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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC16-341

RENALDO MCGIRTH,
Petitioner,

v.

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

REPLY TO AMENDED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This reply 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 letter "R" followed by the record volume number, followed by a "p," followed by the volume page number or numbers. For ease of reading, the Petitioner is referred to as Mr. McGirth and the Respondent is referred to as "Respondent."

The Respondent has filed its response to Mr. McGirth's petition, and this reply follows. This reply will address only the most salient points argued by the Respondent. Mr. McGirth relies on his petition in reply to any argument or authority argued by the Respondent that is not specifically addressed in this reply.

REPLY TO ARGUMENT I

In response to Mr. McGirth's Ground I, the Respondent argues that Mr. McGirth's ineffective assistance of appellate counsel claim for failure to raise a *Caldwell v. Mississippi*[1] claim was not properly preserved for appeal because there was no contemporaneous objection during the delivery of the jury instructions.

According to § 90.104(1)(b) of the Florida Evidence Code, "If the court has made a definitive ruling on the record admitting or excluding evidence, either at or

[1] *Caldwell v. Mississippi*, 472 U.S. 279 (1985).

before trial, a party need not renew an objection or offer of proof to reserve a claim of error for appeal."

Mr. McGirth filed a Motion in Limine and to Strike Portions of "Florida Standard Instructions in Criminal Cases" Re: *Caldwell v. Mississippi.* R2, pp. 259 – 261. The Court heard arguments on the motion at a pretrial hearing on October 3, 2007, and issued an order denying the motion on October 12, 2007. R2, p. 260; R2, p. 364. Mr. McGirth's motion stated with his legal grounds for the motion and the Court ruled on the motion prior to trial. According to § 90.104(1)(b), Fla. Stat. (2006), Mr. McGirth's trial attorney was not required to raise a contemporaneous objection during the jury instructions to preserve this issue on appeal.

The State also argues that if Mr. McGirth's Ground I is properly preserved for appeal, a *Caldwell v. Mississippi* claim is a meritless claim and there is no ineffective assistance of appellate counsel for failure to raise a meritless claim.

The Supreme Court's decision in *Hurst v. Florida,* 136 S. Ct. 616 (2016), is an enormous shift in Florida death penalty law and requires a paradigm shift in our understanding of the Sixth Amendment aspects of Florida's death penalty scheme. *Hurst* necessarily opens up new approaches to understanding what is, and is not, unconstitutional in what remains of that scheme. Mr. McGirth was sentenced to death under an unconstitutional sentencing scheme, and in violation of *Caldwell*, his jury was instructed that its penalty phase verdict was merely a

"recommendation" or an "advisory verdict" to be returned by majority vote. R6, p. 923. Mr. McGirth's jury was assured that the ultimate decision-maker regarding whether Mr. McGirth lives or dies would be the judge.

In light of *Hurst*, Mr. McGirth's *Caldwell* claim is indeed meritorious and a resentencing jury must unanimously find: 1) whether the State had proven that sufficient aggravating circumstances exist to justify a death sentence, and 2) whether the State had proven that the sufficient aggravating circumstances outweighed the mitigating circumstances. The resentencing jury must also receive instructions compliant with *Caldwell*, properly advising the jury of the binding effect of its factual determinations.

The State also argues that *Hurst* does not apply to Mr. McGirth because his conviction was final almost six years before *Hurst* was decided, and any error would be harmless because Mr. McGirth was convicted of a contemporaneous violent felony. Mr. McGirth will address the retroactivity of *Hurst* and the harmless error issue in his Reply to Argument II.

REPLY TO ARGUMENT II

The State argues in its Response Brief that Mr. McGirth's *Hurst* claim is not properly raised in a habeas petition. This Court has not rendered its decision on *Hurst* and it is unclear to Mr. McGirth the proper way to present this argument to the Court. Mr. McGirth has included the same argument in his Initial Brief in

the appeal from the denial of Rule 3.851 relief, and in his petition for writ of habeas corpus. Since the two pleadings were filed simultaneously with this Court and he has no way of ascertaining this Court's view of which is the proper way to raise this issue before this Court, Mr. McGirth has decided in an abundance of caution that including the same argument in both pleadings is the best way to ensure that he does not make the wrong choice and waive his argument.

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

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

death sentences had been found unconstitutional, not the death penalty itself. Accordingly, this Court should vacate Mr. McGirth's death sentence and direct the trial court to impose a life sentence instead.

***Hurst* is retroactive.**

The State also argues that *Hurst* is not retroactive and does not apply to Mr. McGirth because his conviction was final on April 18, 2011, almost five years before the *Hurst* decision issued on January 12, 2016. Mr. McGirth's conviction was for a 2006 murder.

Timothy Hurst was convicted of a 1998 murder. He was tried and sentenced to death in 2000. His death sentence was affirmed by this Court in 2002. *Hurst v. State*, 819 So. 2d 689 (Fla. 2002).[2] Subsequently, this Court granted Mr. Hurst

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[2] In his 2002 direct appeal, Hurst argued that his death sentence stood in violation of the Sixth Amendment principles enunciated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court rejected the claim saying:

> Subsequent to the filing of Hurst's initial brief, this Court decided this issue and has rejected the argument that the *Apprendi* case applies to Florida's capital sentencing scheme. *See Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), cert. denied, 532 U.S. 1015, 121 S. Ct. 1752, 149 L. Ed. 2d 673 (2001); *Mann v. Moore*, 794 So. 2d 595 (Fla. 2001). In his reply brief, Hurst requests that this Court revisit the *Mills* decision and find that *Apprendi* does apply to the capital sentencing schemes. Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to revisit the *Mills* decision, and thus we reject Hurst's final claim.

Hurst, 819 So. 2d at 703.

collateral relief on an ineffective assistance of counsel claim. *Hurst v. State*, 18 So. 3d 975 (Fla. 2009). Only because this Court ordered a new penalty phase was Mr. Hurst able to present his Sixth Amendment challenge to Florida's capital sentencing scheme a second time in his direct appeal. When the United States Supreme Court granted certiorari review, Hurst's Sixth Amendment challenge was found meritorious.

To deny Mr. McGirth the benefit of the ruling in *Hurst*, while Mr. Hurst gets the benefit, would mean that all that separates Mr. Hurst prevailing on the Sixth Amendment claim from Mr. McGirth not prevailing is the ineffectiveness of Mr. Hurst's trial attorney at his 2000 trial. Mr. McGirth's offense occurred eight years after Mr. Hurst's crime. Such a distinction would be wholly arbitrary in violation of *Furman v. Georgia,* and unfair within the meaning of *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (emphasis added) (quotations omitted): Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Hurst is clearly retroactive under Florida's test. This Court established retroactivity in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). In *Witt,* this Court concluded:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity

> in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid the individual instances of obvious injustice.

Id., 387 So. 2d at 925. Under *Witt,* this Court applies new decisions favorable to criminal defendants retroactively when those decisions (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015) (citing *Witt*, 387 So. 2d at 931). *Hurst* satisfies all three *Witt* factors.

As to the first *Witt* factor, *Hurst* is a decision of the United States Supreme Court. As to the second factor, *Hurst*'s holding is constitutional in nature as it holds that the Sixth Amendment forbids a capital sentencing scheme that requires judges, as opposed to juries, to conduct the fact-finding that subjects a defendant to a death sentence. *Hurst* also satisfies the third *Witt* factor because it "constitutes a development of fundamental significance," *i.e.*, it is a change in the law which is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965)." *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929) (internal brackets omitted). Retroactivity would ensure that the Sixth Amendment rights of individuals like Mr. McGirth are protected, and is in keeping with this Court's

understanding that "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or life under a process no longer considered acceptable and no longer applied in indistinguishable cases.'" *Falcon*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929).

Although Mr. McGirth's sentence became final before *Hurst* was issued, *Witt* does not recognize the concept of partial retroactivity, and this Court has never held that a new Supreme Court decision is retroactive but then refused to allow some individuals to benefit because they were sentenced before some earlier predicate Supreme Court decision. *See Falcon v. State*, 162 So. 3d 954 (Fla. 2015).

Similarly, in the context of capital punishment, this Court rejected the dubious "partial retroactivity" approach after the decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which held that trial courts in capital cases are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances. *See, e.g., Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987). The Court permitted all impacted individuals to seek *Hitchcock* relief by filing a post-conviction motion in the trial court. The Court did not truncate the retroactivity of *Hitchcock* by limiting to those whose death sentences were "finalized" after *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982),

or *Skipper v. South Carolina*, 471 U.S. 1 (1986), upon which *Hitchcock* relied. The concept of "partial retroactivity" is recognized as uncommon and has been criticized as antithetical to basic notions of fairness.

Under *Witt*, Mr. McGirth cannot be treated differently than Mr. Hurst. Uniformity and fairness demand that they both receive the benefit of the Supreme Court's ruling in *Hurst.*

The constitutional deficiencies in Mr. McGirth's case defy harmless error analysis.

The State also argues that "[b]ecause *Ring*[3] is merely procedural, then a decision applying *Ring*, such as *Hurst*, could only be procedural. Mr. McGirth recognizes that the issue of the availability of harmless error was mentioned in *Hurst* although the United States Supreme Court did not resolve its applicability:

> 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, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (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, 122 S. Ct. 2428.

Hurst, 136 S. Ct. at 624.

In so doing though, the Supreme Court referred this court to *Neder v. United States*, 527 U.S. 1 (1999), noting parenthetically that the failure to instruct

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

on an *uncontested element* in that case had been found harmless.[4] The citation to *Neder* contains an extended discussion of when harmless error may be available as to constitutional error and when it may not be appropriate to consider constitutional error subject to harmless error analysis. It is Mr. McGirth's position that the *Hurst* error in his case is structural error that can never be found harmless under *Neder.*[5]

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[4] Here, Mr. McGirth contested the presence of the statutorily defined facts. This takes Mr. McGirth's case outside the scope of *Neder.*

[5] Unlike the circumstances in *Neder*, the element at issue under *Hurst* is the element that separates first degree murder and a life sentence from capital first degree murder and a death sentence. Unlike the circumstances in *Neder* where the presence of the element was not contested, Mr. McGirth did contest whether he should be sentenced to death and would contest it again in a new proceeding. Moreover, a reversal in Mr. McGirth's case on the basis of Hurst would not by itself require a retrial of his guilt of first degree murder. It would either require the imposition of a life sentence or a remand for a new proceeding to determine whether the State could now prove the statutorily defined facts necessary to authorize the imposition of a death sentence, and Mr. McGirth will contest the existence of those facts. This distinguishes *Neder* and demonstrates that the error should be found structural and not subject to harmless error.

Of course at his penalty phase, Mr. McGirth did not have notice that the statutorily defined facts were elements that under the Sixth Amendment a jury was required to find proven beyond a reasonable doubt. Due process demands reasonable notice, which was not given here. This Court cannot rely on counsel's actions or inactions to find errors harmless when counsel's strategic decisions were made on the basis of misinformation as to factual issues the Sixth Amendment required the jury to determine. Voir dire would be conducted differently. The exercise of peremptory challenges may be impacted. The jury instructions imposed would have to comply with *Caldwell.* The full ramifications of *Hurst* on Florida capital trials at the moment can only be guessed.

Hurst requires a jury to find the elements of capital first degree murder beyond a reasonable doubt. There is no such jury verdict in Mr. McGirth's case. Mr. McGirth's jury was not instructed that *any* aspect of its sentencing recommendation would be binding on the sentencing judge as required by *Caldwell*. Mr. McGirth's jury did not specify which, if any, aggravating circumstances it found unanimously. Nor did the jury return a unanimous verdict finding "sufficient aggravating circumstances exist[ed] to justify the imposition of the death penalty." Finally, the jury did not return a unanimous verdict finding insufficient mitigating circumstance existed to outweigh the aggravating circumstances. Since Florida law requires unanimity, there is no way to conclude beyond a reasonable doubt that if Mr. McGirth's jury had been properly instructed that its determination of the statutorily defined facts would be binding on the judge that it would have unanimously found the statutorily defined facts necessary to authorize a death sentence. Under *Hurst*, Mr. McGirth's death sentence cannot stand.

In this situation, "there has been no jury verdict within the meaning of the Sixth Amendment," and "[t]here is no object. . .upon which harmless-error scrutiny can operate." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how

inescapable the findings to support the verdict might be—would violate the jury-trial guarantee." *Id.* at 281-82.

But assuming for the sake of argument that *Hurst* error is subject to harmless error analysis, the *Hurst* error present on the face of Mr. McGirth's trial records shows that the State cannot prove that the error was harmless beyond a reasonable doubt, and certainly not in Mr. McGirth's case where one juror voted in favor of a life sentence. This is without regard to the relevant non-record evidence regarding how the pre-*Hurst* law impacted and changed strategic decisions made in the course of the trial which should also be considered before constitutional error is determined to be harmless. *See Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991). Certainly, before this Court could make a finding that the *Hurst* error is harmless, it must afford Mr. McGirth an opportunity to present evidence at a hearing regarding the impact pre-*Hurst* law had on defense counsel, just as this Court did in *Meeks.*[6]

REPLY TO ARGUMENT III

[6] In *Meeks*, this Court, while considering a habeas petition raising a *Hitchcock* claim, determined that the petitioner was entitled to an evidentiary hearing as to the issue of harmless error, and it relinquished jurisdiction to the trial court to conduct such a hearing. On the basis of *Meeks*, this Court can similarly remand Mr. McGirth's case to the trial court should it determine that an evidentiary hearing is warranted on any State argument that the *Hurst* error in Mr. McGirth's case is harmless.

The State argues that Ground III, Competency to Execute, cannot be raised until a death warrant is issued by the Governor. Mr. McGirth acknowledges this point but raises the claim in his state habeas petition in order to preserve a future claim.

CONCLUSION

WHEREFORE, Mr. McGirth 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,

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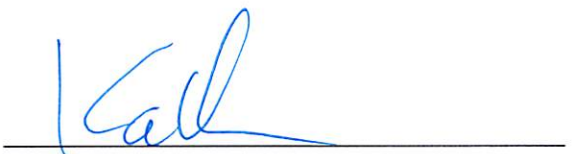
CERTIFICATE OF SERVICE

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, P.O. Box 1000, Raiford, FL 32083, on this date, June 8, 2016.



KAREN L. MOORE

CERTIFICATE OF FONT COMPLIANCE

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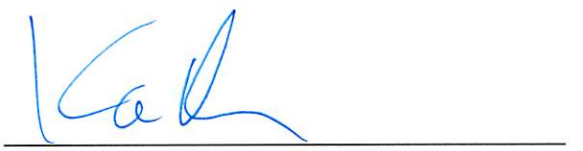

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