the two cases. This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying *Ring* claims. *See, e.g., Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004) (denying relief on *Ring* claim and "specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction"); *Davis v. State*, 875 So. 2d 359, 374 (Fla. 2003) (stating that "[w]e have denied relief in direct appeals where there has been a prior violent felony aggravator"); *Johnston v. State*, 863 So. 2d 271, 286 (Fla. 2003) (stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined

> beyond a reasonable doubt"), *cert. denied*, 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004); *Henry v. State*, 862 So. 2d 679, 687 (Fla. 2003) (stating in postconviction case that this Court has previously rejected *Ring* claims "in cases involving the aggravating factor of a previous violent felony conviction").

Franklin v. State, 965 So. 2d at 101-02.

Here, McGirth 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. Since 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. This line of authority was undisturbed by the recent decision in *Hurst*. *See also, Smith v. Florida*, 136 S.Ct. 980 (2016), *reh'g denied*,136 S.Ct. 980; *Hobart v. Florida*, 2016 WL 1078981 (U.S. Mar. 21, 2016).

McGirth has failed to show that appellate counsel seriously erred in declining to raise a *Caldwell* claim on direct appeal; and, to the extent that counsel could or should have raised a *Caldwell* claim, such would be unavailing because the jury was properly instructed on its advisory role in a way that did not unconstitutionally diminish the jury's responsibility. Appellate counsel was not ineffective, and Petitioner has proven neither deficiency nor prejudice as required under *Strickland* to be entitled to habeas relief. This Court should deny all relief on Ground I.

GROUND II: HURST DOES NOT ENTITLE MCGIRTH TO A COMMUTATION OF HIS DEATH SENTENCE TO LIFE.[10] (*PETITION* 9-17, RESTATED).

In his second claim, McGirth argues that he is entitled to have his death sentence commuted to one of life imprisonment based upon the recent decision in *Hurst*, but fails to present any cognizable claim for habeas relief.

To the extent that McGirth is claiming the unconstitutionality of Florida's death penalty statute as a basis for habeas relief, that claim is not properly presented here and should be stricken. *Nelson v. State*, 43 So. 3d 20, 34 (Fla. 2010) (denying habeas claim as to constitutionality of Florida's death sentencing statute because it was not raised on direct appeal and thus was procedurally barred); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992). Florida law is long-settled that "'habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.' *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989)." *Hardwick v. Dugger*, 648 So. 2d at 105. In raising a state habeas claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman* v. *State*, 761 So. 2d 1055, 1069 (Fla. 2000) (citing *Knight* v. *State*, 394 So. 2d 997, 1001 (Fla. 1981)). McGirth fails to argue

[10] In the last line of this argument section McGirth asks, in the alternative, for an additional 3.851 to raise *Hurst* claims. This request is unsupported by any specific argument or authority and is a remedy unrelated to the current procedural standing of the case which, if successful on state habeas, would result in a new direct appeal, not a new postconviction motion. This argument should be stricken.

any deficiency on the part of his appellate counsel and merely seeks to circumvent the procedural bar to a second appeal. Moreover, this Court has dismissed state habeas claims as procedurally barred when they were not raised in the petitioner's 3.851 motion. *See Stewart v. Wainwright*, 494 So. 2d 489, 490 (Fla. 1986). To the extent further substantive argument is necessary, the State submits the following.

***Hurst* does not entitle McGirth to a life sentence.**

Petitioner presents the meritless argument that Section 775.082(2), *Florida Statutes* entitles McGirth to an automatic life sentence. He argues, in the alternative, that Hurst must be applied retroactively in his case. (*Petition* at 14-15). It is pivotal to note however, *Hurst* did not determine capital punishment to be unconstitutional; *Hurst* merely invalidated Florida's procedures for implementation, finding that they *could* result in a Sixth Amendment violation if the judge makes factual findings which are **not supported by a jury verdict**. *See, State v. Perry*, Case No. 5D16-516, (Fla. 5th DCA Mar. 16, 2016).[11] Section 775.082(2), *Florida Statutes* does not apply because it provides that life sentences

[11] "*Hurst* determined that Florida's procedure to impose the death penalty was unconstitutional, not the penalty itself. The Court recognized that section 775.082(1), Florida Statutes (2010), "does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" 136 S. Ct. at 622 (quoting §775.082(1), Fla. Stat. (2010)). In holding Florida's capital sentencing procedure unconstitutional, the Court was particularly concerned that "Florida does not require the jury to make the critical findings necessary to impose the death penalty." *Id*. We believe that Hurst's holding is narrow and based solely on the Court's determination that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id*. at 619. Thus, we have no difficulty in concluding that *Hurst* struck the process of imposing a sentence of death, not the penalty itself." (*Slip op*. at 5).

without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional." This provision was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. *See Coker v. Georgia*, 433 U.S. 584 (1977).

In *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), this Court explained that following *Furman*, the Attorney General filed the motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences were illegal sentences.[12] That is certainly not the case here.

Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." *Donaldson v. Sack*, 265 So. 2d 499, 565 n. 10 (Fla. 1972) (Roberts, C.J., concurring specially). The Court held that the death penalty, as imposed for murder and for rape, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible. The situation following *Furman* simply has no application to

[12] It is also notable that this was before the time that either this Court or the United States Supreme Court had determined the appropriate rules for retroactivity, as in *Teague v. Lane*, 489 U.S. 288 (1989), and *Witt v. State*, 387 So. 2d 922 (1980).

the limited procedural ruling issued by the Supreme Court in *Hurst. Hurst* merely prompted the change in procedure in sentencing a defendant to death, but did not constitutionally invalidate all prior death penalty cases, as McGirth asserts.

***Hurst* is not retroactive**.

McGirth's conviction was final April 18, 2011. When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.[13] *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

In *Hurst*, the Court held that Florida's capital sentencing structure violated *Ring v. Arizona*, 536 U.S. 584 (2002), because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst*, at 624. In arriving at its decision, the Court looked directly to Florida's sentencing statute, finding that it does not "make a defendant eligible for death until 'findings *by the court*

[13] Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. 288, 310–13 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990)).

that such a person shall be punished by death.'" *Id*. at 620 (citing Fla. Stat. § 775.082(1) (emphasis in opinion). Also, under *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. *Spaziano*, 433 So. 2d at 512. Thus, the Supreme Court held Florida's capital sentencing structure, "which required the judge alone to find the existence of an aggravating circumstance," violated its decision in *Ring*, and overruled the prior decisions of *Spaziano*, and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Hurst*, at 620-24.

However, the Supreme Court reaffirmed that the Sixth Amendment right underlying *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. *Alleyne v. United States*, 133 S. Ct. 2151, 2161 n.2 (2013) ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' *Williams v. New York*, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."); *see also United States v. O'Brien*, 560 U.S. 218, 224 (2010) (recognizing that *Apprendi* does not apply to

sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible). Here, McGirth was eligible for a death sentence before entering the sentencing phase of his trial based upon his prior violent felony conviction and his contemporaneous conviction in the guilt phase.

Significantly, this Court has already decided that *Ring* does not apply retroactively in Florida. Logically, no case applying *Ring*—such as *Hurst* – should apply retroactively. In *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005), this Court comprehensively applied the *Witt* factors to determine that *Ring* was not subject to retroactive application. This Court concluded:

> We conclude that the three *Witt* factors, separately and together, weigh against the retroactive application of *Ring* in Florida. To apply *Ring* retroactively "would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state ... beyond any tolerable limit." *Witt*, 387 So. 2d at 929-30. Our analysis reveals that *Ring*, although an important development in criminal procedure, is not a "jurisprudential upheaval" of "sufficient magnitude to necessitate retroactive application." *Id*. at 929. We therefore hold that *Ring* does not apply retroactively in Florida and affirm the denial of Johnson's request for collateral relief under *Ring*.

In *Johnson*, this Court specifically noted the severe and unsettling impact that retroactive application would have on our justice system (commuting 389 death sentences to life in prison.) *Johnson*, 904 So. 2d at 411-12. Appellant's invitation for this Court to revisit this Court's decision is unpersuasive. Neither the Federal nor Florida Constitutions justify or authorize this Court to commute

his sentence. Such a decision would ignore the considerable interests of the citizens of this State and, in particular, victims' family members upon whom the emotional toll of such an action cannot be measured. Moreover, the floodgates of litigation that has already begun as a result of the *Hurst* decision would be exponentially amplified as every defendant sought relief, regardless of the finality of their sentences or the decades since their convictions.

State and federal courts have uniformly held that *Ring* is not retroactive. *See State v. Towery*, 64 P.3d 828, 835-36 (2003), *cert. dismissed*, 539 U.S. 986 (2003). ("Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconstant with the Court's duty to protect victim's rights under the Arizona Constitution); *Rhoades v. State*, 233 P. 3d 61, 70-71 (2010), *cert. denied*, 562 U.S. 1258 (2011) (holding that *Ring* is not retroactive after conducting its own independent *Teague* analysis and observing, as the Supreme Court did in *Summerlin*, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy."); *Colwell v. State*, 59 P. 3d 463, 473 (2002), *cert. denied*, 540 U.S. 981 (2003) (applying *Teague* to find that *Ring* announced a new procedural rule that would not be subject to retroactive application).

In *Schriro v. Summerlin*, the Supreme Court directly addressed whether its decision in *Ring v. Arizona* was retroactive. *Summerlin*, 542 U.S. at 349. The Court held the decision in *Ring* was **procedural** and non-retroactive. *Id*. at 353. This was because *Ring* only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id*. The Court concluded its opinion stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin*, 542 U.S. at 358. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (holding *Crawford v. Washington*, 541 U.S. 36 (2004) was not retroactive under *Teague* and relying extensively on the analysis of *Summerlin*).

Ring did not create a new constitutional right. That right was created by the

Sixth Amendment guaranteeing the right to a jury trial.[14] If *Ring* was not retroactive, then *Hurst* cannot be retroactive as *Hurst* is merely an application of *Ring* to Florida. In fact, the decision in *Hurst* is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. *See DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in *Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States was not retroactive); *McCoy v. United States*, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague*, and acknowledging that every federal circuit to consider the issue reached the same conclusion); *Varela v. United States*, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as *Ring*, *Blakely*, and *Booker*, applying *Apprendi*'s "prototypical procedural rule" in various contexts are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 424 (2015) (holding that *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013), which extended *Apprendi* from maximum to minimum sentences, did not, like *Apprendi* or *Ring*, apply retroactively); *State v. Johnson*, 122 So. 3d 856, 865-66 (Fla. 2013) (holding *Blakely* not retroactive in Florida).

[14] The right to a jury trial was extended to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968). But, in *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*), the Court declined to apply the holding of *Duncan* retroactively. *Apprendi* merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. *Apprendi*, 530 U.S. at 494.

McGirth's Sixth Amendment Rights were not violated and harmless error analysis is appropriate.

Appellant takes the position that any *Hurst* error is structural and not subject to harmless error review. Because *Ring* is merely procedural, then a decision applying *Ring*, such as *Hurst*, could only be procedural. Harmless error review is available to a procedural rule. Moreover, the Court necessarily contemplated harmless error review in *Hurst* when the Court stated:

> Finally, we do not reach the State's assertion that any error was harmless. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *See Ring*, 536 U.S. at 609 n.7."

Hurst, at 624.

Clearly, any error in sentencing a defendant to death, contrary to Petitioner's position, is subject to harmless error review in the context of a *Ring/Hurst* claim – which asks only whether a defendant's Sixth Amendment right to jury sentencing – was violated under the facts of his particular case. This Court need not reach that issue here, however, because this claim is not properly raised in a state habeas petition.

To the extent it is relevant, Hurst was in a distinctly different position from McGirth. *Hurst* presented the United States Supreme Court with a 'pure' claim

under *Ring*, where none of the established aggravating circumstances were identifiable as having come from a jury verdict. *Hurst*, 147 So. 3d at 445–47. In Florida, a defendant is *eligible* for a capital sentence if at least one aggravating factor applied to the case. *See Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010); *Zommer v. State*, 31 So. 3d 733, 752-54 (Fla. 2010); *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005). In McGirth's case, a unanimous jury convicted him of the contemporaneous offenses of the attempted first-degree murder of James Miller, robbery with a firearm, and fleeing to elude law enforcement. The jury also heard that McGirth had been under a sentence of felony probation, which was not contested in the penalty phase, and that he had committed prior violent felonies. Based on these convictions, McGirth was eligible for his 11-1 reccomendation of death. Once the jury found one aggravator, McGirth became eligible for the higher range penalty-death. In *Alleyne*, 133 S. Ct. at 2162-63, the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." In Florida, only one aggravating factor is necessary to support the higher range penalty-death. This Court has consistently rejected *Ring* claims where the defendant is convicted of a qualfying contemporaneous felony. *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012). Unlike Hurst, McGirth's death sentence eligibility is supported by unanimous jury findings. Each of these facts,

independently, and considered together, remove McGirth from any considerations under *Ring/Hurst.*

As discussed *supra*, the United States Supreme Court has recognized the distinction of an enhanced sentence supported by a prior conviction. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (noting *Ring* does not challenge *Almendarez-Torres*, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); *Alleyne*, 133 S. Ct. at 2160 n.1 (affirming *Almendarez-Torres* provides valid exception for prior convictions). Consequently, this Court's well-established precedent that any *Ring* claim (or now *Hurst* claim) is meritless in the face of a prior qualifying felony conviction was not disturbed. This issue is procedurally barred and meritless, and should be denied.

GROUND III: MCGIRTH IS NOT INCOMPETENT AND NO DEATH WARRANT HAS BEEN SIGNED. (*PETITION* 17-18, RESTATED).

In his third claim, McGirth raises an "incompetent for execution" claim. As Petitioner recognizes, this claim is not ripe because no death warrant has been signed for McGirth. (*Petition* at 17). In *Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001), this Court found that the issue of competency to be executed is premature and cannot legally be raised until after a death warrant is issued. *Anderson v. State*,

18 So. 3d 501, 522 (Fla. 2009); *State v. Coney*, 845 So. 2d 120, 137, n. 19 (Fla. 2003). This claim must be denied.

CONCLUSION

Based on the foregoing authority and arguments, the Respondent respectfully requests that this Honorable Court deny McGirth's petition for a writ of habeas corpus.

CERTIFICATE OF SERVICE

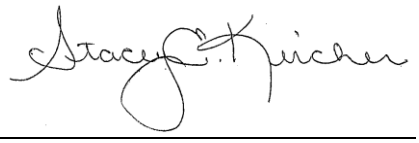
I HEREBY CERTIFY that a true and correct copy of the above has been furnished by email via e-Portal filing to: Robert S. Friedman, Assistant CCRC – North, (friedman@ccmr.state.fl.us); Karen L. Moore, Assistant CCRC-North, (moore@ccmr.state.fl.us); and Stacy R. Biggart, Assistant CCRC-North, (biggart@ccmr.state.fl.us); support@ccmr.state.fl.us; on this 29nd day of April, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14-point font.

Respectfully submitted and certified,

PAMELA JO BONDI
ATTORNEY GENERAL

/S/ 

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