DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DARIOUS WILCOX

Petitioner,

vs.

STATE OF FLORIDA and
SEC'Y, DEP'T OF CORR.,

Respondents.

On Petition For A Writ of Certiorari To
The Supreme Court of Florida

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME 1

BRITTNEY N. LACY*
Assistant CCRC-South
LacyB@ccsr.state.fl.us
**Counsel of Record*

MICHAEL COOKSON
Staff Attorney
CooksonM@ccsr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH
110 S.E. 6th Street, Suite 701
Fort Lauderdale, FL 33301
Tel. (954) 713-1284

COUNSEL FOR PETITIONER

November 17, 2026

INDEX TO APPENDIX

VOLUME 1

APPENDIX A: Florida Supreme Court Opinion Affirming Denial of Postconviction and Habeas Relief, *Darious Wilcox v. State of Florida*, 436 So. 3d 434 (Fla. 2026), May 21, 2026..... A1

APPENDIX B: Circuit Court Order Denying Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence, *State of Florida v. Darious Wilcox*, Case No. 08-003736 CF 10A, Sept. 26, 2023 ..... A17

APPENDIX C: Initial Brief of Appellant on Appeal From the Circuit Court to the Florida Supreme Court, *Darious Wilcox v. State of Florida*, Case No. SC2023-1498, May 24, 2024. ..... A37

APPENDIX D: Supplemental Initial Brief of Appellant on Appeal From the Circuit Court to the Florida Supreme Court, *Darious Wilcox v. State of Florida*, Case No. SC2023-1498, Sept. 6, 2024. ..... A193

VOLUME 2

APPENDIX E: Reply Brief of Appellant on Appeal From the Circuit Court to the Florida Supreme Court, *Darious Wilcox v. State of Florida*, Case No. SC2023-1498, Oct. 18, 2024. ..... A219

APPENDIX F: Supplemental Reply Brief of Appellant on Appeal From the Circuit Court to the Florida Supreme Court, *Darious Wilcox v. State of Florida*, Case No. SC2023-1498, Nov. 6, 2024. ..... A260

APPENDIX G: Motion for Rehearing of Florida Supreme Court's Opinion Affirming Denial of Relief, *Darious Wilcox v. State of Florida*, Case No. SC2024-0785, June 27, 2026. ..... A279

APPENDIX H: Petition for Writ of Habeas Corpus to the Florida Supreme Court, *Darious Wilcox v. State of Florida*, Case No. SC2024-0785, May 24, 2024. ..... A300

APPENDIX I: Reply Brief of Petitioner to the Florida Supreme Court, *Darious Wilcox v. State of Florida*, Case No. SC2024-0785, May 24, 2024. ..... A379

2026 WL 1424742

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida.

Darious WILCOX, Appellant,

v.

STATE of Florida, Appellee.

Darious Wilcox, Petitioner,

v.

Secretary, Department of Corrections, Respondent.

No. SC2023-1498, No. SC2024-0785

|

May 21, 2026

Synopsis

Background: After his conviction of first-degree murder, armed kidnapping, and armed robbery, and his resulting death sentence were affirmed on direct appeal, 143 So.3d 359, defendant filed motion for postconviction relief. The Circuit Court, 17th Judicial Circuit, Broward County, Martin S. Fein, J., 2019 WL 4391268, summarily denied motion and defendant appealed. The Supreme Court, vacated and remanded for a case management conference and further proceedings. On remand, the Circuit Court, Fein, J., summarily denied all but one of defendant's claims, and after an evidentiary hearing on the remaining claim, entered order denying relief. Defendant appealed and petitioned for writ of habeas corpus, raising additional issues.

Holdings: The Supreme Court, Grosshans, J., held that:

defendant failed to show deficient performance or prejudice in connection with his penalty-phase ineffective assistance of counsel claim;

counsel's failure to investigate and challenge defendant's competency to waive counsel was not deficient performance, as element of ineffective assistance of counsel;

unanimous jury findings of guilt for first-degree murder, armed kidnapping, and armed robbery, supported findings of aggravating factors beyond reasonable doubt, as required to support jury's recommendation of death;

there was no reasonable probability of acquittal had purported newly discovered evidence been introduced at trial;

appellate counsel's failure to challenge jury instructions and jury's finding related to death-penalty statute's prior violent felony (PVF) aggravator was not deficient performance, as element of ineffective assistance of counsel;

appellate counsel's failure to raise due process challenge to admission of defendant's prior convictions during guilt phase did not prejudice defendant, and therefore was not ineffective assistance of counsel;

appellate counsel's failure to argue that defendant's constitutional right to effective cross-examination was infringed based on the State's refusal to transcribe various witness statements was not deficient performance, as element of ineffective assistance of counsel; and

appellate counsel's failure to raise claim that trial court violated defendant's Sixth Amendment right to effective cross-examination by refusing to allow him to refresh a witness's memory did not prejudice defendant, and therefore was not ineffective assistance of counsel.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

An Appeal from the Circuit Court in and for Broward County, Martin S. Fein, Judge – Case No. 062008CF003736A88810

And an Original Proceeding – Habeas Corpus

Attorneys and Law Firms

Suzanne Keffer, Capital Collateral Regional Counsel, Brittney N. Lacy, Assistant Capital Collateral Regional Counsel, Paul Kalil, Special Assistant Capital Collateral Regional Counsel, and Michael T. Cookson, Staff Attorney, Southern Region, Fort Lauderdale, Florida, for Appellant/Petitioner

James Uthmeier, Attorney General, Tallahassee, Florida, and Lisa-Marie Lerner, Assistant Attorney General, West Palm Beach, Florida, for Appellee/Respondent

 © 2026 Thomson Reuters. No claim to original U.S. Government Works.

Opinion

GROSSHANS, J.

***1** Darious Wilcox, a prisoner sentenced to death, appeals the circuit court's order denying his initial postconviction motion filed under Florida Rule of Criminal Procedure 3.851. He also separately asks us to issue a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm the circuit court's order and deny habeas relief.

I

A jury found Wilcox guilty of the 2008 murder of Nimoy Johnson and other serious related crimes. Early in 2008, Wilcox briefly stayed with his cousins, Richaunda Curry and Terrell Collier, who lived next door to Johnson in the same townhouse complex. The day that Wilcox arrived, Johnson's home was burglarized. Suspecting that someone from Curry's residence was responsible, Johnson angrily confronted her ex-boyfriend, who also was living there. Curry, however, denied that anyone from her home was involved. The discussions on this topic concluded amicably, with Johnson apologizing for his accusations.

Roughly a week later, Johnson called a friend, Stephanie Hankerson, and asked her to come over to his home. Hankerson agreed and brought along two of her friends, Veronica McMorris and Taneshia Arnold. As the three women approached Johnson's doorway, a man standing inside—later proven to be Wilcox—frightened McMorris. Screaming, the women ran back to Hankerson's vehicle, a white Chevy Tahoe.

Johnson called Hankerson, explained that the man was his friend, and asked the women to return. Hankerson went back alone. As she entered Johnson's home, she saw Wilcox standing inside. He was dressed in a black jacket and bandana and was pointing a gun at her. Wilcox demanded that Hankerson call her friends and tell them to come back inside. Hankerson complied. When her friends reentered the home, Wilcox, still holding the gun, positioned himself between them and the doorway.

After forcing Johnson to serve the women drinks, Wilcox ordered everyone upstairs. Once upstairs, Wilcox (still armed) smoked a marijuana cigarette with Johnson and took Hankerson's car keys against her will. Wilcox then instructed Johnson to bind the women's wrists and ankles. After confirming for himself that the restraints were secure, Wilcox wiped down everything he had touched and ordered Johnson back downstairs. There, Wilcox bound Johnson's wrists and ankles.

Having restrained Johnson, Wilcox then exited Johnson's house, retrieved his belongings from his cousin Collier, placed them in Hankerson's car, and started the engine. Next, after telling Collier to leave, Wilcox went back inside the house. He approached Johnson—who was on his knees and still restrained—and shot him once in the back of the head. He then drove off in Hankerson's vehicle.

With Wilcox now gone, Hankerson managed to free herself of the restraints. She called 911 and ventured downstairs where she found Johnson dead on the floor—facedown, arms tied behind his back, and a bullet wound to the back of his head.

A few hours later, Wilcox called Collier and explained that he killed Johnson to protect Curry and Collier. Wilcox added that he was afraid of how Johnson would react to the burglary and to Wilcox's presence at Curry's house, considering his past accusations.

***2** Meanwhile, law enforcement responded to the crime scene and began an investigation. Eventually, based on Wilcox's cell phone use, officers were able to locate him at a gas station in Miami. Alerted to the presence of law enforcement, Wilcox sped off to a nearby apartment complex where he abandoned the Tahoe and fled on foot. He was arrested a short time later when he emerged from one of the units.

With Wilcox secured, some officers turned their attention to the abandoned SUV. Notably, officers found two firearms inside the vehicle. One of them was a Taurus Millenium pistol. Also in the Tahoe, law enforcement discovered a black jacket and bandana as well as temporary registration paperwork later revealed to contain fingerprints.

Ultimately, the State charged Wilcox with one count of first-degree murder, four counts of armed kidnapping, and one count of armed robbery. And based on the murder charge, the State filed a notice of intent to seek the death penalty.

At the guilt phase, the State presented testimony from Curry, Collier, Hankerson, McMorris, Arnold, and Jaquinda

 © 2026 Thomson Reuters. No claim to original U.S. Government Works.

ht (the s ste of Cu y's ex-boyf end). Gene ally, these w tnesses spoke about the nte act ons w th lcox du n the t me pe od a ound the mu de . Amon othe th n s, these w tnesses elayed va ous th n s that lcox had sa d and done, nclud n a statement about h s ntent to comm t a obbe y.

Du n the State's case, Detect ve B an Ha dy also test f ed about ce ta n steps that led to the a est of lcox— nclud n obta n n lcox's phone numbe wh ch was then used to t ack h s locat on.

In add t on, the State called seve al expe ts. One such w tness exam ned the p stol and p oject le desc bed above, conclud n that the p stol f ed the p oject le that caused the fatal wound. Othe expe ts d scussed DNA ev dence that was developed f om a c a ette found at Johnson's home. The expe ts dete m ned that lcox's DNA p of le was cons stent w th one of the two p of les ene ated f om the c a ette. Anothe w tness, a latent p nt exam ne , concluded that the p nts l fted f om the e st at on fo m matched lcox's p nts.

Round n out the expe ts, the med cal exam ne d scussed h s exam nat on of the v ct m and op ned that Johnson d ed f om a s n le unshot wound to the head. Acco d n to the med cal exam ne , the p oject le ente ed th ou h the back of Johnson's head, passed th ou h h s b a n, and came to est n soft t ssue n h s neck.

lcox, who ep esented h mself du n the u lt phase, [1] called as w tnesses h s lf end, one of h s cous ns, and h s son's mothe . lcox h mself also test f ed. He alle ed that he was not p esent at Johnson's home at the t me of the mu de . H s theo y, as evealed n clos n a ument, was that Coll e was the eal k lle

Reject n that defense, the ju y found lcox u lty as cha ed on all s x counts. Follow n ssuance of the ve d ct, lcox asked that h s standby counsel, Joe alsh, be appo nted to ep esent h m at the penalty phase. The cou t anted that equest.

At the penalty phase (wh ch took place f ve months afte the u lt phase), the State sou ht to p ove fou a avato s. Fo the p o v olent felony a avato , the State p esented a st pulat on that lcox was conv cted of second-de ee mu de and a med obbe y n 1993. In suppo t of the othe a avato s, the State called one w tness and el ed on ev dence p esented du n the u lt phase.

***3** Tu n n to m t at on, lcox p esented test mony f om one w tness, h s mothe Lawanda. She desc bed the dan e ous ne hbo hood n wh ch lcox ew up, h s d ff cult home l fe, he lack of p esence n h s l fe, he p ost tut on, and the mpacts of he own d u add ct on on h m. Lawanda also test f ed that due to he d u add ct on, lcox was a sed by h s andmothe .

Howeve , as elevant he e, lcox, as adv sed by alsh, decl ned to p esent mental-health ev dence to the ju y. In app s n the cou t of that jo nt dec s on, alsh noted that the defense's eta ned expe t, D . She la Rapa, could not offe favo able mental-health m t at on. As eflected n he epo t, she concluded that lcox had ant soc al pe sonal ty d so de , wh ch alsh wo ed m ht nd cate "futu e dan e ousness."

Ult mately, afte cons de n the State's and lcox's ev dence, the ju y voted seven to f ve to ecommend a sentence of death.

At the *Spencer* [2] hea n , alsh p esented D . Ch stophe F che a's test mony. D . F che a added mo e deta ls e a d n lcox's home l fe, pa t cula ly h s uncle's d u use and how Lawanda sold lcox's ame console fo d u money.

Subsequently, the t al cou t sentenced lcox to death, not n fou statuto y a avato s: (1) lcox had comm tted p o v olent felon es (PVF), namely the two 1993 conv ct ons; (2) the mu de was comm tted wh le lcox was en a ed n the comm ss on of a med obbe y and a med k dnapp n ; (3) the mu de was comm tted to avo d a est; and (4) the mu de was cold, calculated, and p emed tated (CCP). § 921.141(5)(b), (d), (e), ( ), Fla. Stat. (2011). The cou t ass ned eat we ht to each a avato . Tu n n to m t at on, the t al cou t found seven nonstatuto y facto s, ass n n each l ttle we ht. [3] Ult mately, the cou t concluded that the a avato s "fa outwe h[ed]" the m t ato s. The cou t added that even f t excluded the CCP and "avo d a est" a avato s f om ts cons de at on, t would st ll mpose the death sentence on the we ht of the othe a avato s. [4]

lcox appealed, a s n both u lt- and penalty-phase ssues. But we ejected h s ten cla ms, f nd n n connect on w th each e the no e o o that any e o was ha mless.

Accordingly, we affirmed. *Wilcox v. State* (*Wilcox I*), 143 So. 3d 359 (Fla. 2014). [5]

***4** After the United States Supreme Court denied Wilcox's petition for certiorari, *Wilcox v. Florida*, 574 U.S. 1161, 135 S.Ct. 1406, 191 L.Ed.2d 375 (2015), he filed his initial motion for postconviction relief under rule 3.851, raising claims under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The circuit court summarily denied Wilcox's motion. We, however, vacated the circuit court's order and remanded for a *Huff*[6] hearing and further proceedings. *Wilcox v. State* (*Wilcox II*), No. SC18-146, 2019 WL 4391268, at *1 (Fla. Sep. 13, 2019).

After the circuit court held the mandated *Huff* hearing, it summarily denied all but one of Wilcox's eight claims, concluding that they could be resolved as a matter of law on the existing record. However, the court determined that an evidentiary hearing would be necessary to resolve Wilcox's claim that his penalty-phase counsel provided ineffective assistance in investigating and presenting mitigating evidence.

At the evidentiary hearing, Wilcox called a total of nine witnesses, including penalty-phase counsel, the mitigation specialist, and four experts. After the hearing concluded, the circuit court entered an order denying all eight claims. Wilcox now appeals, arguing that the circuit court erred in denying five of the claims. He also petitions for a writ of habeas corpus, in which he raises eight additional issues. For the following reasons, we reject all of Wilcox's claims.

II

We begin with Wilcox's appeal. Before addressing Wilcox's arguments for reversal, we discuss relevant background principles governing his ineffectiveness claims.

As interpreted by the U.S. Supreme Court, the Sixth Amendment to the U.S. Constitution guarantees the right to effective assistance of counsel "at all critical phases" in a criminal case, including the penalty phase. *State v. Mullens*, 352 So. 3d 1229, 1236 (Fla. 2022). To establish a violation of this right, a defendant must prove that counsel's performance was deficient and that such deficiency was prejudicial. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

In assessing counsel's performance, we consider whether counsel's conduct was objectively reasonable under prevailing professional norms. *See Hitchcock v. State*, 991 So. 2d 337, 346 (Fla. 2008) (citing *Cherry v. State*, 781 So. 2d 1040, 1048 (Fla. 2000)). That assessment takes into account the entirety of the circumstances at the time of representation, absent the distorting effect of hindsight. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. 2052. And given the difficulties inherent in evaluating counsel's conduct, we have stressed that "there is a 'strong presumption' that trial counsel's performance 'falls within the wide range of reasonable professional assistance.' " *Brown v. State*, 304 So. 3d 243, 257 (Fla. 2020) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Our cases also recognize that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Hilton v. State*, 326 So. 3d 640, 648 (Fla. 2021) (quoting *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000)).

***5** We have applied these principles in the penalty-phase context noting, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Cherry*, 781 So. 2d at 1050 (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). In particular, a defendant who hampers his trial counsel's ability to build a case for mitigation cannot later argue that counsel was deficient for failing to present better mitigation. *Id.* ("By failing to provide trial counsel with the names of witnesses who could assist in presenting mitigating evidence, [the defendant] may not now complain that trial counsel's failure to pursue such mitigation was unreasonable."). Relatedly, "[t]he fact that [the defendant] may have made ill-advised decisions while he represented himself does not establish that he is entitled to a 'do-over' of his penalty phase." *McKenzie v. State*, 153 So. 3d 867, 884 (Fla. 2014).

Nevertheless, as part of effective representation, penalty-phase counsel is required "to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *Mullens*, 352 So. 3d at 1237 (quoting *Valentine v. State*, 98 So. 3d 44, 53 (Fla. 2012)). When evaluating the reasonableness of counsel's investigation, courts examine not only the evidence known to counsel but also whether that evidence would reasonably prompt

further investigation. *Salazar v. State*, 188 So. 3d 799, 817 (Fla. 2016). Critically, counsel may rely on experts' opinions to determine the proper scope of investigation. *Mullens*, 352 So. 3d at 1240. In particular, counsel is not deficient for failing to request additional psychological testing of the defendant in reliance on expert assessments that such testing is unnecessary. *Id.* Moreover, "the presentation of more favorable testimony in postconviction proceedings does not render counsel's investigation into mitigation deficient." *Valentine*, 98 So. 3d at 53; *see also Mullens*, 352 So. 3d at 1239 ("[C]ounsel is entitled to rely on a qualified expert even when postconviction experts later disagree with that expert's opinion.").

Turning to the prejudice prong, our focus is on the effect of the attorney's error on the proceeding whose result the defendant is challenging. *See Carratelli v. State*, 961 So. 2d 312, 322 (Fla. 2007) (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052). In the penalty-phase context, "a defendant is prejudiced only if 'there is a reasonable probability that, absent [counsel's] errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Thornell v. Jones*, 602 U.S. 154, 163, 144 S.Ct. 1302, 218 L.Ed.2d 626 (2024) (alteration and omission in original) (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052). We look to the totality of the evidence, including aggravating and mitigating factors, to determine if a defendant satisfied this burden. *Id.* at 164, 144 S.Ct. 1302.

On appeal of the circuit court's denial of an ineffective assistance of counsel claim, we accept the circuit court's "factual findings to the extent they are supported by competent substantial evidence." *Mullens*, 352 So. 3d at 1238. By contrast, we review de novo the circuit court's legal conclusions and ultimate determinations on the performance and prejudice prongs. *Id.*

A

Wilcox argues that the circuit court erred in denying his claim of ineffective assistance of counsel at the penalty phase. According to Wilcox, Walsh was ineffective in four ways: (1) he insufficiently prepared for the penalty phase; (2) he did not present enough witness testimony about Wilcox's background; (3) he failed to provide sufficient evidence of Wilcox's mental-health issues; and (4) he failed to challenge the State's aggravation case. As explained below, we disagree in all respects.

1

First, Wilcox argues that Walsh's preparations were insufficient. Specifically, Wilcox contends that Walsh should have spent more time interviewing witnesses and collecting information, that he was preoccupied with other work and personal responsibilities, and that he should have hired mitigation specialist Kerry Sheehan earlier. Wilcox also alleges that the five attorneys who represented him prior to his guilt-phase trial did not properly prepare mitigation. We agree with the circuit court that these arguments are unavailing.

***6** Based on Wilcox's own choices, Walsh was given limited time to prepare for the penalty phase. He was first appointed to represent Wilcox in December 2008. But, in January 2009, Wilcox dismissed both Walsh and Sheehan, and proceeded to trial pro se. Only in March, after the jury found Wilcox guilty, was Walsh reappointed as counsel for the penalty phase, which ultimately took place in August. Following his reappointment, Walsh again hired Sheehan as a mitigation investigator in April. During the less than five months that the two had to prepare for the penalty phase, Walsh and Sheehan met with Wilcox three or four times. They also met with five of his family members and one of his friends, who provided an affidavit. In light of these and other facts, we find Wilcox's argument that Walsh should have interviewed more witnesses meritless. [7]

Next, in arguing that Walsh was distracted during the penalty phase, Wilcox points to other responsibilities in Walsh's life at the time—including another capital case, the criminal law certification exam, and a medical issue—as evidence that his attention was spread too thin. But these other responsibilities never required that Walsh miss or move court dates. Moreover, evidence shows that Walsh gave this case priority among his case load, and there is no evidence that his representation of Wilcox was hindered.

As such, Wilcox's generalized assertions of distraction are insufficient to show deficient performance. *See Mullens*, 352 So. 3d at 1242 n.15. After all, *Strickland* does not mandate that an attorney spend a certain amount of time representing a client, or that an attorney only represent one client at a time. The question is not whether counsel could have investigated further, but whether counsel's performance was deficient in

light of all the surrounding circumstances faced by counsel at the time. *Id.* at 1242.

Similarly, Wilcox's reliance on the timing of Sheehan's post-verdict hiring is misplaced. This contention ignores the fact that Wilcox's decision to fire Walsh and Sheehan and proceed pro se deprived his legal team of months to prepare his mitigation. [8] As Walsh testified, the most difficult aspect of Wilcox's case was the "time frame that we had to prepare and ... do a thought-out mitigation process for Mr. Wilcox ... under some pretty serious time constraints." Wilcox cannot make decisions about his representation and then fault his attorneys for the necessary consequences of those decisions. *See Cherry*, 781 So. 2d at 1050; *McKenzie*, 153 So. 3d at 884. Thus, Wilcox's claim that Walsh was ineffective for not spending more time working on his case or hiring Sheehan earlier is meritless.

Lastly, we reject Wilcox's argument regarding the lack of preparation performed by attorneys who represented him before the guilt phase. Wilcox was represented by five different attorneys in the nine months before he moved to proceed pro se. Despite the heavy turnover, Wilcox's various attorneys still obtained discovery, employed a mitigation specialist, filed motions, and appeared at multiple court hearings. The amount of pretrial work his attorneys accomplished is not objectively unreasonable considering the limited amount of time each attorney spent representing him. Accordingly, we do not find that any of Wilcox's attorneys were deficient for failing to undertake a more extensive mitigation investigation before being discharged.

***7** However, even assuming these attorneys performed deficiently, Wilcox fails to show how he was prejudiced. Despite broad generalizations, Wilcox has not specified what additional preparation Walsh's predecessors could have undertaken that would have resulted in a reasonable probability that the trial court would not have sentenced him to death. *See Thornell*, 602 U.S. at 163-64, 144 S.Ct. 1302.

2

Next, Wilcox argues his counsel was ineffective for not presenting more background witnesses during the penalty phase. This claim lacks merit. Counsel reasonably concluded that additional background witnesses would have been cumulative to the testimony by his mother Lawanda and Dr. Fichera during the penalty-phase trial and *Spencer* hearing, respectively, regarding Wilcox's troubled upbringing. *See Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007).

Lawanda and Dr. Fichera testified to the following details of Wilcox's background: Lawanda became pregnant with Wilcox when she was only fifteen, and Wilcox's father left her before he was born. She was a largely absent mother, who failed to attend many of her son's school events. Her mother Nancy primarily raised Wilcox. When present, Lawanda disciplined him harshly, sometimes beating him with a belt. Lawanda started taking drugs at age ten and used drugs for most of Wilcox's life. Her drug addiction directly impacted and sometimes involved her son. Wilcox watched his mother take drugs. He also witnessed her endure withdrawal symptoms and act out and yell in the early morning when she was under the influence. Sometimes, she would send Wilcox to obtain drug paraphernalia for her. Other members of Wilcox's family engaged in drug activity around him. Namely, his uncle injected heroin in front of him.

Moreover, Wilcox was aware that his mother engaged in prostitution to pay for drugs. Lawanda even stole her son's clothes and toys and sold them for drug money. For instance, when Wilcox was twelve, Lawanda took and sold his game console, which had been his primary escape from his miserable surroundings. After this episode, Wilcox changed: he became angry and depressed, spent considerable time on the streets, and began to sell drugs.

Wilcox was aware that Lawanda was frequently involved with the criminal justice system, having been arrested forty times, sometimes in front of Wilcox. The area where both she and Wilcox grew up was riddled with drugs and violence—she saw "all kinds of people get killed." Two of Wilcox's friends were shot dead, and by the time he turned fifteen, most of his peers were in jail or prison. Wilcox himself was arrested at age fourteen for second-degree murder, and his grandmother Nancy passed away while he was in prison. He was unable to grieve her passing with his family.

Lawanda and Dr. Fichera's testimony painted a bleak picture of Wilcox's upbringing, prompting the trial court's finding of five nonstatutory mitigators regarding Wilcox's background. But Wilcox argues that this testimony was insufficient. He claims Walsh should have presented more testimony. To support his argument, Wilcox presented testimony about his background at the postconviction evidentiary hearing from multiple family members, friends, and experts. These

 © 2026 Thomson Reuters. No claim to original U.S. Government Works.

witnesses provided additional details that supported the mitigation evidence given at trial.

Although it is true that these witnesses' testimony added examples of Wilcox's difficult upbringing, they did not provide new meaningful information. Between Lawanda's and Dr. Fichera's testimony, the court heard most of the evidence that Wilcox claims should have been presented. This includes that Wilcox's mother was a harsh disciplinarian, that she stole and sold his game console, that she was a prostitute, that his uncle injected himself with drugs in front of Wilcox, and that Wilcox witnessed multiple shootings in his neighborhood. Counsel was not deficient for failing to present the cumulative evidence Wilcox now offers. *See id.*

***8** Nor can Wilcox show that he was prejudiced. Based on the witness testimony that Walsh presented, multiple jurors did not vote in favor of death, and the trial court found five mitigating factors related to Wilcox's background. Nevertheless, the evidence of his upbringing was insufficient to overcome several weighty aggravators, and we do not see how cumulative testimony creates a reasonable probability of a different result. *See State v. Woodel*, 145 So. 3d 782, 802 (Fla. 2014) (explaining that cumulative mitigation evidence would not have affected the defendant's sentence (citing *Rhodes v. State*, 986 So. 2d 501, 512-13 (Fla. 2008))).

3

Wilcox also argues that Walsh failed to present sufficient expert testimony about his mental health. Like his previous arguments, this subclaim can be summarized as follows: counsel should have done more. And as we have said before, postconviction counsel may find more favorable experts, but that is not the standard we apply for determining whether trial counsel was ineffective. *See Mullens*, 352 So. 3d at 1238; *Valentine*, 98 So. 3d at 53.

Walsh hired Dr. Sheila Rapa, a licensed psychologist who was familiar with his law office, to diagnose and prepare a report on Wilcox. Dr. Rapa diagnosed Wilcox with Antisocial Personality Disorder (ASPD). Dr. Rapa also administered various tests and determined Wilcox's IQ to be 87 and his verbal abilities below average. Concerned that the ASPD diagnosis implied that Wilcox would not behave well with others and would taint the jury against a life sentence, Walsh made the reasonable strategic decision not to have Dr. Rapa testify at the penalty phase. [9]

Instead, Walsh hired Dr. Fichera and made the strategic decision to have him testify at the *Spencer* hearing. Walsh explained that he wanted to ensure that the judge heard at least some mental-health mitigation. Dr. Fichera testified that Wilcox experienced a psychologically damaging childhood and adolescence and suffered from many risk factors, which indicated likely future violent behavior. Dr. Fichera highlighted the severe impacts that growing up without a father, moving frequently, being exposed to domestic violence and a parent's drug addiction, and receiving an inadequate education would have on a child's development.

At the postconviction hearing, various experts took issue with Dr. Fichera's testimony and Dr. Rapa's report. For one, Dr. Sarah Vinson claimed that Dr. Rapa diagnosed Wilcox based on a preconceived hypothesis rather than observed behaviors. Dr. Micah Johnson, for his part, criticized Dr. Fichera's presentation for not sufficiently expounding on the impact that Lawanda's sex-trafficking experience had on Wilcox. Finally, Dr. Robert Ouaou critiqued Dr. Rapa's testing as well as Dr. Fichera's failure to provide testing to support his testimony regarding the impact of Wilcox's background. On several intelligence exams Dr. Ouaou administered, Wilcox's scores ranged from low average to borderline. In many areas, he tested below the eighth percentile.

***9** However, the postconviction experts' critiques do not indicate that Walsh acted unreasonably in relying on his original experts' opinions. As we have repeatedly held, an attorney is justified in relying on a qualified expert's views, even if experts retained in postconviction proceedings later disagree with those views. *Mullens*, 352 So. 3d at 1239. Drs. Rapa and Fichera were both highly educated and experienced experts: Dr. Rapa has a doctorate in psychology, is a licensed psychologist, and was recommended to Walsh by a colleague with whom he worked closely; Dr. Fichera has a PhD, is a licensed psychologist, has been retained as an expert in about one thousand criminal cases, and has previously testified in Florida courts. These experts were qualified, and Walsh was not deficient for relying on their opinions, including their determinations that Wilcox did not require further testing. *Id.* at 1240.

However, even if we were to assume deficient performance, Wilcox fails to show that Walsh's use of these two experts prejudiced him. Dr. Rapa's findings indicated that Wilcox's intellect and mental state were low average, while a decade later Dr. Ouaou found that they were borderline. Wilcox

claims that there is a reasonable probability that the court would not have sentenced him to death based on the borderline finding. Wilcox's prejudice argument fails for multiple reasons.

First, Wilcox has failed to show that Dr. Rapa's findings were erroneous at the time she performed the tests in 2009. And while Dr. Vinson critiqued Dr. Rapa's findings, she never actually diagnosed Wilcox with a condition, disorder, or the like. Consequently, there is no basis to find that Dr. Rapa's findings were incorrect.

Moreover, even if Dr. Ouaou's borderline finding had been presented to the court, Wilcox's prejudice argument still fails in light of the three weighty aggravating factors found by the court—the CCP, PVF, and the "in the course of a felony" aggravators. Notably, the court characterized the aggravation as "overwhelming" and concluded that Wilcox's 1993 convictions—murder and robbery—and the four specified concurrent felonies—one count of armed robbery and three counts of armed kidnapping—"far outweigh[ed] the mitigating factors."

Additionally, we stress that the expert-related mitigation developed in postconviction proceedings added very little substance to the overall mitigation presented to the jury and the sentencing judge. Thus, it is not reasonably probable that presentation of Wilcox's experts as additional mitigation would have altered the jury's recommendation or the judge's ultimate sentencing determination.

4

Finally, Wilcox claims that Walsh was ineffective for failing to challenge the State's aggravation case, particularly the PVF aggravator. During the penalty phase, Walsh stipulated to Wilcox's 1993 convictions for second-degree murder and armed robbery, which stemmed from a shooting. The stipulation specified that Wilcox was not the shooter.

Although Walsh argued against the aggravator, Wilcox claims such argument was insufficient given the stipulation. Specifically, Wilcox contends that Walsh should have attacked the State's aggravation by having Cory Waters, one of Wilcox's 1993 codefendants, testify that Wilcox did not plan the robbery or make physical contact with the victim.

Yet, this argument overlooks the many problems posed by presenting Waters' testimony. As a witness, Waters would have been subjected to the State's cross-examination, which potentially could have revealed damaging details about Wilcox's involvement in the prior shooting. Furthermore, Waters' testimony would have drawn more attention to Wilcox's prior convictions. In light of these concerns, counsel's strategic decision to stipulate to the convictions, but object to the aggravator, was reasonable. [10] *See Hilton*, 326 So. 3d at 648. Accordingly, we find no deficiency.

***10** In sum, Wilcox failed to show deficient performance or prejudice in connection with his penalty-phase ineffectiveness claim. As such, the circuit court properly denied it in its entirety.

B

Next, Wilcox argues that counsel was ineffective for failing to investigate and challenge his competency to waive counsel prior to the guilt phase. [11] According to Wilcox, his counsel failed to ensure that his competency was evaluated by a qualified expert. We affirm the circuit court's summary denial of this claim because it "is positively refuted by the record." *Doty v. State*, 403 So. 3d 209, 214 (Fla. 2025) (quoting *Kocaker v. State*, 311 So. 3d 814, 821 (Fla. 2020)).

The Sixth Amendment, as interpreted by the U.S. Supreme Court, affords a defendant not only the right to counsel, but also the right to represent himself, so long as he knowingly and intelligently chooses to proceed in this manner. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A waiver of counsel is knowing and intelligent if the defendant shows he is "literate, competent, and understanding, and that he [h]as voluntarily exercis[ed] his informed free will." *Id.*

The record reflects that after Wilcox requested to represent himself, he was examined by Dr. Michael Brannon, who found that Wilcox was competent to proceed and had no indicators of mental disorders or diseases. Dr. Brannon specifically found that Wilcox was aware of the criminal charges brought against him, the punishment he faced if found guilty, the roles of the various people in the courtroom, and his right to an attorney. Counsel cannot be deemed deficient for relying on Dr. Brannon's competency determination. *See Craft v. State*, 427 So. 3d 486, 492-93 (Fla. 2024) (holding counsel was not deficient for relying on court-appointed

experts' conclusions that the defendant was competent to waive counsel). Therefore, the circuit court's summary denial of this claim was proper. [12]

C

***11** Wilcox also seeks relief under *Hurst v. Florida* and *Hurst v. State*. He argues that *State v. Poole*, 297 So. 3d 487 (Fla. 2020), was wrongly decided and asks that we, in any event, not apply it retroactively to bar his claim. As a fallback, Wilcox claims that his death sentence cannot stand even if *Poole* does apply. Wilcox's arguments fall short —*Poole* supplies the governing legal standard, and under that standard, he is not entitled to relief. [13]

1

Wilcox raises a slew of arguments challenging our *Poole* decision. We have considered and ultimately rejected similar arguments many times. *See, e.g.*, *Herard v. State*, 390 So. 3d 610, 623 (Fla. 2024), *cert. denied*, —— U.S. ——, 145 S. Ct. 1315, 221 L.Ed.2d 399 (2025); *Wells v. State*, 364 So. 3d 1005, 1014-15 (Fla. 2023); *McKenzie v. State*, 333 So. 3d 1098, 1105-06 (Fla. 2022). Our focus is on Wilcox's argument that the U.S. Supreme Court's recent decision in *Erlinger v. United States*, 602 U.S. 821, 144 S.Ct. 1840, 219 L.Ed.2d 451 (2024), demonstrates that *Poole* was wrongly decided. Consistent with our recent decisions, *Tanzi v. State*, 407 So. 3d 385, 394-95 (Fla.), *cert. denied*, —— U.S. ——, 145 S. Ct. 1914, 225 L.Ed.2d 654 (2025); *Ford v. State*, 402 So. 3d 973, 979-81 (Fla.), *cert. denied*, —— U.S. ——, 145 S. Ct. 1161, 221 L.Ed.2d 225 (2025), we reject Wilcox's *Erlinger*-based challenge.

In *Erlinger*, the defendant was sentenced under a statute that exposed him to a longer sentence if he had committed three felonies on different occasions. 602 U.S. at 834, 144 S.Ct. 1840. The Supreme Court recognized that whether the defendant had committed the felonies on different occasions was a factual issue that would expose him to an increased penalty and, as such, was required to be decided by a jury. *Id.* at 835, 144 S.Ct. 1840.

Here, by contrast, the sentencing judge's sufficiency and weighing determinations do not resemble the factual findings addressed in *Erlinger*. By its terms, considering and weighing aggravators and mitigators involves value judgment—not a fact-intensive assessment of when and where certain crimes were committed. *Compare Poole*, 297 So. 3d at 503 (explaining that the "weighing of mitigators and aggravators is a determination that 'require[s] subjective judgment' " (quoting *Hurst*, 202 So. 3d at 82 (Canady, J., dissenting))), *with Erlinger*, 602 U.S. at 834, 144 S.Ct. 1840 ("[D]eciding whether [a defendant's] past offenses occurred on three or more different occasions is a fact-laden task."). Thus, *Erlinger* does not cast doubt on *Poole*.

2

Next, Wilcox argues that *Poole* should not be applied retroactively to him because that would create a constitutionally impermissible class of one. He claims that he is the only 7 to 5 death-sentenced defendant entitled to relief under *Hurst v. State* who has yet to receive a new sentencing. Singling him out in this manner, Wilcox contends, would be unfair and arbitrary and, thus, would deny him due process of law.

Wilcox's "class of one" argument centers on the timing of his postconviction proceedings. He claims he was arbitrarily denied relief under *Hurst v. State* because the circuit court initially denied him an evidentiary hearing, which pushed the timing of his proceedings back. We find no merit in the argument that all *Hurst*-resentencing defendants are constitutionally entitled to the same procedures. *See Dobbert v. Florida*, 432 U.S. 282, 301, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

***12** We addressed a similar argument in *Jackson v. State*, 430 So.3d 64 (Fla. 2025). There, the defendant argued that the application of a new statute impermissibly created a "class of one" as to him because he was "the only *Hurst*-resentencing defendant, of the less than 60 [who] remained to be resentenced when [Senate Bill 450 became law], to be sentenced to death under the 8-4 statute." *Id.* at 80 (alterations in original and internal quotation marks omitted). We rejected that argument, stressing in part that it was "grounded in the meritless notion that all *Hurst*-resentencing defendants must receive the 'benefit' of the procedures enacted in response to the erroneous holdings of *Hurst*." *Id.* This rationale obliterates a core premise of Wilcox's class-of-one argument. Thus, he cannot prevail on such a theory under our precedents.

Wilcox also contends that applying *Poole* retroactively would violate his due process rights under *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). [14] In that decision, the Supreme Court held that, just as the Ex Post Facto Clause prohibits state legislatures from enacting laws that retroactively criminalize conduct, the Fourteenth Amendment's Due Process Clause "bar[s]" state courts "from achieving precisely the same result by judicial construction." *Id.* at 353-54, 84 S.Ct. 1697. That is, "[w]hen a[n] ... unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Id.* at 354-55, 84 S.Ct. 1697.

Wilcox's reliance on *Bouie* is misplaced. In *Poole*, we did not interpret a criminal statute, let alone in a manner that retroactively criminalized conduct that would have been lawful under a prior interpretative regime. Rather, *Poole* addressed the constitutionality of Florida's capital sentencing procedure. *See Poole*, 297 So. 3d at 501. Therefore, *Bouie* is inapplicable here.

Wilcox's due process argument fails for another related reason: *Hurst v. State* was decided eight years *after* Wilcox committed the crimes at issue. *Bouie* asks whether a court's interpretation of a statute that criminalizes conduct "is 'unexpected and indefensible by reference to the law which had been expressed *prior to the conduct in issue*.' " *Metrish v. Lancaster*, 569 U.S. 351, 360, 133 S.Ct. 1781, 185 L.Ed.2d 988 (2013) (emphasis added) (quoting *Rogers*, 532 U.S. at 462, 121 S.Ct. 1693). Here, even assuming *Poole* constitutes a qualifying subsequent interpretation for purposes of *Bouie*, we would compare *Poole* to the capital sentencing procedure in effect in 2008 when Wilcox committed the crimes in this case. Critically, Wilcox does not claim that *Poole* was either "unexpected" or "indefensible" in reference to that 2008 law, i.e., the law "expressed prior to the conduct in issue." *Id.* (quoting *Rogers*, 532 U.S. at 462, 121 S.Ct. 1693). [15] We add that *Poole* is in no way more onerous than the 2008 law. *Compare, e.g.*, § 921.141(3), Fla. Stat. (2008) (allowing the judge to sentence the defendant to death even without a unanimous jury finding of an aggravating circumstance), *with Poole*, 297 So. 3d at 505 (requiring jury to unanimously find at least one aggravating circumstance).

***13** Therefore, due process does not prohibit us from applying *Poole* in the context of Wilcox's right-to-jury claim. *See Walls v. State*, 361 So. 3d 231, 234 n.5 (Fla. 2023) (rejecting similar due process argument).

Under *Poole*, Wilcox is not entitled to relief. In *Poole*, we held that neither the Sixth nor Eighth Amendment requires a jury to make the sufficiency or weighing determinations called for by the death-penalty statute; nor, we said, is a jury constitutionally required to make any sentencing recommendation at all. 297 So. 3d at 501-08. Instead, as a matter of constitutional law, all the jury must do is "unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Id.* at 491.

This requirement is satisfied in this case. Namely, the jury, by its guilt-phase verdict, [16] unanimously found facts that establish the "in the course of a felony" aggravator beyond a reasonable doubt. § 921.141(5)(d), Fla. Stat. (2011) (listing robbery and kidnapping as qualifying offenses for purposes of the aggravator); *Gaskin v. State*, 361 So. 3d 300, 308 (Fla. 2023) (recognizing that a unanimous jury finding of contemporaneous felonies satisfied *Poole*); *see also Arbelaez v. State*, 369 So. 3d 1141, 1142 (Fla. 2023) (finding *Poole* was satisfied because the jury unanimously found the defendant guilty of kidnapping the victim whom he then murdered). Here, the guilt-phase jury found Wilcox guilty of three counts of armed kidnapping and one count of armed robbery. What is more, by its special firearm-related findings during the guilt phase, the jury unanimously determined that Wilcox shot and killed Johnson "during the course" of committing those four crimes. [17] Accordingly, *Poole*'s requirements are met.

Based on the analysis above, we reject all of Wilcox's *Poole*-related arguments.

D

Wilcox's fourth claim is that the State's refusal to transcribe certain witness statements violated his constitutional rights under *Brady v. Maryland* and *Giglio v. United States*. On direct appeal, he argued that the State's refusal to transcribe these statements was a discovery violation. *Wilcox I*, 143 So. 3d at 375-77. We rejected that argument, and Wilcox is procedurally barred from rebranding it as a *Brady* or *Giglio* claim. Fla. R. Crim. P. 3.851(e)(1). We therefore affirm the circuit court's summary denial of this claim. *See Bell v. State*, 421 So. 3d 399, 408 (Fla. 2025) ("[A] defendant cannot revive a rejected direct appeal claim by repackaging it under a different label in postconviction.").

***14** Wilcox's claim also fails on the merits. As noted above, Wilcox argues he was constitutionally entitled to the transcription of certain witness interviews. But the State did not have transcripts either. Thus, there was no *Brady* violation, in that Wilcox has failed to show that the State suppressed evidence in its possession. *See Davis v. State*, 417 So. 3d 242, 247 (Fla. 2025) (listing elements of *Brady* claim and recognizing suppression of evidence as one such requirement).

As for *Giglio*, even though Curry and Collier's respective trial testimony contradicted their prior sworn statements to the detective, Wilcox does not allege that the State knew their testimony was false. *See Davis v. State*, 383 So. 3d 743, 754-55 (Fla. 2024) ("To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." (quoting *Sheppard v. State*, 338 So. 3d 803, 827 (Fla. 2022))).

Accordingly, Wilcox has not properly alleged a basis for this claim, and the circuit court's summary denial was proper on the merits. *See Doty*, 403 So. 3d at 214 (holding that summary denial is proper if the postconviction claim is facially insufficient (quoting *Kocaker*, 311 So. 3d at 821)).

E

Finally, Wilcox appeals the circuit court's denial of his newly discovered evidence claim under *Jones v. State*, 709 So. 2d 512 (Fla. 1998). Wilcox argues that a 2017 notice (sent to a different inmate) regarding the laboratory that processed DNA evidence related to his case is newly discovered evidence indicating that DNA evidence was mishandled in his case. This claim is "positively refuted by the record," so we affirm the court's summary denial of it. *Doty*, 403 So. 3d at 214 (quoting *Kocaker*, 311 So. 3d at 821).

To prove a *Jones* claim, Wilcox must show (1) that the evidence was unknown by the trial court, himself, or his counsel at the time of trial, and that he or his counsel could not have known of it through the exercise of diligence; and (2) that the evidence would probably yield an acquittal on retrial. *Truehill v. State*, 358 So. 3d 1167, 1184-85 (Fla. 2022) (quoting *Jones*, 709 So. 2d at 521). Assuming Wilcox can satisfy prong one, the record indicates that there is not a reasonable probability of acquittal if this "newly discovered" evidence was introduced at trial.

The notice to the other inmate explained that the laboratory had improperly used the statistic "Combined Probability of Inclusion" (CPI) to calculate the importance of the genetic profiles when allelic dropout occurred. [18] Wilcox claims this notice would have provided a basis for him to impeach the State's DNA evidence. Even though the same laboratory handled the DNA in Wilcox's case, he does not argue that CPI was used or that allelic dropout occurred. Wilcox has pointed to no record evidence showing that the scientific procedures referenced in the notice were used in his case. In fact, the State presented only limited DNA evidence showing Wilcox was a likely DNA donor at the scene. [19]

***15** Moreover, even if this notice was minimally relevant and somehow admissible in Wilcox's case, it would have served as weak impeachment evidence at best. The other evidence presented at trial was far more damning. This included an expert's testimony that the pistol used to fire the lethal projectile was found in the white Tahoe Wilcox was driving, Wilcox's fingerprints in the Tahoe, testimony by the women Wilcox kidnapped, and testimony from Wilcox's cousin that Wilcox confessed to killing Johnson. In light of this record evidence, we conclude that admission of the notice would not probably produce an acquittal at a new trial. Accordingly, the circuit court properly denied this claim.

III

We now turn to Wilcox's habeas petition, which raises eight claims. None has merit.

Wilcox first argues that he is entitled to habeas relief under *Hurst v. Florida* and *Hurst v. State*. As discussed above, there is no *Hurst* error in this case, so we deny this claim. We also deny Wilcox's claim that his appellate counsel was ineffective for not challenging his competency to proceed pro se. [20] As we have previously stated, the direct-appeal record contains sufficient evidence for us to conclude that the *Faretta* inquiry was more than adequate and that the trial court did not abuse its discretion in finding him competent to waive his right to counsel. *See Woodbury*, 320 So. 3d at 645 (quoting *Trease*, 41 So. 3d at 124). [21] Likewise, we reject Wilcox's argument that appellate counsel was ineffective for failing to challenge the finding of the in the course of a felony aggravator. As we

explained above, there was sufficient evidence to support that aggravator. We now address the more substantive claims in greater detail.

A

We begin with Wilcox's claim that appellate counsel was ineffective for not claiming that his lawyers' inactivity forced him to "abandon one constitutional right" in order to "assert" another one. Specifically, Wilcox says that he had to give up his Sixth Amendment right to counsel in order to enforce his Sixth Amendment speedy trial rights. As he sees it, this constitutional dilemma violated *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), and would have offered a basis for reversal on direct appeal, had the issue been briefed. We disagree.

In *Simmons*, the U.S. Supreme Court considered whether it was constitutionally permissible for the Government to use a defendant's pretrial testimony against him at trial where that testimony was offered to establish standing for purposes of a Fourth Amendment claim. *Id.* at 389-90, 88 S.Ct. 967. The Court recognized that such pretrial testimony could be strong evidence connecting the defendant to seized items. *Id.* Yet, per the Court, if the Government could use that testimony at trial, a defendant might well forego potentially meritorious Fourth Amendment claims. Ultimately, the Court concluded:

> ***16** [I]n this case [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

Id. at 394, 88 S.Ct. 967.

In later cases, the Court noted *Simmons*' limited scope in several ways. The Court has characterized the holding in *Simmons* in narrow, context-specific terms. *See United States v. Salvucci*, 448 U.S. 83, 88, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) ("This Court ... held [in *Simmons*] that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial."); *see also Jeffers v. United States*, 432 U.S. 137, 153 n.21, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) (plurality opinion). The same is true with respect to how the Court has described the purpose and effect of *Simmons*. *See Brown v. United States*, 411 U.S. 223, 229, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) ("*Simmons* has removed the danger of coerced self-incrimination."); *Salvucci*, 448 U.S. at 88, 94, 100 S.Ct. 2547 (explaining that *Simmons* granted a form of "use immunity" or "privilege" in connection with a defendant's pretrial testimony). And perhaps most significantly, the Court has not extended *Simmons* outside the search-and-seizure context. *See United States v. Kahan*, 415 U.S. 239, 243, 94 S.Ct. 1179, 39 L.Ed.2d 297 (1974) (noting context of *Simmons* decision); *Jeffers*, 432 U.S. at 154 n.21, 97 S.Ct. 2207; *McGautha v. California*, 402 U.S. 183, 212-13, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), *reh'g granted*, *judgment vacated sub nom. Crampton v. Ohio*, 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972).

Based on this discussion, it is clear to us that Supreme Court precedent does not support Wilcox's so-called *Simmons* claim, which does not allege either that he was forced to surrender an arguably valid Fourth Amendment claim or that the State improperly used any pretrial testimony or statements against him at trial as substantive proof of guilt.

We acknowledge that some courts, including ours, have applied *Simmons* beyond the strict facts of that case. *See, e.g.*, *Gragg v. State*, 429 So. 2d 1204, 1208 (Fla. 1983); *United States v. Jones*, 600 F. App'x 74, 77 (4th Cir. 2014); *United States v. Aguirre*, 605 F.3d 351, 357 (6th Cir. 2010). However, we have not found, nor has Wilcox cited, any case applying *Simmons* where one of the rights in tension was the Sixth Amendment right to a speedy trial. [22] Absent such supportive precedent, we cannot fault appellate counsel for declining to seek reversal based on a violation of *Simmons*. *See McKenzie*, 153 So. 3d at 875 (rejecting deficiency argument that is based on "no supporting precedent" and "is not supported in the law"). [23]

B

Wilcox next argues his appellate counsel was ineffective for not challenging the jury instructions and the jury's finding related to the PVF aggravator. In 1993, Wilcox was convicted of second-degree murder and armed robbery along with three other defendants. Wilcox was not the shooter, but he did take money off the victim. He contends these convictions were insufficient to satisfy the requirements of the PVF aggravator because, in his view, he did not directly contact the victim during the murder and robbery. Wilcox's argument lacks merit.

***17** We have said that "robbery and murder involve violence *per se*." *Bevel v. State*, 983 So. 2d 505, 518 (Fla. 2008) (quoting *Johnson v. State*, 442 So. 2d 193, 197 (Fla. 1983)). Nevertheless, and despite the fact that the death-penalty statute makes no mention of "direct contact," we have sometimes required proof that the defendant came in "direct contact" with the victim for the PVF aggravator to apply. *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998) (quoting *Lewis v. State*, 398 So. 2d 432, 438 (Fla. 1981)). With respect to robbery, we have since clarified that direct contact is generally established when the defendant "exert[s] any force" on the victim. *Gonzalez v. State*, 136 So. 3d 1125, 1151 (Fla. 2014) (emphasis omitted) (citing *Mahn*, 714 So. 2d at 394).

Here, although Wilcox was not the shooter, he did get out of the vehicle at the scene of the crime and remove money from the victim who had been shot by Wilcox's codefendant. By taking the money, Wilcox exerted some direct force on the victim. *Id.* That act satisfies the direct contact requirement, even though Wilcox did not have a weapon. Thus, the jury instructions and finding of the PVF aggravator were both proper and supported by the record. For these reasons, appellate counsel was not ineffective for failing to challenge this aggravator.

C

Next, Wilcox blames appellate counsel for not raising a due process challenge to the admission of his 1993 convictions. At the guilt phase, Wilcox testified on his own behalf. During cross-examination, the State asked him if he had been convicted of a crime of dishonesty. Wilcox appeared confused by the question, but the State refused to clarify the question and merely re-asked it. Wilcox then denied having committed a crime of dishonesty, and the State moved to enter Wilcox's prior convictions into evidence, which the trial court permitted.

On appeal, Wilcox raised an evidentiary challenge to the prosecutor's questioning. Though finding the questions improper, we found the error to be harmless. Now, Wilcox contends that appellate counsel should have raised a due process argument, too, arguing that the prosecutor's impeachment-related questioning deprived him of a fair trial. This argument does not warrant relief.

Our logic here is straightforward. In concluding on direct appeal that this line of questioning was *harmless* error, *Wilcox I*, 143 So. 3d at 373-75, we determined that there was no reasonable possibility that it affected the verdict. It logically follows that if the improper questioning had that little potential for affecting the verdict, the questioning (and the circuit court's ruling allowing it) did not, as Wilcox claims, deny him of a fundamentally fair trial. *See Johnson v. State*, 53 So. 3d 1003, 1007 (Fla. 2010).

Accordingly, appellate counsel was not ineffective in failing to raise this due process-based argument.

D

Wilcox also argues that appellate counsel was ineffective for not arguing that his constitutional right to effective cross-examination was infringed based on the State's refusal to transcribe various witness statements, even though appellate counsel did raise this issue as a discovery violation. *See Wilcox I*, 143 So. 3d at 375-77. This argument lacks merit.

Wilcox's right to effective cross-examination was not violated because any injury he suffered was self-inflicted. He was given DVD recordings of the witness statements, yet he wanted transcripts because he could not access the recordings in jail. But if Wilcox had not chosen to waive his right to counsel, his attorney could have viewed the recordings. Even as he continued pro se, he could have had standby counsel review the recordings for him.

***18** Therefore, Wilcox cannot now argue his appellate counsel was ineffective for failing to raise a due process or confrontation clause argument that we find to be meritless. *See Allen v. State*, 416 So. 3d 291, 308 (Fla. 2025) (explaining that "appellate counsel cannot be deemed deficient for failing

 © 2026 Thomson Reuters. No claim to original U.S. Government Works.

to raise meritless issues" (quoting *Conahan v. State*, 118 So. 3d 718, 733 (Fla. 2013))).

E

Finally, Wilcox faults appellate counsel for not arguing that the circuit court violated his Sixth Amendment right to effective cross-examination based on the court's refusal to allow him to refresh a witness's memory with a statement made by an individual named Louvens Jean. As was the case with respect to his improper-questioning argument, Wilcox's appellate counsel did raise this issue as an evidentiary error. We agreed that there was error but determined that it was harmless beyond a reasonable doubt. *Wilcox I*, 143 So. 3d at 377-79. Wilcox believes counsel should have raised constitutional arguments as well. His argument is not well-taken.

Because we held this error to be harmless, we conclude that, by definition, the error did not deprive him of a fundamentally fair trial. *See Johnson*, 53 So. 3d at 1007; *Blanton v. State*, 978 So. 2d 149, 156 (Fla. 2008) (stating that confrontation clause violations are subject to harmless error review). As such, counsel was not deficient for failing to seek reversal based on this meritless constitutional argument. *See Allen*, 416 So. 3d at 308 (quoting *Conahan*, 118 So. 3d at 733).

IV

For the reasons given above, we affirm the circuit court's denial of Wilcox's postconviction motion, and we deny his petition for writ of habeas corpus.

It is so ordered.

MUÑIZ, C.J., and LABARGA, COURIEL, FRANCIS, and SASSO, JJ., concur.

TANENBAUM, J., did not participate.

All Citations

--- So.3d ----, 2026 WL 1424742, 51 Fla. L. Weekly S129

Footnotes

1 By this time, Wilcox had gone through five different appointed attorneys.

2 *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

3 The nonstatutory mitigating factors were as follows: (1) Wilcox received little care from his drug-addicted mother; (2) he lacked stability in his home environment; (3) his abusive and dysfunctional childhood and adolescence played a role in his commission of the murder; (4) circumstances beyond his control negatively affected his psychological development during his childhood and adolescence; (5) he exhibited signs of untreated depression from the age of twelve or thirteen; (6) he would spend the rest of his life in prison; and (7) he exhibited good behavior during court proceedings. The court found no statutory mitigators.

4 The court also imposed life sentences for each of the four counts of armed kidnapping and the single count of armed robbery.

5 We agreed with Wilcox that the trial court had committed two evidentiary errors at the guilt phase and was wrong during the penalty phase in finding the avoid-arrest aggravator applicable. However, we found that each error was harmless. *Id.* at 375, 379, 386.

6 *Huff v. State*, 622 So. 2d 982 (Fla. 1993); *see also* Fla. R. Crim. P. 3.851(f)(5)(A) (providing that the circuit "court must hold a case management conference" on an initial postconviction motion).

 © 2026 Thomson Reuters. No claim to original U.S. Government Works.

7 To the extent Wilcox is arguing that Walsh was deficient for not interviewing more witnesses as part of his subclaim that counsel should have called more witnesses at the penalty phase, we address that issue fully in Section II.A.2.

8 To the extent Wilcox alleges that Sheehan should have done additional work, we note that even under these time constraints she was able to interview Wilcox, his mother Lawanda, his aunt Sandra Waterman, his friend and prior codefendant Cory Waters, and his aunt Linda Kelly, as well as her son Richard and niece, Nicki Finch. Additionally, Sheehan uncovered records on Wilcox's education, medical history, social background, police encounters, incarceration, and prior legal proceedings. During the postconviction hearing, Wilcox did not present any new records.

9 Wilcox claims that Walsh performed deficiently during the ensuing *Spencer* hearing because he allowed the State to question Dr. Fichera about Dr. Rapa's report, eliciting damaging material. But the trial court was already aware of the report, as it had been disclosed to the court during a hearing on Wilcox's decision to waive the presentation of testimony by a mental health expert to the jury. Under these circumstances, Wilcox fails to explain how Walsh could have prevented the State from learning about Dr. Rapa's report.

10 Wilcox points to Walsh's statement at the postconviction hearing that he did not consider putting Waters on the stand at all. Contrary to Wilcox's argument, we do not find this indicates a lack of strategy. Indeed, it makes sense that Walsh may not have seriously considered presenting Waters' testimony—putting Waters on the stand was so risky that a reasonable attorney might well reject that idea immediately.

11 To the extent that Wilcox argues the trial court erred in finding him competent to waive counsel, that claim could have been raised on direct appeal and is therefore procedurally barred. Fla. R. Crim. P. 3.851(e)(1) ("This rule does not authorize relief based on claims that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence."). In any event, the trial court did not abuse its discretion in determining, based on its *Faretta* inquiry, that Wilcox was "more than capable of making the decision" to waive counsel. *See Woodbury v. State*, 320 So. 3d 631, 645 (Fla. 2021) ("Trial court rulings regarding competency to waive counsel are reviewed for abuse of discretion." (citing *Trease v. State*, 41 So. 3d 119, 124 (Fla. 2010))). During and leading up to trial, Wilcox demonstrated he was competent to maneuver the legal system, as he filed various motions and letters with the court, cross-examined witnesses, and raised objections to the State's questions.

12 Wilcox also argues that under *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008), his counsel should have objected to Wilcox's competency to waive counsel because of his mental impairments. However, even now, there is no evidence that he suffers from a "severe mental illness" as described in *Edwards*. *Id.* at 178, 128 S.Ct. 2379.

13 The circuit court's summary denial of this purely legal claim was proper. *See* Fla. R. Crim. P. 3.851(e)(1)(E) (noting that "purely legal or constitutional claim[s]" do not require "an evidentiary hearing"); *id.* 3.851(f)(5)(A)(ii) (providing that "[a]t the case management conference, the trial court must ... hear argument on any purely legal claims not based on disputed facts").

14 To the extent Wilcox argues that applying *Poole* retroactively would violate the Ex Post Facto Clause, *see* U.S Const., art. I, § 10, he is incorrect. *See Rogers v. Tennessee*, 532 U.S. 451, 462, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) ("[T]he *Ex Post Facto* Clause does not apply to judicial decisionmaking.").

15 Wilcox mistakenly urges us to instead compare *Poole* with *Hurst v. State*, claiming that "[t]his Court's construction of § 921.141, Florida Statutes, in *Hurst v. State* constitutes substantive law." Initial Brief of Appellant at 116. We have consistently rejected that proposition. *See Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018); *Wright v. State*, 312 So. 3d 59, 60 (Fla. 2021).

16 We have recognized that *Poole* may be satisfied based on factual findings made by the jury during the guilt phase as well as the penalty phase. *See Ford*, 402 So. 3d at 981 (holding that *Poole* was satisfied because the guilt-phase jury had convicted the defendant of a contemporaneous murder and sexual battery with a firearm, which necessarily means the jury found the PVF aggravator beyond a reasonable doubt).

17 Wilcox also argues that these felonies were not committed in the course of the murder because there was no causal relationship between the crimes. This claim is procedurally barred, as Wilcox could have raised it on direct appeal. Fla. R. Crim. P. 3.851(e)(1). Even if this claim were not barred, it would still fail. Our precedents do not require that there be a causal relationship between the murder and the concurrent felonies. Instead, we have held that a murder is committed in the course of another felony if it "occur[s] during the same criminal episode as the enumerated felony." *Way v. State*, 496 So. 2d 126, 128 (Fla. 1986); *see also Griffin v. State*, 639 So. 2d 966, 971 (Fla. 1994) (affirming the in the course of a felony aggravator when the murder occurred while the defendant was seeking to escape from the scene of the robbery). That standard is satisfied here.

18 "Allelic dropout" refers to the failure of a DNA test "to detect an allele within a sample resulting from the failure of an allele to amplify during the polymerase chain reaction," which occurs when the DNA sample is either small or degraded. Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751, 784 n.161 (2011).

19 An expert testified that Wilcox could not be excluded as a possible donor of the DNA sample from a marijuana cigarette found at Johnson's house and that only a little over two percent of the population, including Wilcox, has the particular D-19 gene on the sample.

20 We have said that "claims of ineffective assistance of appellate counsel are properly presented in a petition for writ of habeas corpus." *Jackson v. State*, 347 So. 3d 292, 308 (Fla. 2022) (quoting *Brown*, 304 So. 3d at 278). "The standard for a claim of ineffective assistance of appellate counsel mirrors the *Strickland* standard for ineffective assistance of trial counsel: the petitioner must demonstrate deficient performance and resulting prejudice." *Id.* (quoting *Hilton*, 326 So. 3d at 652).

21 Wilcox argues that his waiver fails to satisfy the factors for waiver of counsel under *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986). But we have never held that those factors are determinative. Indeed, "this Court recently reiterated 'that once a court determines that a competent defendant of his ... own free will has "knowingly and intelligently" waived the right to counsel, the dictates of *Faretta* are satisfied, the inquiry is over, and the defendant may proceed unrepresented.' " *Noetzel v. State*, 328 So. 3d 933, 948 (Fla. 2021) (quoting *Hooks v. State*, 286 So. 3d 163, 168 (Fla. 2019)).

22 *See Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (noting uniqueness of constitutional speedy trial right in terms of interests protected, invocation, and waiver); *cf.* 3 Wayne R. LaFave et al., *Criminal Procedure* § 10.5(c) Testimony by defendant (4th ed. 2025) (identifying no successful *Simmons* claims based on tension with speedy trial right).

23 We also stress that a fair number of Wilcox's factual allegations are not borne out in the record. This lack of factual support would independently justify denial of this claim.

End of Document © 2026 Thomson Reuters. No claim to original U.S. Government Works.

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FORIDA,
Plaintiff

CASE: 08-3736CF10A
JUDGE: MARTIN S. FEIN

vs.

DARIOUS WILCOX,
Defendant

_____/

ORDER DENYING DEFENDANT'S SECOND AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

The Court having heard Defendant's motion for postconviction relief pursuant to Rule 3.851 finds as follows:

1. On February 19, 2016, the Defendant filed a motion to vacate judgments of conviction and sentence with special request for leave to amend.
2. On May 10, 2016, the State file a written response to Defendant's motion to vacate judgment of conviction and sentence with special request for leave to amend.
3. On September 22, 2017, the Defendant filed an amended motion to vacate judgments of conviction and sentence with special request for leave to amend.
4. On December 4, 2017, the State filed a written response to Defendant's amended motion to vacate judgment of conviction and sentence with special request for leave to amend.

5. On August 9, 2021, the Defendant filed the present second amended motion to vacate judgments of conviction and sentence with special request for leave to amend.

6. On November 1, 2021, the State filed an amended written response to Defendant's motion to vacate judgment of conviction and sentence with special request for leave to amend.

7. On January 1, 2022, the Defendant filed a reply to State's response to claim one of Defendant's second amended motion to vacate judgments of conviction and sentence with special request for leave to amend.

8. On February 18, 2022, this Court conducted a Huff hearing. A copy of the transcript of the Huff hearing is attached to and incorporated as part of this order as **ATTACHMENT A.**

9. On April 21, 2022, this Court granted the Defendant's request for an evidentiary hearing as to claim three only. A copy of the order entered on April 21, 2022, is attached to and incorporated as part of this order as **ATTACHMENT B.**

10. On June 10, 2022, this Court entered a discovery order in preparation for the evidentiary hearing as to claim three only. A copy of the order entered on June 10, 2022, is attached to and incorporated as part of this order as **ATTACHMENT C.**

11. On January 5, 2023, this Court entered a second discovery order in preparation for the evidentiary hearing as to claim three only. A copy of the order entered on January 5, 2023, is attached to and incorporated as part of this order as **ATTACHMENT D.**

12. This Court conducted an evidentiary hearing on April 19, 2023, April 20, 2023 and April 21, 2023.

13. This Court heard testimony from witnesses Kerry Sheehan, Joseph Walsh, Dr. Sarah Vinson, Linda Kelly, Darrell Howard, Cory Waters, Dr. Micah Johnson, Dr. Stuart Grassian and Dr. Robert Ouaou.

14. This Court admitted Defendant's exhibits one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty one, twenty two, twenty three, twenty four, twenty five, twenty six, twenty seven, twenty eight, twenty nine and thirty.

15. This Court took judicial notice of the entire court file, all exhibits introduced at trial and the entire record on appeal pursuant to F.S.S. 90.201, 90.202 and 90.203.

16. After considering the Defendant's motion to vacate judgments of conviction and sentence, the State's written response to the Defendant's motion to vacate judgment of conviction and sentence, the Defendant's amended motion to

vacate judgments of conviction and sentence, the State's written response to the Defendant's amended motion to vacate judgment of conviction and sentence, the Defendant's second amended motion to vacate judgments of conviction and sentence, the State's amended written response to Defendant's second amended motion to vacate judgments of conviction and sentence, the Defendant's reply to State's response to claim one of Defendant's second amended motion to vacate judgments of conviction and sentence, the testimony of all the witnesses, all the exhibits in evidence, the entire court file, all exhibits introduced at trial, the entire record on appeal as well as the arguments from the State and the Defendant this Court makes the following findings of fact and conclusions of law:

A. The Defendant seeks postconviction relief based on eight grounds.

B. As to ground one the Defendant claims his death sentence is unconstitutional pursuant to Hurst vs. Florida, 577 U.S. 92 (2016) and that applying State vs. Poole, 297 So.3d 487 (Fla. 2020) denies the Defendant due process and equal protection pursuant to the United States Constitution and Florida Constitution. This claim is legally sufficient but can be conclusively resolved as a matter of law and by reliance on the record. The Defendant claims that but for the prior

Judge's erroneous denial of his motion for postconviction relief the Defendant would have received relief pursuant to Hurst prior to Poole being decided by the Florida Supreme Court. The State argues and this Court agrees the Defendant's motion for postconviction relief was still pending when Poole was decided and as a result this Court must apply Poole to the Defendant. Pursuant to Poole this Court finds the jury unanimously convicted the Defendant of armed kidnapping and armed robbery and therefore also unanimously found the prior or contemporaneous violent felony aggravator. This Court adopts the reasoning contained in the State's amended response to Defendant's motion to vacate judgment of conviction and sentence a copy of which is attached to and incorporated as part of this order as **ATTACHMENT E.** A copy of the verdict forms reflecting the Defendant's unanimous convictions of the contemporaneous violent felonies are also attached to and incorporated as part of this order as **ATTACHMENT F.** Therefore, pursuant to Rule 3.851(f)(5)(F) this claim is denied.

C. As to ground two the Defendant claims trial counsel was ineffective for failing to challenge the Defendant's competency to waive his right to counsel and proceed pro se. This claim is legally sufficient but can be conclusively resolved as a matter of law and by reliance on the record.

Specifically, this Court finds that although the trial Judge appointed Dr. Brannon to evaluate the Defendant for competency in an abundance of caution prior to conducting a Faretta hearing there is no evidence that supports the conclusion that trial counsel should have raised the issue of competency pursuant to Rule 3.210 and 3.211. This Court notes a review of the transcript demonstrates the trial Court conducted a thorough and detailed Faretta inquiry prior to granting the Defendant's request to proceed pro se. This Court further notes the trial Judge participated in lengthy discussions with the Defendant and specifically commented that the Defendant always gave intelligent and appropriate responses when questioned by the trial Judge. This Court concludes trial counsel was not ineffective in failing to challenge the Defendant's competency to waive his right to counsel and proceed pro se. In addition the Defendant also claims the trial Court erred when it found the Defendant competent to waive his right to counsel and proceed pro se pursuant to Faretta. As to this claim the State argues and this Court agrees trial Court error is procedurally barred as it could have and should have been raised on direct appeal. If this issue was not procedurally barred this Court would find the trial Court exceeded what is required to conduct a legally sufficient Faretta hearing and also had no grounds

to question the Defendant's competency pursuant to Rule 3.210 and 3.211. In Figueroa-Sanabria vs. State, 366 So.3d 1035 (Fla. 2023) the Florida Supreme Court recently stated "all competent defendants have a right to control their own destinies." The Florida Supreme Court also quoted Justice Scalia in Figueroa-Sanabria and stated "[o]ur system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State." This Court adopts the reasoning contained in the State's amended response to Defendant's motion to vacate judgment of conviction and sentence a copy of which is attached to and incorporated as part of this order. A transcript of the Faretta hearing is also included in the State's amended response to Defendant's motion to vacate judgment of conviction and sentence a copy of which is attached to and incorporated as part of this order as **ATTACHMENT E.** Therefore, pursuant to Rule 3.851(f)(5)(F) this claim is denied.

D. As to ground three the Defendant claims penalty phase trial counsel was ineffective for failing to discover available mitigation evidence, failing to present available mitigation evidence and failing to present additional available mitigation evidence. This claim is legally sufficient and can be conclusively resolved as a matter of law and by

reliance on the record and by reliance on the testimony and evidence presented at the evidentiary hearing conducted on April 19, 2023, April 20, 2023 and April 21, 2023. At the conclusion of the Huff hearing this Court found the Defendant was entitled to an evidentiary hearing as to this claim. A copy of the order entered at the conclusion of the Huff hearing on April 21, 2022 is attached to and incorporated as part of this order as **ATTACHMENT B**. As to the evidence presented at the evidentiary hearing this Court makes the following findings of fact and conclusions of law:

1. Kerry Sheehan is credible.
2. Joseph Walsh is credible.
3. Sarah Vinson is credible in part.
4. Linda Kelly is credible.
5. Darrell Howard is credible.
6. Cory Waters is credible.
7. Micah Johnson is credible in part.
8. Stuart Grassian is credible.
9. Robert Ouaou is credible in part.
10. This Court took judicial notice of the court file, the exhibits introduced at trial and the entire record on appeal in the present case pursuant to F.S.S. 90.201, 90.202 and 90.203.

11. The Defendant argues that although mitigation was presented at the penalty phase regarding the Defendant's life, family background and mental health there was additional evidence known to trial counsel that should have been presented as mitigation, there was additional evidence not known to trial counsel due to inadequate preparation that should have been presented as mitigation and there was substantial additional mental health evidence also not known to trial counsel due to inadequate preparation that should have been presented as mitigation. As a result the Defendant argues that he received ineffective assistance of counsel pursuant to Strickland which prevented the Defendant from receiving a Life sentence instead of the Death sentence imposed by the trial Judge.

12. The State argues that trial counsel did perform a thorough investigation of the Defendant's life, family background and mental health. The State further argues that trial counsel made strategic decisions assessing the positives and negatives of each to determine which evidence was presented to the jury, which evidence was presented to the trial Judge at the Spencer hearing and which evidence was not presented. The State further argues that even if this Court found trial counsel to be

ineffective the Defendant fails to satisfy the second prong of Strickland in that the outcome would not have been different based on the abundant evidence of aggravating factors and the facts of the crime as presented to the jury and trial Judge.

13. This Court finds that mitigation specialist Sheehan and trial counsel Walsh both did an excellent job as to the preparation and presentation of mitigation evidence. The State argues and this Court agrees any time constraints imposed on mitigation specialist Sheehan and trial counsel Walsh was primarily caused by the Defendant's choice to proceed pro se during the guilt phase of his trial. This Court notes mitigation specialist Sheehan testified that "she did the best she could." This Court further notes mitigation specialist Sheehan testified that trial counsel Walsh "worked hard" on the case. This Court also notes when trial counsel Walsh was asked if "he gave it his all" his response was "absolutely."

14. This Court finds Dr. Vinson credible as she has multiple board certifications in her field. However, this Court finds portions of Dr. Vinson's testimony problematic and not credible as she was repeatedly evasive and refused to answer direct questions. Specifically, this Court notes in response to a direct question Dr. Vinson testified

"[i]t's difficult to answer your question." This Court further notes Dr. Vinson did not test the Defendant for malingering and did not render any diagnosis of the Defendant.

15. This Court finds Dr. Johnson more credible than Dr. Vinson. This Court also finds Dr. Johnson's testimony regarding cumulative trauma, social disadvantage and unhealthy life outcomes both credible and corroborated by academic research. However, this Court notes trial counsel Walsh did present mitigation evidence regarding the cumulative trauma and social disadvantage present in the Defendant's life, family background and mental health history. This Court does not agree with Dr. Johnson's conclusion that additional evidence regarding the Defendant's life, family background and mental health history was required to present a sufficient mitigation case to the jury or the trial Judge.

16. This Court finds Dr. Grassian both credible and an expert in the research field of the effects of solitary confinement on juveniles in a prison setting. This Court notes Dr. Grassian did not conduct a formal interview of the Defendant (he had two phone conversations with the Defendant) nor does he have any personal knowledge as to the locations and conditions in the Florida Department of

Corrections where the Defendant was housed in solitary confinement. This Court further notes Dr. Grassian testified that a neuropsychological workup should be prepared to accurately determine how being housed in solitary confinement effected the Defendant. This Court further notes that the Defendant did not present any evidence of a neuropsychological workup during the evidentiary hearing. This Court further notes Dr. Grassian testified that he did not make any particularized determination about the Defendant, the effects of solitary confinement on the Defendant or the Defendant's behavior after being released from the Department of Corrections.

17. This Court finds Dr. Ouaou credible and an expert in neuropsychology. This Court notes Dr. Ouaou testified that in criminal cases he only testifies for the defense and that forensic work accounts for 100% of his current practice. This Court further notes Dr. Ouaou testified that he did not review an MRI of the Defendant, did not diagnose the Defendant with any abnormalities and did not render any diagnosis of the Defendant. As it did with Dr. Johnson this Court does not agree with Dr. Ouaou's conclusion that additional evidence regarding the Defendant's mental health history was required to present

a sufficient mitigation case to the jury or the trial Judge.

18. This Court finds Linda Kelly, Darrell Howard and Cory Waters credible. This Court also finds that each was available to testify and in all probability would have testified if called upon to present mitigation evidence to the jury and trial Judge. The Defendant argues and this Court agrees the Defendant endured very difficult circumstances during his life prior to committing murder in the case. However, the State argues and this Court agrees additional evidence regarding the Defendant's life, family background and mental health history was not required to present a sufficient mitigation case to the jury or the trial Judge.

19. This Court notes trial counsel Walsh presented experts Dr. Fichera and Dr. Rapa as part of the mitigation case to the jury and trial Judge. This Court further notes mitigation evidence concerning the Defendant's life, family background and mental health history including testimony about trauma and risk factors was presented as part of the mitigation case to the jury and trial Judge. The Defendant argues that Dr. Fichera and Dr. Rapa were not the best experts to present a sufficient mitigation case to the jury or the trial Judge. Put simply, the

Defendant argues that there was better or more persuasive mitigation evidence available as articulated by the testimony of Dr. Vinson, Dr. Johnson, Dr. Grassian and Dr. Ouaou. This Court does not agree. As previously stated in this order this Court finds trial counsel Walsh did an excellent job as to the preparation and presentation of mitigation evidence under difficult circumstances caused by the Defendant's choice to proceed to trial pro se. Even if this Court found trial counsel Walsh to be ineffective (which this Court does not find) the Defendant also fails to satisfy the second prong of Strickland. This Court finds no evidence that undermines the Death sentence imposed by the trial Judge after the majority recommendation by the jury. The Defendant stood before the jury and trial Judge previously convicted of murder and presently convicted of a separate first degree murder. The jury and trial Judge were presented with abundant evidence to support the finding beyond a reasonable doubt of a prior violent felony aggravator and the cold, calculated and premediated aggravator. Based on the Defendant's prior criminal conduct and the extreme violence and needless killing of the victim this Court finds overwhelming evidence of aggravation and minimal evidence of mitigation. This Court finds even if all the

mitigation evidence presented in this evidentiary hearing including the testimony of Dr. Vinson, Dr. Johnson, Dr. Grassian and Dr. Ouaou was presented to the jury or the trial Judge the outcome would remain the same and the Defendant would still have received a Death sentence. This Court adopts the reasoning contained in the State's post-hearing memorandum a copy of which is attached to and incorporated as part of this order as **ATTACHMENT G.** A copy of the transcript of the evidentiary hearing is attached to and incorporated as part of this order as **ATTACHMENT H.** Therefore, pursuant to Rule 3.851(f)(5)(F) this claim is denied.

E. As to ground four the Defendant claims he was denied due process and a fair trial based on alleged Brady and Giglio violations by the State regarding recorded witness statements. This claim is legally sufficient but can be conclusively resolved as a matter of law and by reliance on the record. The Defendant was provided DVD recordings of the witness statements. The recorded statements were never transcribed so there were no transcripts available to be produced to the Defendant. The Defendant did not have access to equipment in the Broward County Jail to view the contents of the DVD recordings. This Court finds no evidence of any discovery violation, Brady violation or Giglio violation.

Specifically, this Court finds the State complied with all discovery obligations pursuant to Rule 3.220. The sole and complete cause of the Defendant's inability to view the contents of the DVD recordings was his decision to proceed pro se while incarcerated in the Broward County Jail. This Court has repeatedly been confronted with this exact issue when a defendant chooses to proceed pro se while incarcerated in the Broward County Jail. This Court finds the Broward County Sheriff is required to operate a pretrial detention facility pursuant to Florida Law and is not required to operate a law office to be used by an incarcerated Defendant who chooses to proceed pro se. In addition, this Court notes as this issue was previously raised and denied on the merits by the Florida Supreme Court on direct appeal the Defendant is now procedurally barred from raising the issue again in the present motion for postconviction relief. This Court adopts the reasoning of the Florida Supreme Court in Wilcox vs. State, 143 So.3d 359 (Fla. 2014) a copy of which is attached to and incorporated as part of this order as **ATTACHMENT I.** This Court also adopts the reasoning contained in the State's amended response to Defendant's motion to vacate judgment of conviction and sentence a copy of which is attached to and incorporated as part of this order as

ATTACHMENT E. Therefore, pursuant to Rule 3.851(f)(5)(F) this claim is denied.

F. As to ground five the Defendant claims he was denied due process and a fair trial based on alleged Brady and Giglio violations by the State and there is newly discovered evidence regarding DNA evidence introduced at trial. This claim is legally sufficient but can be conclusively resolved as a matter of law and by reliance on the record. Specifically, the State argues and this Court agrees there is nothing in the record that reflects there is any newly discovered evidence. This claim is based on a notice disclosed by BSO that there may have been a problem with the combined probability of inclusion (CPI) calculations used by their DNA lab. This Court finds there was no testimony or evidence introduced at trial based on CPI calculations. Even if this Court found there was newly discovered evidence regarding the CPI calculations (which this Court does not find) the Defendant fails to satisfy the second prong of Jones vs. State, 709 So.2d 512 (Fla. 1998) which is required to be entitled to relief based on a claim of newly discovered evidence. This Court finds no evidence that any evidence or testimony related to a problem with the CPI calculations would have produced an acquittal at trial or raised a reasonable doubt as to the Defendant's guilt based on the

overwhelming evidence of the Defendant's presence at the location of the murder introduced at trial. This Court adopts the reasoning contained in the State's amended response to Defendant's motion to vacate judgment of conviction and sentence a copy of which is attached to and incorporated as part of this order as **ATTACHMENT E.** Therefore, pursuant to Rule 3.851(f)(5)(F) this claim is denied.

G. As to ground six the Defendant claims he was denied due process and equal protection based on the parameters imposed on this motion for postconviction relief pursuant to Rule 3.851. This claim is legally sufficient but can be conclusively resolved as a matter of law. Specifically, the State argues and this Court agrees this claim has previously been rejected on the merits by the Florida Supreme Court. See Vining vs. State, 827 So.2d 201 (Fla. 2002) and Arbelaez vs. State, 775 So.2d 909 Fla. (2000). This Court adopts the reasoning contained in the State's amended response to Defendant's motion to vacate judgment of conviction and sentence a copy of which is attached to and incorporated as part of this order as **ATTACHMENT E.** Therefore, pursuant to Rule 3.851(f)(5)(F) this claim is denied.

H. As to ground seven the Defendant claims he was denied due process based on the parameters imposed on his access to

public records pursuant to Rule 3.852. This claim is legally sufficient but can be conclusively resolved as a matter of law. Specifically, the State argues and this Court agrees this claim has previously been rejected on the merits by the Florida Supreme Court. This Court adopts the reasoning contained in the State's amended response to Defendant's motion to vacate judgment of conviction and sentence a copy of which is attached to and incorporated as part of this order as **ATTACHMENT E.** Therefore, pursuant to Rule 3.851(f)(5)(F) this claim is denied.

I. As to ground eight the Defendant claims he was denied due process and a fair trial based on the parameters imposed on his ability to interview jurors pursuant to Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar and Rule 3.575. This claim is legally sufficient but can be conclusively resolved as a matter of law. Specifically, the State argues and this Court agrees this claim has previously been rejected on the merits by the Florida Supreme Court. The State also argues and this Court also agrees that since this claim could have and should have been raised on direct appeal it is now procedurally barred. See Griffin vs. State, 866 So.2d 1 (Fla. 2003). This Court notes the Defendant did not file any motion pursuant to Rule 3.575. As a result this Court finds there is no evidence of any basis that the Defendant

has to challenge the verdict returned by the jury pursuant to Rule 3.575 and therefore there is no Constitutional violation. This Court adopts the reasoning contained in the State's amended response to Defendant's motion to vacate judgment of conviction and sentence a copy of which is attached to and incorporated as part of this order as **ATTACHMENT E.** Therefore, pursuant to Rule 3.851(f)(5)(F) this claim is denied.

As previously explained in this order this Court finds no merit in claims one, two, three, four, five, six, seven or eight. As such it is hereby **ORDERED and ADJUDGED** that the Defendant's second amended motion to vacate judgments of conviction and sentence is hereby **DENIED**.

The Defendant has the right to appeal this order within 30 days of rendition of this order pursuant to Rule 3.851(f)(8).

DONE and ORDERED at Fort Lauderdale, Broward County, Florida this 26th day of September, 2023.

MARTIN S. FEIN
CIRCUIT COURT JUDGE
case #08-3736CF10A

CC: Nicole Chiappone, Assistant State Attorney
Steven Klinger, Assistant State Attorney
Lisa-Marie Lerner, Assistant Attorney General
Brittney Lacy, Attorney for Defendant
Courtney Hammer, Attorney for Defendant
Paul Kalil, Attorney for Defendant

Filing # 199205044 E-Filed 05/24/2024 10:44:21 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-1498

DARIOUS WILCOX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, BROWARD COUNTY, FLORIDA

LOWER CASE NO. 08-3736CF10A

INITIAL BRIEF OF APPELLANT

BRITTNEY N. LACY
Assistant CCRC-South
Florida Bar No. 116001

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 174114

COLIN WAGNER
Staff Attorney
Florida Bar No. 1054120

CAPITAL COLLATERAL REGIONAL COUNSEL – SOUTH
110 SE Sixth Street, Suite 701
Fort Lauderdale, Florida 33301

May 24, 2024

COUNSEL FOR WILCOX

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT AND CITATIONS TO RECORD x

REQUEST FOR ORAL ARGUMENT xi

STATEMENT OF THE CASE AND FACTS 1

Waiver of Counsel 2

The Guilt Phase 3

Recorded Statements 4

Penalty Phase 6

Spencer Hearing 9

The Sentencing Order 10

Direct Appeal 12

Postconviction Proceedings 13

Initial Postconviction Appeal 15

Proceedings on Remand 15

Postconviction Evidentiary Hearing 16

The Order Denying Postconviction Relief 20

SUMMARY OF THE ARGUMENTS 22

STANDARD OF REVIEW 24

ARGUMENT I 25

Wilcox was Denied Effective Assistance of Counsel at the Penalty Phase of His Capital Trial in Violation of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. 25

A. The Mitigation Case 27

i. Trial Counsel Rendered Deficient Performance in Failing to Conduct a Reasonable Mitigation Investigation and Failing to Present Available Mitigation. 27

ii. Trial Counsel Failed to Investigate and Present Mental Health Mitigation Evidence. 37

iii. Prejudice 47

B. Trial Counsel Was Ineffective for Failing to Investigate and Challenge the State's Case in Aggravation. 89

C. The Lower Court's Credibility Findings 95

ARGUMENT II 99

The Lower Court Erred in Denying Wilcox a New Penalty Proceeding in Light of *Hurst v. Florida* and *Hurst v. State* in Violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Corresponding Provisions of the Florida Constitution. 99

A. Wilcox's *Hurst* Litigation 102

B. There is no Rational Basis that Would Justify Denying *Hurst* Relief to Wilcox Where Other Similarly Situated Defendants Received the Benefit of *Hurst*. 105

C. The Court's Denial of Wilcox's *Hurst* Claim has Resulted in an Arbitrary and Capricious Sentence, Where the Application of the Death Penalty is Not Narrowly Tailored in Accordance With Longstanding Constitutional Requirements. 110

D. The *Hurst* Error Here is Not Harmless. 113

E. The Retroactive Application of *State v. Poole* to Wilcox's Case Violates Due Process Under the Ex Post Facto Clause..... 116

F. Conclusion..... 117

ARGUMENT III 118

The Lower Court Erred in Summarily Denying Several Sufficiently Pled, Meritorious Claims in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. 118

A. Wilcox Is Entitled to an Evidentiary Hearing on His Claim of Pretrial Ineffective Assistance of Counsel..... 119

B. The Lower Court Erred In Summarily Denying Wilcox's Claim that the State violated *Brady* and/or *Giglio* by withholding Witnesses' Recorded Statements..... 128

C. Wilcox is Entitled to an Evidentiary Hearing on His Claims of Newly Discovered Evidence. 137

CONCLUSION AND RELIEF SOUGHT..... 142

CERTIFICATE OF SERVICE..... 144

CERTIFICATE OF COMPLIANCE AND FONT 144

TABLE OF AUTHORITIES

Cases

Allen v. Butterworth, 756 So. 2d 52 (2000) 118

Amendments to Fla. R. Crim. P. 3.851, 772 So. 2d 488, 491 n.2 (Fla. 2000).....118

Asay v. State, 210 So. 3d 1 (Fla. 2016) 101

Ault v. State, 213 So. 3d 670 (Fla. 2017) 25

Blanco v. State, 702 So.2d 1250 (Fla.1997) 95

Booker v. State, 969 So. 2d 186 (Fla. 2007).....118

Bouie v. City of Columbia, 378 U.S. 347 (1964) 116

Brady v. Maryland, 373 U.S. 83 (1963)..... 128, 136

Brim v. State, 695 So. 2d 268 (Fla. 1997) 137

Caldwell v. Mississippi, 472 U.S. 320 (1985) 114

Carmell v. Texas, 529 U.S. 513 (2000) 106

Cheshire v. State, 568 So. 2d 908 (Fla. 1990) 87

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 106

Clubside, Inc. v. Valentin, 468 F.3d 144 (2d Cir. 2006) 106

Cooper v. Sec'y, Dept. of Corr., 646 F.3d 1328 (11th Cir. 2011) 88

Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991) 38

Curry v. United States, 658 A.2d 193 (D.C. 1995) 130

Davis v. State, 207 So. 3d 142 (Fla. 2016) 103

Dixon v. State, 283 So. 2d 1 (Fla. 1973) 109, 111

Dusky v. United States, 362 U.S. 402 (1960) 122

Edelen v. United States, 627 A.2d 968, 970 (D.C. 1993).....130

Faretta v. California, 422 U.S. 806 (1975) 3, 122, 123

Ferrell v. State, 29 So. 3d 959 (Fla. 2010) 89

Furman v. Georgia, 408 U.S. 238 (1972) 109, 110

Gaskin v. State, 822 So. 2d 1243 (Fla. 2002).....43

Gideon v. Wainwright, 372 U.S. 335 (1963).....125

Giglio v. United States, 405 U.S. 150 (1972) 128, 130

Godfrey v. Georgia, 446 U.S. 420 (1980).....110

Gonzales v. State, 990 So. 2d 1017 (Fla. 2008).....118

Gregg v. Georgia, 428 U.S. 153 (1976)..... 26, 110

Guzman v. State, 868 So. 2d 498 (Fla. 2003).....130

Hardwick v. Crosby, 320 F.3d 1127 (11th Cir.2003).....34

Hayes v. State, 660 So. 2d 257 (Fla. 1995).....140

Hilton v. State, 961 So. 2d 284 (Fla. 2007).....24

Holland v. Gross, 89 So. 2d 255 (Fla. 1956) 24

Huff v. State, 622 So. 2d 982 (Fla. 1993).....x, 14

Hurst v. Florida, 577 U.S. 92 (2016)..... 13, 99

Hurst v. State, 202 So. 3d 40 (Fla. 2016)..... 14, 100

Indiana v. Edwards, 554 U.S. 164 (2008) 122, 123, 124, 126, 127

Johnson v. Mississippi, 486 U.S. 578 (1988) 107

Johnson v. Sec'y, Dept. of Corr., 643 F. 3d 907 (11th Cir. 2011) 86

Jones v. State, 591 So. 2d 911 (Fla. 1991) 140

Jones v. State, 678 So. 2d 309 (Fla. 1996) 140

Jones v. State, 709 So. 2d 512 (Fla. 1998) 139, 140

Kyles v. Whitley, 514 U.S. 419 (1995) 128, 129, 136

Lee v. State, 340 So. 2d 474 (Fla. 1976) 109, 110

Lindsey v. Washington, 301 U.S. 397 (1937) 116

Lockett v. Ohio, 438 U.S. 586 (1978) 87

Marks v. United States, 430 U.S. 188 (1977) 116

Mason v. State, 489 So. 2d 734 (Fla. 1986) 38

Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984) 38

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) 14, 100

Napue v. Illinois, 360 U.S. 264 (1959) 130

Nordelo v. State, 93 So. 3d 178 (Fla. 2021) 118

Pagan v. State, 235 So. 3d 317 (Fla. 2018) 100

Peede v. State, 748 So. 2d 253 (Fla. 1999) 118

Phillips v. State, 608 So. 2d 778 (Fla. 1992) 89

Pietri v. State, 885 So. 2d 245 (Fla. 2004) 33

Porter v. McCollum, 558 U.S. 30 (2009) 47, 87, 88

Rhodes v. State, 547 So. 2d 1201 (Fla. 1989) 94

Ring v. Arizona, 536 U.S. 584 (2002) 13, 100

Roberts v. Louisiana, 428 U.S. 325 (1976) 26

Rompilla v. Beard, 545 U.S. 374 (2005) 27, 87

Rose v. State, 675 So. 2d 567 (Fla. 1996) 89

Routly v. State, 590 So. 2d 397 (Fla. 1991).....130

Roy v. Wainwright, 151 So. 2d 825 (Fla. 1963).....125

Sears v. Upton, 561 U.S. 945 (2010).....86

Skinner v. Oklahoma ex rel. Williamson, 316 U.S 535 (1942).....109

Sliney v. State, 944 So. 2d 270 (Fla. 2006).....43

Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004).....38

Smith v. Texas, 543 U.S. 37 (2004).....85

Sochor v. State, 883 So. 2d 766 (Fla. 2004).....24

State v. Hacker, 510 So. 2d 306 (Fla. 4th DCA 1986).....115

State v. Lewis, 838 So. 2d 1102 (Fla. 2002).....28

State v. Michael, 530 So. 2d 929 (Fla. 1988).....38

State v. Poole, 297 So. 3d 487 (Fla. 2020)..... 15, 101, 102, 105

State v. Riechmann, 777 So. 2d 342 (Fla. 2000).....89

State v. Williams, 776 So. 2d 1066 (Fla. 4th DCA 2001).....115

Steiger v. State, 328 So. 3d 926 (Fla. 2021).....127

Stephens v. State, 748 So. 2d 1028 (Fla. 2000).....24

Strickland v. Washington, 466 U.S. 668 (1984)..... 22, 25, 32, 34, 47, 88

Strickler v. Greene, 527 U.S. 263 (1999).....129

Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994).....139

Truehill v. State, 358 So. 3d 1167 (Fla. 2002).....118

United States v. Bagley, 473 U.S. 667, 674 (1985).....128

United States v. Beale, 921 F.2d 1412 (11th Cir. 1991).....130

United States v. Meros, 866 F.2d 1304 (11th Cir. 1989).....130

United States v. Scheer, 168 F.3d 445 (11th Cir. 1999) 129

United States v. Simmons, 390 U.S. 377 (1968) 134

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 106

Weaver v. Graham, 450 U.S. 24 (1981) 116

Wheat v. United States, 486 U.S. 153 (1988).....124

Wiggins v. Smith, 539 U.S. 510 (2003) 25, 27, 32, 33, 86, 87, 89

Wilcox v. Florida, 574 U.S. 1161 (2015) 13

Wilcox v. Florida, 575 U.S. 980 (2015).....13

Wilcox v. State, 143 So. 3d 359 (Fla. 2014)..... 13, 133

Wilcox v. State, SC18-146, 2019 WL 4391268 (Fla. Sept. 13, 2019). 104

Williams v. Taylor, 529 U.S. 362 (2000) 27, 28, 47, 87, 129

Woodson v. North Carolina, 428 U.S. 280 (1976) 26

Yick Wo v. Hopkins, 118 U.S. 356 (1886).....109

Zant v. Stephens, 462 U.S. 862 (1983) 107

Statutes

Fla. Stat. § 921.141 102

Other Authorities

2 Subst. Crim. L. § 14.5(f) (3d ed.) 115

ABA Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases (2003)..... 28, 35, 38, 42, 89, 120

Fla. R. Crim. P. 3.851(f)(5)(A) 14, 118

List of Burglary Arrests, MIAMI HERALD, July 31, 1984, 1984 WLNR 2667739.....60

Resentencing Status of Florida Prisoners Sentenced to Death by Non-Unanimous Juries, DEATH PENALTY INFO. CTR.....101

Constitutional Provisions

Art. I, § 10, U.S. Const.....116

PRELIMINARY STATEMENT AND CITATIONS TO RECORD

This appeal arises from the circuit court's denial of Wilcox's initial motion to vacate judgments of conviction and sentence of death, pursuant to Florida Rule of Criminal Procedure 3.851.

Citations to the record will be as follows:

"R(volume)-___", "T(volume)-___", and "S(volume)-___": record, trial transcripts, and supplemental record on direct appeal to this Court;

"PCR-___": postconviction record on appeal following the lower court's summary denial of Wilcox's initial Rule 3.851 motion, without holding a *Huff*[1] hearing; and

"2PCR-___": postconviction record for the current appeal.

[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

REQUEST FOR ORAL ARGUMENT

Darious Wilcox has been sentenced to death. A full opportunity to air the issues presented herein through oral argument is appropriate in this case given the stakes involved, as the resolution of these claims will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. Wilcox, through counsel, respectfully moves this Court for oral argument on his appeal.

STATEMENT OF THE CASE AND FACTS

Judge Paul Backman of the Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, entered the judgments of conviction and death sentence at issue.

On February 28, 2008, Wilcox was indicted on one count of first-degree murder of Nimoy A. Johnson; four counts of armed kidnapping of Mr. Johnson; Stephanie Hankerson; Tanesha Arnold; and Veronica Morris; and armed robbery with a firearm. R1-8; 11. He invoked his right to counsel. R1-16.

Over the following nine months, Wilcox's counsel changed four times. R1-17, 27, 22, 26-7, 40, 46. The Broward Public Defender was appointed on March 5th but did nothing until moving to withdraw on May 8th. R1-22. The trial court granted the motion and appointed the Office of Criminal Conflict and Civil Regional Counsel (CCCRC) the same day. R1-27. The State filed its Notice of Intent to Seek Death Penalty on June 28th. R1-38. CCCRC did nothing until Attorney Keathan Frink entered his appearance on July 23rd. R1-40. Frink was not qualified to act as lead counsel under Florida Rule of Criminal Procedure 3.112. S8-41.

Counsel obtained minimal discovery and did nothing else until Robert Gershman, contracted by CCCRC, entered his appearance on September 28th. R1-46. In the interim, Wilcox filed his own discovery demands. R1-52.

Nine-months post-arrest, and three months after the State filed its Notice of Intent to Seek Death, no investigator had been assigned to Wilcox's case. No family or friends had been contacted and no records requested.

Having received just five legal visits and no discovery, on November 14th, Wilcox moved pro se to represent himself and demanded speedy trial. R1-56. Only then did Gershman contact Kerry Sheehan, an experienced mitigation specialist to assist with Wilcox's case. 2PCR-972.

At a hearing on Wilcox's pro se motion on December 15, 2008, Attorney Joseph Walsh made his first appearance as second-chair counsel. 2PCR-1052-53. Walsh had met with Wilcox one time before that hearing.

Waiver of Counsel

The court appointed psychologist Michael Brannon, Psy.D. to determine whether he *felt* Wilcox was competent to waive counsel

pursuant to *Faretta v. California*, 422 U.S. 806, 807 (1975). T5-18. Judge Backman's order only instructed Brannon to determine whether Wilcox was competent to proceed. R1-67-68.

Brannon spent forty-seven minutes at the jail conducting a "clinical interview," a "mental status examination," and "competency interview." 2PCR-3377. Without administering any intelligence testing, Brannon "grossly estimated" that Wilcox's "functional intelligence . . . fall[s] in the Low Average range." 2PCR-3379. Brannon opined Wilcox was "Competent to Proceed," but did not address whether Wilcox was competent to waive his constitutional right to counsel.

After conducting a *Faretta* hearing, the court in turn found Wilcox competent to proceed and waive counsel. T6-53-54. The court dismissed Walsh, allowing Wilcox to represent himself. CCCRC was appointed as standby counsel and Frink was assigned.

The Guilt Phase

Wilcox represented himself at the guilt phase. The State's case against Wilcox was circumstantial, based largely on the testimony of Wilcox's cousins Richaunda Curry, Shaquira Curry, and Terrell Collier and DNA from a "cigar type butt." S9-73.

Recorded Statements

Pretrial, Wilcox requested transcripts of all three witnesses' recorded statements and the transcript of Willie Ward's statement. T8-69-70; T9-115-24. The State agreed to give Wilcox copies of the recorded statements on DVDs but argued that Wilcox was not entitled to transcripts because they hadn't prepared any, citing "extensive costs." T8-68-70, 73. The court denied Wilcox's request, saying "there are a lot of pitfalls to representing yourself in a capital homicide. You're starting to find out how limited you are." T8-73.

Wilcox had also sought transcripts of recorded phone calls certain testifying witnesses had made to him at the jail. The State agreed to provide recordings on CDs but refused to provide transcripts. T8-74-5. Wilcox later argued that the State's failure to turn over transcripts constituted a discovery violation because he was unable to view the DVDs while incarcerated.

Without transcripts, Wilcox sought to impeach Richaunda at trial with Detective Hardy's arrest affidavit, S10-282-83, wherein Hardy wrote that after interviewing key witnesses, "[a]ll four . . . denied any knowledge or involvement with the burglary of their neighbor's residence a week prior to the murder." R1-4. Their denial

of knowledge of the burglary supported Wilcox's theory that they had framed him insofar as it contradicted their later statements that they had known about the burglary all along. The State, however, objected to Wilcox's use of the affidavit since Hardy, not Richaunda, had written it. S10-283. The State then revealed that Richaunda had, in fact, told the police about the burglary in her statement on DVD. S10-284 ("In her first statement on the DVD, she tells them about the robbery. She tells about the burglary. Says he was robbed the week before."). Wilcox attempted to object, S10-284, but the trial court again responded by chiding him with the "perils of self-representation." S10-283-86.

DNA Evidence

DNA Analyst Aida Saunders testified that Wilcox could not be excluded as a contributor of DNA obtained from a "cigar type butt" recovered at the crime scene, S9-90-91, but admitted that the DNA comparison was based on "minimal information" of just two alleles at a single site. S9-90-91.

Because Saunders could not provide a definitive match, the State presented Dr. Martin Tracey, a professor of biological sciences with an interest in population genetics, who concluded that:

> [T]he minor component on the gene D-19 is the same profile seen in Darious Wilcox. That's an infrequent profile present in only two percent or so of the population and would have excluded him more than 97 percent of the time if it wasn't his DNA.

T16-795.

The jury found Wilcox guilty on all charges on March 4, 2009.

Penalty Phase

After the jury's verdict, Wilcox invoked his right to counsel for the penalty phase. The following day, the court reappointed Walsh, who was on contract with CCCRC. R1-196; 2PCR-1052. This was Walsh's first capital case as lead counsel. 2PCR-1046; 1052.

The penalty phase was conducted on August 3-4, 2009. In aggravation, the State presented the probable cause affidavit from Wilcox's conviction for second-degree murder, armed robbery, and grand theft (which occurred in 1992 when Wilcox was 14 years old) and counsel's stipulation that Wilcox was a principal participant but not the actual shooter. T20-1208.

In mitigation, Walsh presented only one witness, Wilcox's mother Lawanda Wilcox, who testified that she was a crack cocaine addict and began using at age 10. Lawanda brought Wilcox along

when she ran the streets and bounced around. At times, Lawanda sent Wilcox outside to find trash she could use to smoke crack. She stole to support her addiction, even from her own son. The jury heard that Lawanda "just came up wrong," dating men "to get money, to do things [she] needed to do, like for Pampers, stuff like that." T20-1187-89.

Lawanda testified that she was not involved with her children's education and "stuff like that." T20-1191. Lawanda came in and out of Wilcox's life, was unable to provide for him, and "wasn't there" for him. T20-1190. She told the jury that, as punishment, she made Wilcox "go in the bathroom, close the door, and not come out" because "[she] didn't like beating him." T20-1197.

Lawanda testified that she had a fourth son, Darius, who she left at the hospital after giving birth. Wilcox was raised primarily by his Grandma, Nancy. Nancy was "sweet" but emotionally and physically unavailable for Lawanda and her siblings. T20-1189.

Walsh presented no mental health evidence.[2]

---

[2] Six weeks prior to the penalty phase, Walsh retained Psychologist Sheila Rapa, Psy.D. Rapa wrote a report, but Walsh did not present her at the penalty phase.

Wilcox's jury was instructed on four aggravating factors:

> 1) "the defendant has previously or contemporaneously been convicted of another capital offense or felony involving the use or threat of violence to some person";
>
> 2) the crime was committed "while he was engaged or an accomplice in the commission of or attempt to commit the crime of robbery, burglary or kidnapping";
>
> 3) the crime was committed "for the purpose of avoiding or preventing a lawful arrest or to effect an escape from custody"; and
>
> 4) the crime was committed "in a cold, calculated and premeditated manner, without any pretense of moral or legal justification."

T21-1258-60. The jury was instructed on five mitigating factors:

> 1) "difficulty of the defendant's home environment as a child, not properly nurtured by a crack- and heroin-addicted mother due to her problem with drugs, alcohol and crime";
>
> 2) "lack of stability in the home environment";
>
> 3) "society would be safe; and the defendant would spend the rest of his natural life in prison with a jury recommendation of life imprisonment without the possibility of parole";
>
> 4) "the incident which brought about the prior conviction for second-degree murder, armed robbery and grand theft in 1993 occurred when the defendant was a young age; he was

> convicted as a principle [sic] in the offense and not the actual shooter"; and
>
> 5) "any of the following circumstances that would mitigate against the imposition of the death penalty: Any aspects of the defendant's character, record or background; any other circumstances."

T21-1261-62.

After deliberating for 50 minutes, R1-143, the jury rendered its advisory recommendation of death by the barest majority: 7-to-5. T21-1274. The jury made no specific findings of fact.

***Spencer* Hearing**

Counsel presented one witness at the *Spencer* hearing, Psychologist Christopher Fichera, Ph.D, who counsel only contacted after the jury reached its penalty-phase verdict. Fichera testified that he was retained to "to provide the Court with information about Wilcox's life that is then empirically linked with factors in the course of scientific literature" to present to the court in mitigation. T22-1301. Fichera only interviewed Wilcox's aunt Linda and reviewed the probable cause affidavit, Drs. Rapa's and Brannon's reports, Sheehan's sentencing and mitigation reports, DCF records, and the Presentence Investigation Report. T22-1300.

Fichera testified to Lawanda's addiction, the neighborhood violence, and Wilcox's lack of educational support He gave an overview of the abuse and neglect Wilcox suffered. T22-1301-06. Fichera explained that Adverse Childhood Experiences (ACEs), or "risk factors," are linked to negative health outcomes. Fichera found that virtually every one of the identified risk factors applied to Wilcox. T22-1310, 1315. He explained that "protective factors" can guard against future criminal behaviors and violence. Relying on Brannon's and Rapa's report, Fichera identified only one protective factor applicable to Wilcox: "his intelligence." T22-1313, 1315.

Fichera had not reviewed Lawanda's testimony and had not conducted standardized testing of Wilcox's intelligence.

The Sentencing Order

On May 16, 2011, Judge Backman sentenced Wilcox to death for the murder of Mr. Johnson and life imprisonment on each remaining count. R5-860-75. The court found four aggravating circumstances, affording each "great weight:" 1) Wilcox was previously convicted of a violent felony; 2) the murder was cold calculated and premeditated (CCP); 3) the murder was committed in

the course of a felony; and 4) the murder was committed to avoid or prevent a lawful arrest. R5-861-67.

As mitigation, the court found that: Wilcox "grew up in a difficult environment as a child—[n]ot properly nurtured by a crack and heroin addicted mother due to her problems with drugs, alcohol and crime" and experienced a "[l]ack of stability in the . . . home environment growing up"; "behaviors that resulted in the conviction of [Wilcox] were a direct outcome of the abusive and dysfunctional childhood and adolescent period"; "[c]ircumstances beyond [Wilcox's] control effected [sic] his development and led him to have a psychologically damaging childhood and adolescence"; Wilcox "exhibited symptoms of childhood depression around the age of 12-13 which went untreated by professionals"; "[s]ociety would be safe and [Wilcox] would spend the rest of his natural life in prison"; and Wilcox behaved well in court. R5-867-71. The court assigned "little weight" to each finding.

The court discounted Dr. Fichera's testimony because there was "no evidence" that the ACEs risk factors Wilcox experienced "increased the likelihood that the Defendant might murder someone years later." R5-870.

Direct Appeal

Wilcox, through counsel, appealed to this Court raising several claims, including:

> The denial of transcripts of witness statements violated Florida's rules of discovery;
>
> The court erred in allowing the State to present evidence of Wilcox's prior conviction;
>
> The court erred in ruling that a witness's recollection could only be refreshed with her own statement;
>
> The court erred in failing to allow compulsory service of process for witnesses;
>
> The jury was improperly instructed on, and the court improperly found, the avoiding arrest aggravator;
>
> The jury was improperly instructed on, and the court improperly found, the CCP aggravator;
>
> The court improperly gave little weight to "significant, uncontradicted" mitigation;
>
> A 7–5 death recommendation is "constitutionally unreliable;" and
>
> Florida's death penalty statute is unconstitutional.

Initial Br., SC11-1017 (Fla. Dec. 28, 2012).

Despite finding several points of error and striking the "avoiding arrest" aggravator, this Court affirmed Wilcox's

convictions and sentences on direct appeal. *Wilcox v. State*, 143 So. 3d 359 (Fla. 2014).

Wilcox petitioned for a writ of certiorari in the U.S. Supreme Court, including a claim that his death sentence violates *Ring v. Arizona*, 536 U.S. 584 (2002). The Court denied review on February 23, 2015. *Wilcox v. Florida*, 574 U.S. 1161 (2015).

Two weeks later, the Supreme Court granted review in *Hurst v. Florida*, Case No. 14-7505. Based on the Court's consideration of *Hurst*, Wilcox sought rehearing of the denial of certiorari, which was denied. *Wilcox v. Florida*, 575 U.S. 980 (2015).

Postconviction Proceedings

This Court appointed the Office of the Capital Collateral Regional Counsel-South (CCRC-South) to represent Wilcox in postconviction. Initially, Judge Backman presided over the proceedings.

Wilcox timely filed his initial motion for postconviction relief pursuant to Rule 3.851 on February 19, 2016, one month after the Supreme Court decided *Hurst v. Florida*, 577 U.S. 92 (2016). Wilcox raised several claims for relief including *Hurst* error. Because this Court had yet to address the implications of *Hurst v. Florida*, Wilcox

moved to stay proceedings until this Court revisited the case on remand. PCR-659.

After this Court decided *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), Wilcox amended his postconviction motion, arguing that his death sentence violated the Sixth and Eighth Amendments pursuant to *Hurst v. Florida* and *Hurst v. State.* The State also conceded that if Judge Backman did not grant *Hurst* relief, Wilcox's claim of penalty phase ineffective assistance of counsel (IAC) "needed an evidentiary hearing." PCR-868.

In accordance with Rule 3.851(f)(5)(A), Judge Backman set a case management conference (*Huff*[3] hearing) for February 12, 2018; however, on January 18th, mere weeks before the scheduled hearing, he "[i]nexplicably," 2PCR-50, issued an order summarily denying all relief. PCR-889.

---

[3] *Huff*, 622 So. 2d 982 (due process requires "the opportunity to appear before the court and be heard" on initial rule 3.851 motions).

Initial Postconviction Appeal

Wilcox appealed Judge Backman's summary denial, asserting three claims: 1) the lower court erred in failing to conduct a *Huff* hearing; 2) Wilcox's sentence violates the Sixth and Eighth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution in light of *Hurst v. Florida* and *Hurst v, State*; and 3) the court erred in summarily denying his meritorious claims. Initial Br., SC18-146 (Fla. Sept. 4, 2018). Without addressing the merits of Wilcox's claims, this Court reversed and remanded for a *Huff* hearing and further proceedings. Order, SC18-146 (Fla. Sept. 13, 2019).

Proceedings on Remand

While the case was before this Court on the initial appeal, Judge Backman retired. After rotating between several judges, the case was assigned to Judge Martin S. Fein.

On January 23, 2020, this Court decided *State v. Poole*, 297 So. 3d 487 (Fla. 2020) (receding from *Hurst v. State* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt").

With leave of court, Wilcox amended his *Hurst* claim in light of *Poole*. In response, the State argued that the *Hurst* error in Wilcox's case was harmless but maintained that an evidentiary hearing on the penalty phase IAC claim was necessary.

After conducting a *Huff* hearing, Judge Fein granted an evidentiary limited to Wilcox's IAC penalty phase claim. 2PCR-429.

Postconviction Evidentiary Hearing

At the evidentiary hearing, Wilcox presented trial counsel Joseph Walsh and mitigation specialist Kerry Sheehan. Sheehan testified to prevailing norms in mitigation. Each testified to the work they performed on Wilcox's penalty phase.

Counsel also presented expert and lay testimony to establish available mitigation that was not presented at the penalty phase and evidence to rebut the State's case in aggravation.

Wilcox's aunt Linda Kelly gave insight into the Wilcox family and dangers of living in Perrine. Because she lived with Darious when he was a baby and remained nearby throughout his life, she saw the impact on Darious. 2PCR-1228-30. Linda spoke with Darious's lawyer one time before trial and offered some of this information. 2PCR-709-11. Counsel never returned for more

thorough information and she was never asked to testify. 2PCR-1251.

Wilcox's cousin, and Linda's son, Darrell Howard testified to his experiences with Wilcox growing up in Perrine, Florida, the extreme violence and crime they were exposed to, and the remorse he felt for the way he treated Wilcox when they were young. Counsel never spoke with Darrell.

Cory Waters testified about his childhood relationship with Darious, the neighborhood they grew up in, and facts surrounding the prior second-degree murder case. The two met at just eight or nine years old and saw each other frequently. He provided details about the violence he and Darious experienced as children, including how he and Darious personally knew at least three people who were killed on the street in the neighborhood. 2PCR-1312. Counsel met with and spoke with Cory, who agreed to testify, but counsel never called him.

Sarah Vinson, M.D., a triple board-certified psychiatrist specializing in child and adult trauma, testified that she evaluated Wilcox "for biopsychosocial and structural factors that may have contributed to [his] thoughts, feelings and behaviors, and the events

leading up to the instant case." 2PCR-1126. Vinson conducted an extensive record review, clinical interview of Wilcox, interview with aunt Linda, and prepared a report. *See* Exh. 20, 2PCR-794.

Vinson testified to the clinical definitions of trauma and the overall impact of trauma on Wilcox's life. 2PCR-1127-33. Vinson opined that Wilcox experienced childhood traumas "at the interpersonal level, the neighborhood level, and the structural level, they were a constant part of his life and his experience." 2PCR-1141.

Stuart Grassian, M.D., J.D., a board-certified psychiatrist who completed his residency in child and adolescent psychiatry and teaches courses on solitary confinement at Harvard's law and medical schools. 2PCR-1497, 1499. Grassian testified to the effects of solitary confinement on adults, juveniles, and juveniles with mental illness. 2PCR-1519. Grassian reviewed records and experts' reports, interviewed Wilcox, and prepared a report. *See* Exh. 28.

Grassian testified that Wilcox was particularly vulnerable to solitary confinement because he was incarcerated as a child and had been subjected to substantial childhood trauma. Grassian

could not "think of a case that had more glaring evidence of vulnerabilities."[4] 2PCR-1520.

Robert Ouaou, Ph.D., a licensed forensic and clinical psychologist with a specialization in neuropsychology, testified that he reviewed extensive records, interviewed Wilcox's mother,[5] conducted a clinical interview of Wilcox, and administered a battery of neuropsychological tests. 2PCR-1556-58. Ouaou prepared a report. *See* Exh. 30.

Ouaou opined that Wilcox's history of trauma, among other factors, impacted his adolescent brain development. 2PCR-1582. Wilcox is the "poster child" or "poster adult[] for the development of difficulties with executive functions and memory." 2PCR-1582. Neuropsychological testing revealed that Wilcox's IQ is 78. 2PCR-1568.

---

[4] Grassian explained that his report and testimony were not particularized to the specifics of the physical and mental impact confinement had on Wilcox. 2PCR-848. He explained such an investigation requires a much larger mitigation inquiry including a neuropsychological workup and extensive client and collateral interviews. 2PCR-1518.

[5] Lawanda died of a drug overdose on June 19, 2021. 2PCR-4046.

Micah Johnson, Ph.D., is a professor and researcher at the University of South Florida Department of Mental Health Law and Policy. 2PCR-1354. Dr. Johnson reviewed extensive records, interviewed Wilcox, and conducted sociological research on Perrine, Florida, the community where Wilcox and his family spent most of their lives which he detailed in his report. *See* Exh. 27; 2PCR-827.

Johnson opined that Wilcox was exposed to an "extreme level" of adverse childhood experiences, 2PCR-1411, and "has one of the worst trauma histories" he has seen. 2PCR-1448.

The Order Denying Postconviction Relief

Following the evidentiary hearing, the lower court denied relief on all of Willcox's claims.

As to Ground I, alleging Wilcox's death sentence should be overturned due to *Hurst* error, the court denied relief pursuant to *Poole* because one or more aggravators were found at trial.

As to Ground II, alleging that trial counsel was ineffective for failing to argue that Wilcox was not competent to waive his right to counsel, the court reasoned that an evidentiary was not necessary because "there is no evidence that supports the conclusion that

trial counsel should have raised the issue of competency pursuant to Rule 3.210 and 3.211." 2PCR-1908.

As to Ground III, alleging ineffective assistance of counsel at the penalty phase, the court found each of the lay witnesses presented at the postconviction hearing to be "credible" and each of the experts to be "credible" or "credible in part." 2PCR-1910. Nevertheless, the court found neither deficient performance nor prejudice.

On Ground 4, alleging that the State violated *Brady* and/or *Giglio* by failing to disclose witnesses' prior inconsistent statements, the court found the claim meritless and procedurally barred because "this issue was previously raised and denied on the merits" on direct appeal to this Court. 2PCR-1917-18.

As to Ground 5, alleging newly discovered evidence and/or that the State violated *Brady* and/or *Giglio* by failing to disclose that the forensic science used to convict and sentence Wilcox was neither reliable nor valid, the court determined that an evidentiary hearing was not required because "there is nothing in the record that reflects there is any newly discovered evidence." 2PCR-1919.

In support of each of its findings, the court "adopt[ed] the reasoning contained in the State's amended response to [Wilcox's] motion" and incorporated it as part of the order. 2PCR-1907, 1909, 1917-18, 1920-22.

This appeal follows.

SUMMARY OF THE ARGUMENTS

I. Wilcox was denied effective assistance of counsel at the penalty phase of his capital trial in violation of the Sixth, Eighth, and Fourteenth Amendments. *See Strickland v. Washington*, 466 U.S. 668 (1984). The lower court 's findings are replete with errors and are not supported by competent, substantial evidence. The lower court's findings that witnesses were "credible in part" is not entitled to deference because they are based on facts not borne out by the record. Counsel failed to conduct a reasonable penalty phase investigation, obtain the necessary background materials, or secure qualified mental health expert assistance. As a result of trial counsel's failings, a wealth of compelling mitigation information never reached the sentencing judge or jury who recommended death by the barest majority, 7-to-5. Given the wealth of mitigation evidence that was available but went unpresented, there is a

reasonable probability that the one additional juror would have been swayed to recommend life.

II. Wilcox's death sentence violates the Sixth Amendment in light of *Hurst v. Florida* and *Hurst v. State* because the trial judge, not the jury, made the findings of fact necessary to impose death. Wilcox remains the only *Hurst*-eligible defendant with a bare majority jury recommendation of 7–5 for death denied relief. The lower court's denial of this claim is violative of due process and equal protection as enumerated in the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

III. The lower court erred in summarily denying Wilcox's meritorious claims where he pled specific facts that, if proven at an evidentiary hearing, would entitle him to relief. Wilcox alleged that he was denied a reliable adversarial testing and fundamentally fair trial at the guilt phase due to pretrial ineffective assistance of counsel and judicial error, resulting in the violation of his Sixth Amendment right to counsel. He further alleged that he was denied due process because the State withheld material, exculpatory evidence and/or presented of false evidence in violation of *Brady v. Maryland* and *Giglio v. United States*, and that newly discovered

evidence establishes that the forensic science used to convict and sentence him was neither reliable nor valid.

These facially sufficient claims are not conclusively refuted by the record. In denying these fact-based claims without evidentiary development, the lower court made factual findings that are not borne out by the record. This Court should remand for an evidentiary hearing.

STANDARD OF REVIEW

Ineffective assistance of counsel claims are mixed questions of law and fact. The lower court's legal rulings are reviewed de novo.

The lower court's findings of fact are entitled to deference only if they are supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004); *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). Factual determinations "induced by an erroneous view of the law" should be set aside. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *see also Hilton v. State*, 961 So. 2d 284, 299 (Fla. 2007).

This Court reviews summarily denied claims de novo, accepting their allegations as true to the extent they are not conclusively refuted by the record and reversing for an evidentiary

hearing if they are facially sufficient to show entitlement to relief and raise an issue of fact. *Ault v. State*, 213 So. 3d 670, 677-78 (Fla. 2017).

ARGUMENT I

Wilcox was Denied Effective Assistance of Counsel at the Penalty Phase of His Capital Trial in Violation of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

The U.S. Supreme Court has consistently affirmed that "[t]he right to counsel is the right to effective assistance of counsel." *Strickland*, 466 U.S. at 686. To establish ineffective assistance of counsel, a petitioner must show: (1) that counsel's representation was deficient in that it "fell below an objective standard of reasonableness," and (2) there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wiggins v. Smith*, 539 U.S. 510, 521, 534 (2003).

The right to effective counsel extends to capital defendants at both phases of the capital trial. *Id*. Because "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a

jury of people who may have never made a sentencing decision," each juror must be presented with meaningful evidence about the defendant's social and family history in order to fully grasp "the particularized characteristics of the individual defendant." *Gregg v. Georgia*, 428 U.S. 153, 190, 206 (1976); *see also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

The postconviction court found that Wilcox failed to establish either prong of *Strickland.* Despite trial counsel's admitted failings, the court found that counsel "did an excellent job as to the preparation and presentation of mitigation evidence under difficult circumstances caused by the Defendant's choice to proceed to trial pro se." 2PCR-1916. In declining to find prejudice, the court determined "no evidence [...] undermines the death sentence." 2PCR-1916.

The lower court's factual findings are not supported by competent, substantial evidence and result from a mistaken understanding of the applicable legal standard. The court's deficient performance and prejudice analyses are fundamentally flawed for three reasons. First, the court misapplied the deficient performance

analysis by using a subjective standard as opposed to the required objective assessment of counsel's performance. Second, the court misapplied the prejudice analysis, determining that counsel presented a "sufficient mitigation case" without considering the wealth of uncontroverted mitigation presented at the evidentiary hearing. Third, the court failed to engage with mitigation presented and assign proper weight in light of the findings of the sentencing court. Each will be addressed in turn.

A. The Mitigation Case

i. Trial Counsel Rendered Deficient Performance in Failing to Conduct a Reasonable Mitigation Investigation and Failing to Present Available Mitigation.

Counsel's highest duty is the duty to investigate and prepare, and to make reasonable decisions supporting that investigation. The proper measure of an attorney's performance remains "simply reasonableness under prevailing norms, " *Wiggins,* 539 U.S. at 521, 524; *Williams v. Taylor*, 529 U.S. 362, 392 (2000); *Rompilla v. Beard*, 545 U.S. 374 (2005). Prevailing norms, established by the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, relied on in *Wiggins*, impose a duty on

counsel to perform an extensive search into the client's background:

> Because the sentencer in a capital case must consider in mitigation, "anything in the life of a defendant which might mitigate against the appropriateness of the death penalty for that defendant," penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.

§10.7, Commentary (citations omitted).

"The obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated—this is an integral part of a capital case." *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002). Wilcox "had a right—indeed, a constitutionally protected right—to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams*, 529 U.S. at 393.

After Wilcox's arrest on February 28, 2009, and the appointment of counsel, Wilcox waited in jail for nearly nine months while appointed counsel did nothing. R1-56; T4-4; 11;17. When Mr. Walsh was appointed, he had five months to investigate and prepare for Wilcox's capital penalty phase. Walsh had to start from

scratch because he had received no files or records from any of the previously assigned attorneys. 2PCR-1080.

While preparing for Wilcox's penalty phase, Walsh had just opened a new law practice. He and Sheehan were simultaneously preparing for the capital trial of Patrick Young, set to begin a month after Wilcox's penalty phase. Walsh was also preparing for the Board Certification Exam, which required him to take time in April and May. 2PCR-1082. Walsh was completely focused on the exam because this was his second time taking the test. In addition, Walsh battled ongoing medical issues requiring a number of hematology and oncology appointments. He admitted, this time in his life was "remarkable" and had an effect on his performance. 2PCR-2089, 1082-84, 1092-92.

Despite time constraints, Walsh waited almost five weeks to hire Ms. Sheehan. 2PCR-1081. Sheehan met with Wilcox only twice. 2PCR-989. She spent a total of *4-to-5 hours* with Wilcox over the course of four months. She admitted, this was "certainly not enough." 2PCR-990. Walsh recalled meeting with Wilcox "maybe three to four times." 2PCR-1057. Sheehan could not obtain all of the records she would have liked to. 2PCR-977. In five months,

Sheehan spent only 5.5 hours interviewing just six witnesses. *See* 2PCR-714-26.

On May 18, 2009, Walsh and Sheehan traveled to Miami and conducted "basically an introduction meeting" with Wilcox's aunt Linda, her son Richard, and niece Nicki Finch, in Linda's home. 2PCR-996, 729. On June 19th, Sheehan interviewed Wilcox's aunt Sandra Waterman over the phone, but did not speak to her in person. 2PCR-701, 993.

On June 11th, Sheehan spoke by phone with Cory Waters, Wilcox's childhood friend and co-defendant in the prior case the State used as aggravation. Cory told Sheehan about Wilcox's lack of involvement in the prior crime. 2PCR-693. Sheehan reported to Walsh that Waters said the "same thing" as stated in the probable cause affidavit, "only better." 2PCR-999, 705. Sheehan did not ask about Cory's experiences growing up with Wilcox.

On July 3rd, Walsh and Sheehan met with Wilcox's mother, Lawanda, at Miami-Dade County jail, and met with Waters. 2PCR-693.

The Lower Court's Deficient Performance Findings

In assessing trial counsel's performance, the lower court found:

> [M]itigation specialist Sheehan and trial counsel Walsh both did an excellent job as to the preparation and presentation of mitigation evidence.
>
> . . .
>
> This Court notes mitigation specialist Sheehan testified that "she did the best she could." This Court further notes mitigation specialist Sheehan testified that trial counsel Walsh "worked hard" on the case. This Court also notes when trial counsel Walsh was asked if "he gave it his all" his response was "absolutely."

2PCR-1912.

By relying on the trial teams' *subjective* perception about their own performance, the court misapplied *Strickland* and its progeny. The deficient performance analysis hinges on whether counsel's performance was *objectively reasonable*:

> When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below *an objective standard of reasonableness*.

Strickland, 466 U.S. at 687-88 (emphasis added). Whether counsel felt they did "the best [they] could" or "gave it his all" is irrelevant. Counsel can do their best and give it their all and still be ineffective.

The court must review counsel's performance using an objective standard assessed under prevailing norms. *Wiggins,* 539 U.S. at 521, 524. Here, the court failed to engage in any analysis at all of counsel's performance as compared to the prevailing norms. An analysis under the correct standard establishes that counsel's performance fell below an objective standard of reasonableness.

Walsh testified that he and Sheehan had done "some mitigation work to locate background witnesses, obtain records, and look into mitigation in the case." 2PCR-1056. In fact, counsel conducted a cursory investigation, speaking to just six witnesses over the course of five months, three of which were met with in a group for an "introductory interview." 2PCR-966.

Trial counsel's omissions are compounded by the fact that he failed to follow up on the mitigating information he did uncover. As In assessing the reasonableness of counsel's investigation, "a court must consider not only the quantum of evidence already known to counsel; but also, whether the known evidence would lead a

reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 532. Witnesses provided information about Wilcox's life that would have prompted a reasonable attorney to further investigate the abuse and neglect Wilcox suffered, his exposure to violence in the home and the community, and his struggles at school.

Counsel presented a single witness at penalty, Wilcox's mother. Trial counsel did not offer any reason why he didn't call any additional family member or friends to testify. He admitted he didn't even consider calling Cory Waters as a mitigation witness. 2PCR-1067.

In finding counsel's performance was not deficient, the postconviction court adopted the State's erroneous argument[6] that "counsel made strategic decisions assessing the positives and negatives" of which mitigation to present. This finding is belied by the record and contrary to law.

---

[6] This Court has explicitly discouraged lower courts from adopting a State's post-hearing memorandum in support of its order denying postconviction relief, particularly in cases like Wilcox where he challenged both the State's misapprehension of the facts and flawed arguments in closing. *See Pietri v. State*, 885 So. 2d 245, 270 (Fla. 2004).

Trial counsel never testified to having a "strategic decision" for failing to investigate or present mitigation. Even if counsel had offered some strategic reason, "[t]he mere incantation of 'strategy' does not insulate attorney behavior from review." *Hardwick v. Crosby*, 320 F.3d 1127, 1186 (11th Cir.2003). Counsel's purported strategy decisions must be reasonable. Here, counsel shortcomings cannot be attributed to any reasonable strategy. As *Strickland* provides,

> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

466 U.S. at 691. Trial counsel cannot make a strategic decision to not investigate further. Having failed to conduct the required investigation, counsel was not in a position to make reasoned, strategic decisions regarding the presentation of evidence. Nor was counsel in a position to decide that further investigation was unnecessary.

The lower court brushed aside counsel's shortcomings because counsel was working "under difficult circumstances caused by the Defendant's choice to proceed to trial pro se." 2PCR-1912. This finding is controverted by the record. Developing a mitigation in a capital case is a time-consuming and extensive process because counsel is required to "develop as complete a picture as possible of the individual from birth all the way up to the present moment." 2PCR-989; Guideline §4.1, Commentary. To accomplish this, counsel's duty to investigate mitigation is imposed *from the beginning,* "even before the prosecution has affirmatively indicated that it will seek the death penalty," Guideline §1.1, Commentary. Indeed, Ms. Sheehan testified that a capital mitigation investigation must begin "right away, as soon as the two attorneys are assigned to the case." 2PCR-971.

The trial record reflects that counsel was first appointed after Wilcox's arrest on February 28, 2008 but Wilcox did not request to go pro se until November 14, 2008. For nearly nine months, Wilcox waited in jail for while appointed counsel did nothing. R1-56; T4-4; 11, 17. As Wilcox explained to the trial court,

> Joe Walsh was the last of my attorneys appointed to me that did anything for me, as far as proving my innocence. He was the only attorney in, say, 11 months, to give me anything in reference to this respective case, that was the issue. No one was coming to visit me to go over anything. No one was counseling me.

T11-108.

Mr. Walsh was not reappointed until after the guilt phase. Testimony at the evidentiary hearing established that Walsh knew five months was a short period to prepare a capital penalty phase presentation. Yet, he waited six weeks to hire an investigator, two and a half months to interview a single witness, and over three months to contact a mental health professional.[7] Walsh then waited until *two weeks* before penalty to file his only motion for a continuance, which the trial court denied.

Walsh admitted that his own trial schedule, preparation for the board certification examination, and his medical issues

---

[7] Walsh testified that he received no records or documents on Wilcox's case after reappointment, further supporting Claim III, alleging ineffective representation at the guilt phase due to counsel's failures to conduct any investigation in the eleven months prior to discharging counsel.

impacted his abilities. 2PCR-1082-84, 1092-92. Walsh didn't report any of this to the trial court in support of his request for a continuance. While five months is certainly a short period in which to prepare for a capital penalty phase, the lower court's finding fails to consider that trial counsel wasted much of that time.

Further, the lower court's finding that counsel's "difficult circumstances [were] caused by the Defendant's choice to proceed to trial pro se" ignores the fact that, for nearly 9 months after Wilcox was arrested and counsel was appointed, counsel did nothing. Indeed, it was counsel's inaction that prompted Wilcox to request they be dismissed in the first place.[8]

ii. Trial Counsel Failed to Investigate and Present Mental Health Mitigation Evidence.

Mental health evidence is "of vital importance to the jury's decision at the punishment phase," and counsel's failure to timely seek out qualified experts to assist in building a mitigation case and

[8] Billing records highlight the egregious failures in counsel's performance. Sheehan spent under 40 hours, substantively, on Wilcox's mitigation investigation. She admitted in postconviction, "I didn't do a good enough job." 2PCR-1019.

present any mental health evidence or expert to the jury is deficient performance. *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004).

Counsel has a duty to conduct proper investigation into the defendant's mental health background, and to ensure that he is afforded a professional and professionally conducted mental health evaluation. *See Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Mason v. State*, 489 So. 2d 734 (Fla. 1986); *Mauldin v. Wainwright*, 723 F.2d 799 (11th Cir. 1984); *see also State v. Michael*, 530 So. 2d 929 (Fla. 1988). Counsel must request *appropriate* experts as soon as possible, avoiding reliance on "an 'all purpose' expert who may have insufficient knowledge or experience to testify persuasively." Guideline § 10.11, Commentary; see also Guideline § 11.4.1 (c), Commentary.

Here, trial counsel Dr. Rapa just six weeks before the penalty phase.[9] Walsh testified at the evidentiary hearing that the decision to hire Rapa wasn't his; the CCCRC would just say, "Here is the expert you should hire." 2PCR-1055. Walsh did not know why Rapa

[9] Walsh admitted that he hired Rapa "definitely later than I would have liked." 2PCR-1069.

was suggested. 2PCR-1055-56. Rapa's forensic work was limited almost exclusively to sex offender cases. She had no experience in developing mitigation in capital cases.

Rapa's report indicates that she was retained to conduct "a forensic psychological evaluation ... in order to aid in the determination of Wilcox's sentence." 2PCR-3381. Walsh told Sheehan that Rapa "definitely needs to know the story with [Wilcox's] family and upbringing," 2PCR-744, however, Rapa was not provided with any of the information Sheehan had developed in the mitigation investigation. Rapa reviewed only the indictment and arrest affidavit. Despite Sheehan having obtained Wilcox's DOC records, Rapa gave no indication that she reviewed the records. Indeed, her findings reflect no consideration of the substantial impact that childhood incarceration and six years of solitary confinement had on Wilcox's adolescent brain development.

Rapa's background investigation consisted of reviewing the indictment and arrest affidavit, as well as conducting a clinical interview. 2PCR-3381. There is no indication she made any effort to interview witnesses or requested collateral information. Counsel

failed to provide Rapa with relevant records and background information so that she could conduct an informed assessment.

Rapa administered the Kauffman Brief Intelligence Test 2nd Edition ("KBIT2"), a quick intelligence screening measure, on which Wilcox obtained a score of 87. 2PCR-3389. According to Rapa, this is "below average range in his verbal performance," indicating he "has difficulty with the understanding of basic words and word knowledge as well as a deficit in the ability to display a range of general knowledge." 2PCR-3388. Wilcox "displayed a deficit in deductive reasoning" and "may experience difficulties in following steps in problem solving. 2PCR-3388. Despite finding Wilcox exhibited cognitive deficits, Rapa did not refer him for neuropsychological testing. [10] 2PCR-3396.

---

[10] As Dr. Ouaou explained at the evidentiary hearing, the KBIT2 is not as reliable as a WAIS for determining intelligence because it does not test the number of domains as the Wechsler tests. For this reason, Florida does not recognize the KBIT2 as an acceptable testing instrument for purposes of determining eligibility for the death penalty under the Eighth Amendment. 2PCR-1579); *see also* Fla. Admin. Code Ann. R. 65G-4.011 (2004). Ouaou further explained that, if the K-BIT is used at all, it would be to "refer for a more comprehensive intelligence examination." 2PCR-1579.

Rapa also administered the Hare Psychopathy Checklist Revised. That test revealed that "Darius [sic] shows a pattern of unhealthy and inconsistent interpersonal relationships, but not significant psychopathy." 2PCR-3392. Despite finding that "results do not endorse the idea that [Wilcox] has significant psychopathological qualities or traits," 2PCR-3392, Rapa diagnosed Wilcox with Antisocial Personality Disorder.[11]

---

[11] Dr. Vinson testified that Dr. Rapa's erroneous ASPD diagnosis is the result of "premature disclosure," or the rendering of a diagnosis first and looking for facts to support the finding after instead of ruling out other reasons for the behaviors and symptoms. 2PCR-1160-61. Vinson explained that premature disclosure occurs particularly when treating black populations, noting higher diagnoses rates of conduct and antisocial personality disorders and lower diagnoses rates of bipolar and depression. 2PCR-1162. Moreover, the symptoms of ASPD are "very nonspecific" and the risk factors for posttraumatic syndrome disorder and depression are nearly identical. If the mental health professional begins the assessment "through an antisocial lens" they "may default to interpreting a presentation in alignment with that diagnosis rather than [depression or PTSD]." 2PCR-1160-61.

Rapa "chalked up" Wilcox's symptoms of depression, such as irritability and anger, to ASPD despite the fact that Rapa's own ASPD testing results weren't consistent with the diagnosis. 2PCR-1162-63. Because of this, Vinson found that Rapa's "reliance on projective testing for this particular forensic question was strange." 2PCR-1160.

Vinson concluded that, Wilcox's "life really was shaped by trauma, not just in the home, not just in the community, but on a

Rapa's nearly exclusive reliance on inaccurate and uninformed personality testing, and her failure to adequately investigate Wilcox's intellectual functioning and social history, demonstrate that she was not qualified to conduct a mitigation investigation in a capital case. Indeed, her work fell far short of the required "competent and reliable mental health evaluation" in death penalty case. *See* Guideline §4.1, commentary. Counsel's reliance on Rapa constituted deficient performance which cannot be attributed to any reasonable strategy.

Walsh spoke to Rapa only three or four times. 2PCR-1070, 743. Walsh did not intend to present Rapa at the penalty phase, in-part because she opined Wilcox has antisocial personality disorder and Walsh was worried about "future dangerousness." 2PCR-1071, 1113. Instead, Walsh advised Wilcox to waive the presentation of a

---

broader level as well." 2PCR-1163-64. Vinson cautioned looking at the diagnosis without considering the other explanations for Wilcox's behaviors, all which are clearly documented and corroborated, and a dearth of support systems, interventions, and assistance. 2PCR-1163-64.

mental health expert.[12], [13] Nevertheless, he disclosed Rapa's confidential, and prejudicial, report to the State.

The State capitalized on this by introducing highly prejudicial evidence to the judge and jury at the penalty phase. Indeed, the State alluded to Rapa's report to discredit Lawanda's testimony that Mr. Wilcox had a history of psychological problems:

> ASA ROSSMAN: You said you wish you could have gotten some of, you were talking about the psych meds you take, you wish you could have gotten some for Darious to help him with his problems?
>
> MS. WILCOX: Yes.
>
> Q: Are you aware he had a full psychological evaluation and shows zero mental illness? Are you aware of that?

---

[12] While this Court has repeatedly held that trial counsel's will not be found deficient when he declines to present mental health mitigation at trial that could be damaging, *see Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002) and *Sliney v. State*, 944 So. 2d 270 (Fla. 2006), trial counsel's actions allowed the information to come in anyway, and without the benefit of eliciting the inconsistencies and outright inaccuracies in Rapa's findings.

[13] The lower court's finding that "trial counsel Walsh presented experts Dr. Fichera and Dr. Rapa as part of the mitigation case to the jury and trial Judge" is not supported by competent, substantial evidence. To the contrary, only the Judge heard Dr. Fichera's testimony, and Walsh never even considered calling Dr. Rapa.

* * *

Q: And are you aware a psychologist has evaluated him and finds that as far as mental illness goes, whether the drugs might help, there is none. Are you aware of that?

After the jury returned its 7–5 recommendation, Walsh agreed to schedule the *Spencer* hearing for September 11th. T21-1279. Because Walsh "wanted to have some psychological testimony put on" at the *Spencer* hearing, 2PCR-750, 1071, only then did he seek out a qualified expert for the purpose of building a mitigation case.[14]

Walsh retained psychologist Christopher Fichera to perform a "mitigating factor examination." However, because Walsh had another trial at the same time and he and Sheehan were also preparing for Patrick Young's trial, Walsh was unable to provide

---

[14] Walsh testified that CCCRC Director Phil Massa "was not very receptive to the idea," of hiring Fichera for the Spencer hearing, 2PCR-1072, 750, and questioned why he was not presented to the jury. Massa remarked that hiring Fichera after the jury verdict "is like closing the barn door after the horse ran out." 2PCR-754.Walsh had difficulty working with Massa. Funding for experts and "important mitigation" was "a recurring problem." 2PCR-1053-54. Massa "was not retained as the director" because he routinely returned CCCRC funds that were intended to ensure due process in providing indigent defense. 2PCR-1114.

Fichera with collateral information. 2PCR-762; T-1341. Walsh didn't even provide Lawanda's penalty phase testimony. Because counsel failed to adequately prepare and provide Fichera with available records or allow him to conduct additional interviews, the evidence presented to the trial court at the *Spencer* hearing was incomplete and inaccurate.

The State capitalized on Fichera's unpreparedness on cross-examination, insinuating that aunt Linda had exaggerated in her interview, which Fichera was unable to contest. T22-1343.

Worse still, because trial counsel had disclosed Rapa's confidential Rapa's report, the State was able to elicit Dr. Rapa's highly prejudicial findings through Fichera at the *Spencer* hearing. Fichera had not administered any testing of his own nor reviewed Rapa's data and was unable to meaningfully rebut any inaccuracies or inconsistencies. Here again, counsel made no effort to contest Rapa's findings or expose the deficiencies, inconsistencies, and inaccuracies in her report. The State relied on Rapa's "possible anti-social personality" diagnosis in arguing for death. R5-784.

Fichera's testimony was disjointed, unclear, and fundamentally lacked recognition or understanding of "trauma

literature, traumatology, victimization." 2PCR-1413. As Dr. Johnson explained, Wilcox's trauma was not isolated, nor is it appropriate to say that because he experienced one trauma, we understand he had, as the state characterized it, a "crappy" life. Yet, Fichera failed to discuss the impact of cumulative trauma. Everyone experiences stress or trauma, but it's the degree to which we are exposed and the protective factors we have to combat that adversity that matters. 2PCR-1436.

Fichera's oversights and omissions are the result of trial counsel's failure to timely investigate and provide him with the necessary information, records, and access to witnesses.

Neither trial counsel nor the experts explored Wilcox's cognitive deficits or the impact of Wilcox's childhood incarceration and his extended periods in solitary confinement. 2PCR-707. Counsel had Wilcox's DOC records and reports from the family that Wilcox was different after prison—he had become withdrawn and became a loner but did not investigate and present the information.

The postconviction court did not engage with the unrebutted evidence about Wilcox's solitary confinement, making no mention of the value it would have had on the overall mitigation.

iii. Prejudice

In its prejudice analysis, the postconviction court determined Wilcox presented "no evidence that undermines the death sentence," 2PCR-1917, because, as the court repeats throughout is order, the mitigation "was not required to present a sufficient mitigation case to the jury or the trial judge." 2PCR-1514-19.

The court has misapprehended the law—whether counsel submitted "sufficient evidence" is not the relevant standard. Prejudice is established if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. Wilcox is required to show that "there is a reasonable probability he would have received a different sentence." *Porter v. McCollum*, 558 U.S. 30, 41 (2009).

The analysis requires consideration of "the totality of the available mitigation evidence" presented both at trial and in postconviction and "reweig[hs] it against the evidence in aggravation." *Porter*, 558 U.S. at 41 (quoting *Williams*, 529 U.S. at 397–98). The postconviction court found "overwhelming evidence of

aggravation and minimal evidence of mitigation." 2PCR-1916. This finding, however, is irreconcilable with the record.

Mitigation Presentation in Postconviction

Postconviction testimony established that Darious was born to Lawanda, a fifteen-year-old drug addict with no supervision, guidance or support, and Michael Frazier, himself a drug addict who was constantly in and out of jail and wanted nothing to do with Darious. Because Lawanda could not provide for Darious, he "went back and forth between his mother and grandmother" over the years, but was raised primarily by Lawanda's mother. 2PCR-728. "[W]here he was at the end of the night would determine where he stayed." 2PCR-728.

Grandma Nancy was born and raised in Georgia. Her mother, Eula Gardner, a black unwed mother of two with no education, worked as housekeeper for a white family in Georgia. Aunt Linda refers to this family as "the slave people. . ." 2PCR-1230. After she passed, Nancy became the housekeeper until her uncle Frank discovered she was being sexually abused by the owner of the home. 2PCR-1231. Frank fled with Nancy to Miami where Nancy again worked as a housekeeper.

Nancy's children, Patricia, Gloria, Mary, Larry, Cynthia, Sandra, Linda, and Lawanda, were fathered by four different men, 2PCR-1228-29, none of which stuck around to support or parent the children.

Nancy and her children lived in a one bedroom, one-bathroom apartment in Cecil Bobby Quarters, a decrepit housing project which has since been demolished. Nancy slept on a pullout sofa while the children piled onto a bunk bed in the bedroom. When home, Nancy either slept or tended to the men in her life, all of whom struggled with drug addiction and had other families.

"If you made it out of Circle Plaza, you were blessed."

While the jury heard some testimony about Darious's deprived upbringing, they knew nothing of the community in which he and his family grew up. Nancy's children, including Lawanda, grew up in West Perrine, a community in Miami-Dade County notorious for its poverty, drugs, prostitution, and violence. Perrine has always been extremely poor and has a long history as "one of the hot spots of crime and violence, particularly gun violence, poor schools, and a host of other environmental and social issues." 2PCR-1397-98. According to the Miami Herald, in the 1960's and 70's, Black men

between the ages of 15 and 25 were more likely to be murdered on the streets of Perrine than die as a soldier in Vietnam. 2PCR-830.

Perrine began as a railroad camp. Over time, it evolved into racially segregated settlements. 2PCR-1397. The Ku Klux Klan would terrorize the primarily black residents by marching down the town's main road. 2PCR-829.

By the time Darious was born, the source of fear and terror in the area had evolved. "[O]pen drug dealing, prostitution, along with rampant crime, cause[d] many in the neighborhood to hide behind locked doors." 2PCR-829.

In the 1980s and 90s, when Darious was growing up, South Florida suffered from staggering crime. As Dr. Johnson explained, Miami and Fort Lauderdale had the second and third worst crime rates in the nation, as Miami "erupted in its most violent racial spasm in the history of the city." 2PCR-829. Perrine was an especially dangerous pocket in one of the most dangerous cities in America. 2PCR-1397. Indeed, Perrine remains one of the most dangerous areas in South Florida today. *See* 2PCR-831.

Perrine was marred by abandoned buildings and dump sites. Despite community needs, Perrine was largely ignored by greater

Miami. The dearth of resources meant that residents had to travel elsewhere just to have their basic needs met. 2PCR-830. In 1992, Hurricane Andrew further devastated the area, bringing even more economic hardships. 2PCR-830. The median income in Perrine was less than 85% of the county-wide income. 2PCR-830-31.

When Darious was a child, Nancy could no longer afford to live in Cecil Bobby Quarters and was forced to move the family to another public housing project called Circle Plaza. This move presented challenges for Darious. As Dr. Johnson explained, Circle Plaza was "different in a lot of negative ways" and "area of [Perrine] that was more dangerous [and] less stable" than Cecil Bobby Quarters. 2PCR-1148, 1245.

In Circle Plaza, Darious met Cory Waters. Cory testified at the evidentiary hearing that he lived just three doors down from Nancy. 2PCR-1309. Cory and Darious saw each other at least two or three times each week. 2PCR-1310. Cory and other kids in the neighborhood would bring Darious along when they played football and basketball. 2PCR-1309. Cory recalled Darious being a quiet kid and more to himself, and that Darious really loved and cared for his

younger brother. 2PCR-1310-11. But their childhood was less than idyllic.

As Cory explained, Circle Plaza was a "very dangerous neighborhood." 2PCR-1311. According to Dr. Vinson, Darious "described seeing things like graffiti, open substance use, neighborhood violence, being exposed to people or knowing people who had been murdered, and seeing things like drug deals being made quite openly." 2PCR-1156.

Darrell's first words to describe Circle Plaza are "bad, terrible," "[b]ecause like all type of stuff used to happen there, drug use, drug selling, killings, police chases." 2PCR-1278. Linda testified that there was no escape from the constant barrage of "drugs, guns, fights, every day." 2PCR-1247. Gun shots were fired "constantly," "probably every other night." 2PCR-1247, 1278. Circle Plaza was so dangerous, Linda was concerned about her mother living there. Indeed, Nancy's apartment was the target of a shooting. 2PCR-1247-48.

Cory described life in Cecil Plaza as "[a] lot of dope selling, killing, shooting. Just dead bodies everywhere." 2PCR-1311. He heard gunshots "almost every other day," from the time he was just

eight or nine years old, and feared for his own safety. 2PCR-1312, 1315. At age eleven, Cory was almost caught in the crossfire of a gunfight when returning from the local store. 2PCR-1315. "[A]ll I did was just ran straight, straight back to the door." 2PCR-1315.

Shootings were commonplace. Cory saw "about five" dead bodies in Circle Plaza. 2PCR-1312. After the gunshots stopped, "we'll come outside and see what's going on, and then you hear people saying, 'oh, somebody around there dead,' and, you know, we'll go around there . . . just watching the body. . ." 2PCR-1312. Police were of little help because "the police used to be scared to come to Circle Plaza." 2PCR-1312.

Cory recalls the names of three people he and Darious personally knew who were killed in Circle Plaza. The first was a kid who went by the nickname "Yung Yung." 2PCR-1313. Another was Darious's and Darrell's 16-year-old friend, Anthony "Termite" Ferguson. Termite was murdered next door to Cory's house when Cory was ten or eleven. 2PCR-1281, 1314. When Cory, Darious, and Darrell were ages nine, ten and eleven, they witnessed the shooting of Termite's father, Antonio Demmoris "Spiderman"

Hickson at a block party. 2PCR-1279, 1314.; *see also* 2PCR-833. They saw Hickson's body lying on the sidewalk. 2PCR-1314.

When Darrell was thirteen and Darious was only twelve, they witnessed the murder of a man called "Jit." 2PCR-1280. Jit owned a food stand across the street from aunt Gloria's apartment. 2PCR-1280. After Jit was shot, Darrell and Darious watched Jit's body lying on the ground. 2PCR-1280.

Darrell also testified that "family fights," where two families would fight against each other, happened "all the time." 2PCR-1281. Darious never started a family fight, but Darrell recalled one that Darious was brought into. 2PCR-1281. People grabbed broomsticks and threw rocks and bottles and Darious was hit in the head with a big rock. 2PCR-1282. There was "a lot of blood," but no one brought Darious to a doctor. 2PCR-1282-83. Cory also testified that he saw the injury on Darious's head but, as was common in the neighborhood, Cory didn't ask any questions. 2PCR-1325.

By the time Darious was age fifteen, the majority of his peers from Circle Plaza were either in jail or prison. Four of his friends were arrested on murder charges. Darrell testified that he was *shot*

nine times. 2PCR-1286. Linda was so worried Darrell living in Circle Plaza, "she slept better when I was in jail." 2PCR-1287.

Cory poignantly testified, "If you made it out of Circle Plaza, you were blessed." 2PCR-1311.

> ***"[H]e would stick the needle in to pull out the blood and then stick it back in to release it, but you had to hold this part really tight."***

The poverty, violence, and crime in Perrine– especially the influx of drugs -- greatly impacted the Wilcox family. Linda explained, once drugs came to Perrine, "people wasn't the same. There was drugs coming in; people was getting killed, stabbings, shootings." 2PCR-1232. All of the siblings were completely immersed in lives of addiction. They would use together, 2PCR-1233, 1237, and encourage each other's negative behaviors. Indeed, it was Lawanda's sister, Patricia, who first introduced Lawanda to crack cocaine. 2PCR-693.[15]

Larry, Lawanda's only brother, began using in his early teens and sold drugs to his sisters. Linda was in elementary school the

---

[15] Mary, Larry, and Lawanda would all die from overdose or drug-related issues. 2PCR-1235.

first time she remembers Larry using drugs, intravenously, in front of them. 2PCR-1234. Six years older than Linda, Larry would make her hold his arm "while he would stick the needle in to pull out the blood and then stick it back in to release it, but you had to hold this part really tight." 2PCR-1234. Larry "didn't care who he did it in front of." 2PCR-1239.

Lawanda had been abusing heroin and cocaine for nearly five years when she got pregnant with Darious at age fourteen. 2PCR-1235. Nancy forced Lawanda to move out and Darious's father rejected them both. Darious never experienced the love of his father. 2PCR-1394. He eventually died from complications due to AIDS. 2PCR-693

Linda recalled Lawanda cuddling Darious as a newborn, "like a normal mother would," but when Darious was only four or five months old, Lawanda "would just leave him," to go "back in the streets again." 2PCR-1236.

When Darious was a baby, Lawanda brought him with her when she bought, prepared, and abused drugs on the street. Linda explained that when Lawanda got high, she would become "crazy," "she would think somebody was trying to kill her. She would be like

peeping out the window and then she'll run and like hide in the closet, or hide anywhere, 'cause she think somebody is outside trying to kill her." 2PCR-1242.

Nancy eventually allowed Lawanda to come back home. By this time, Nancy had a live-in boyfriend, Louis Davis. 2PCR-1230. "Mr. Louis," also known affectionately as "granddaddy," and the family moved into a two-bedroom apartment. The quarters were beyond tight. 2PCR-1269, 1230. Darious shared limited space with his aunts, uncles, and other cousins including Linda and Darrel, who had nowhere else to stay. 2PCR-1237, 1269.

Dr. Vinson noted, "a lot of children needed care from Miss Nancy at various times." 2PCR-1149. Depending on the day, a dozen or more people could be staying in the two-bedroom apartment. 2PCR-1247, 1269, 1273. Darious never had his own room or bed. Instead, he was forced to sleep on the floor while his mother slept on the couch. 2PCR-693.

None of Lawanda's the siblings, except for Linda, were able to care for their children. 2PCR-1237. It all fell on Nancy. After Mary died of an overdose when Darious was a year old, Nancy raised Mary's daughter, Nicki Finch. 2PCR-1269. Nancy also raised

Cynthia's three children while Cynthia ran the streets battling her own drug addictions. At times, Nancy took in Sandra's children too. 2PCR-1247, 1275.

According to Darrell, Darious was treated differently than the other cousins. Darious would be left out of family events and holidays. At Easter one year, all of the cousins dressed up, took pictures, and received Easter baskets, but Darious wasn't included. 2PCR-1277. Despite the rejection, Darious still loved his cousins, and was particularly close with Nicki and Darrell. 2PCR-1247, 1268.

Grandma Nancy was the only stable influence in Darious's life. He considered her a mother figure.[16] Nancy tried and the family have some happy memories. 2PCR-1267. But by the time she was in her 60s, Nancy was exhausted. Despite the love Nancy showed, she could not shield Darious from the chaos and dysfunction of his aunts, uncle, or even his own mother.

---

[16] Linda described Nancy as a great mom. 2PCR-1229. Looking back, however, she understands their lives were much more traumatic than she realized: "[I] always felt like my life was great, but like when I talk about it, it don't seem the same." 2PCR-1247.

None of Darious's aunts and uncles were concerned with childcare, food, working, paying bills, or providing a clean and stable environment for their children. Darrell testified that the adults did not worry or care about what they exposed the children to—the drug abuse and violence were completely normalized. 2PCR-1274. When Darious was five or six years old, Darious witnessed his aunt Gloria stab her boyfriend during a drug and alcohol fueled rage. 2PCR-1239.

Linda remembers the family using crack cocaine together while the children played during birthday parties. 2PCR-1238. Larry was essentially homeless and would stay at Nancy's for days on end, smoking crack cocaine and injecting heroin in front of Darious and the other children. 2PCR-1273. Larry went of his way to make a show of it when he got high. To get the children's attention, he would "sing and dance before he'd do it, and we'd be looking because it was entertaining to us." 2PCR-1273.[17]

[17] It was not always entertaining. At age fifteen, Darrell saved uncle Larry's life by performing CPR after Larry overdosed. 2PCR. 1274.

Not surprisingly, the family's history of drug abuse and addiction had legal consequences. By the time Darious was eleven, Lawanda had been arrested more than six times, uncle Larry at least five times, aunt Gloria at least three times, and aunt Sandra at least once. 2PCR-1275-77; 4029-30. The three sisters were even arrested together at least once. *List of Burglary Arrests*, MIAMI HERALD, July 31, 1984, 1984 WLNR 2667739.

Lawanda was arrested a total of *fifty-six* times in Miami-Dade County,[18] often in front of Darious. The first time he saw his mother get arrested, Darious was four years old. 2PCR-1274.

The jury heard that Lawanda resorted to sex-work as a way to support her drug addiction, and to merely survive. But this was not prostitution, as the jury was led to believe. As Dr. Johnson explained at the evidentiary hearing, Lawanda was a victim of child sex trafficking.[19] 2PCR-1236. Lawanda's body was being exploited

---

[18] Lawanda's charges included dealing in stolen property, larceny, loitering and prowling, grand theft and second-degree battery, prostitution and attempted prostitution, strong arm robbery, obstruction of justice and providing false information. 2PCR-4024.

[19] U.S. Trafficking Victims Protection Act of 2000, https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/co

before she could legally consent, in exchange for sustenance and drugs. Nor did the jury know that when Darious became a teenager, and his peers became the next generation of neighborhood drug dealers, Darious had to live with the knowledge that his own mother was soliciting his peers for sex in exchange for drugs. 2PCR-1293.

The jury was told that Lawanda stole to support her habit and that she stole Darious's toys and belongings. But the jury never heard the extent of Lawanda's stealing, or the devastating impact it had on the family, especially Darious. Lawanda's stealing was such a problem, Nancy was forced to hide and slock away the family's food, lest it be sold for drugs. Darrell testified that Lawanda tried to lure Grandma Nancy out of the house so she could go inside and steal. 2PCR-1276. Linda explained,

> [Lawanda stole from] my mom and anybody that was there, if they didn't keep it close. She used to steal my mom's clothes. If my mom didn't keep her money like on her person, she would steal that, too.

---

mmercial_sexual_exploitation_of_children_and_sex_trafficking.pdf (U.S. Department of State 2011, 8).

2PCR-1243.

The jury knew that Lawanda sold Darious's videogame system for drug money. But they heard nothing of the significance of this event. After stealing the game system, Lawanda lied to Darious and told him someone stole it from the house. But, a few weeks later, he found his game system at a friend's house. To his horror, Darious's friend told him that Lawanda had sold it for drug money. 2PCR-1244, 799.

Others noticed that Lawanda's betrayal had a devastating effect on Darious. 2PCR-1239, 1244. Linda told Dr. Vinson, "I think that broke him, it was like he couldn't believe any more of her lies and had to accept the truth about who she was." 2PCR-799. As Dr. Vinson explained, this not only was "a significant loss for Darious . . . [A]fter that, he had a deeper understanding of his inability to trust his mother or believe things she told him."
2PCR-1147.

Moreover, the jury was not told how the loss of the game system set Darious on a path to drugs and crime. At the postconviction hearing, Linda put Darious's loss in context. She explained that the game system was not just a toy for Darious's

amusement—it offered him an escape from the world around him. "That's all he really had." 2PCR-1244. As Dr. Vinson explained, Darious didn't have access to childhood activities like little league, the video game " was one thing that he could do to pass his time that wasn't going to get him in trouble and that he experienced as a coping mechanism." 2PCR-1152.

The jury heard that Lawanda didn't provide any affection or love for Darious, but they were not presented with the true extent of the emotional neglect and abuse she inflicted on him. Darrell testified at the postconviction hearing that he could not remember *ever* seeing Lawanda hug or kiss her son, or ever say "I love you," and instead would "just fuss[] at him." 2PCR-1276. Indeed, Lawanda "would reprimand [Darious] for showing emotion." 2PCR-801.

Lawanda told the jury that she "didn't like beating" Darious, so, as punishment, she made Darious "go in the bathroom, close the door, and not come out." T20-1197. The testimony at the postconviction hearing presents a much darker reality:

> Lawanda was "abusive, she wasn't affectionate, she wasn't reliable, and she would not only do things physically to him, like beat him, but

> would also talk down to him and call him names"

2PCR-1143. Lawanda hit Darious with "whatever object there was." 2PCR-1383. This abuse was rooted not in discipline, but in Lawanda's addiction and withdrawal. 2PCR-1383.

Aunt Sandra told Ms. Sheehan that Lawanda "treated him terrible," and "[s]he beat him for nothing." 2PCR-707, 700. In a memo to Walsh, Sheehan wrote:

> [Darious] never had a child's life. He was just locked away in the bathroom. Darious used to cry and ask his mother to stop using drugs, but she just kept going back to them.
>
> It was painful for him.

2PCR-707.

The jury never heard that when Darious was eight years old, Nancy moved to Georgia and left him alone with Lawanda. Darious described this time as being akin to "hell." 2PCR-1143. He had no food, supervision, or anyone to care for him.

"[H]e would falter over words when asked to read out aloud and other students would laugh at him."

The jury knew that Darious did not go far in school, but they didn't know why. Chronic drug abuse disguised rampant cognitive, mental, and emotional disorders in the Wilcox family. All of Nancy's

children were labeled as “slow learners”; but Nancy, illiterate herself, was defensive about it and refused to get any support or assistance for the children. 2PCR-794. Lawanda dropped out of school before tenth grade.

Like his mother and her siblings, Darious, too, was also a “slow learner” who struggled at school. Dr. Vinson explained that Darious struggled with reading and spelling and was ridiculed for it: “he would falter over words when asked to read out aloud and other students would laugh at him.” 2PCR-800. Perhaps Linda described it best: Darious is “the opposite of smart.” 2PCR-1260.

After Darious failed the second grade, he was placed in special education classes. His mother’s neglect again took a costly toll. The school arranged a meeting with Lawanda to address Darious’s academic needs, but there was no meaningful follow through. As Dr. Vison explained, Darious never had “real advocates in the school system or on his behalf.” 2PCR-1151. Darious’s experience was common to that of Dr. Vinson’s other clients with similar life experiences: “[R]ather than becoming a place where you learn, [school] becomes a place where you're self-conscious, where you

don't feel like you're getting the help you need, and then you start acting out." 2PCR-1150-51.

Darious's experience worsened when he was sent to the JRE Lee Alternative School. JRE Lee was a "bad school" where the students were constantly fighting, and they picked on Darious because he was small for his age. 2PCR-707. After his arrest at age fourteen, Darious was removed from school altogether.

"[S]he already had custody of two cocaine babies and she was not taking anymore."

The jury knew nothing of the grief and loss Darious experienced. Lawanda testified at the penalty phase that Darious had a brother, Darius, who she left at the hospital after giving birth. But Lawanda had three more children: Nathaniel, Larry, and Darius. All three of Darious's younger siblings were born with cocaine in their systems. Lawanda outright abandoned Larry *and* Darius at the hospital. Both were taken into DCF care and never seen again. The jury never heard that Nancy told DCF that she would not take newborn Darius "because she already had custody of two cocaine babies and she was not taking anymore." 2PCR-3321. Nor did they hear that Lawanda just didn't want the children.

As Linda explained at the evidentiary hearing, Darious loved being a big brother and he wanted to protect his siblings. 2PCR-1241. Nathaniel was born with sickle-cell anemia and cognitive delays. 2PCR-693. According to Linda, Lawanda treated him like her "special child" because she hoped his father would stick around, but he also abandoned them. 2PCR-1241. Nathaniel also ended up in Nancy's care.

Linda recalled that Darious "loved his brother." 2PCR-1240. Darious told her, "one day he wanted to like get all his brothers together and just take care of them." 2PCR-1241. Sandra had told trial counsel how Darious "wanted to take care of his brother and wanted his mother to take care of him." 2PCR-700. Counsel knew that "Darious would beg for his mother to please just straighten out and take care of his brother." 2PCR-700.

When Darious was around ten years old, Mr. Louis died of liver failure. As Dr. Vinson testified, Mr. Louis was one of the few positive role models, and only father figure, in Darious's life. 2PCR-1148. Mr. Louis's death was yet another critical traumatic moment that shaped Darious's adolescence. 2PCR-1131. Not only did he lose his granddaddy, he had to watch his Grandma struggle

through the grief, emotionally and financially. In Mr. Louis, Nancy lost her life partner and her support system. She was left to raise the grandchildren and deal with her own children alone. 2PCR-1271. They jury didn't know anything about Mr. Louis or the grief and loss his death brought to Darious and his family.

"I cannot think of a case that had more glaring evidence of vulnerabilities . . . I mean, I can't think of one."

Darious eventually "started to hang out in the streets" with his friends. 2PCR-709. Darious was a sweet and loving child, but his friends were viewed as "bad influences." 2PCR-709. Darious began smoking marijuana at age twelve and drinking and selling marijuana at thirteen. 2PCR-794, 827, 1152.

Darious was first arrested at thirteen. Over the course of a year, he picked up several relatively minor charges. *See* 2PCR-3694. Because Nancy was never Darious's official legal guardian, police and probation tried contacting Lawanda, but she avoided them. Lawanda missed court dates and meetings. Darious was alone to navigate the court system.

Darious's involvement escalated dramatically over just fourteen months. On March 8, 1992, Darious, Cory, Steve Tolar,

Patricia Mercer, and Duane Smith were arrested on charges of second-degree murder, armed robbery, and grand theft. 2PCR-1315. Darious and Cory were just fourteen and thirteen. Cory took a plea and served eighteen months in a juvenile facility. 2PCR-1319. Fourteen-year-old Darious was direct filed to adult court and sentenced to ten years, all of which to be served in adult prisons.

When Darious went to prison, he was just fifteen and weighed only 100 pounds. Darious was immediately placed in isolation for 144 days. 2PCR-1009. Darious reported to Dr. Vinson that he was afraid. 2PCR-1154.

DOC records indicate that Darious served more than six years of his ten-year prison sentence in solitary or administrative confinement. Darious was subjected to daily strip searches and his access to meaningful social interaction was greatly restricted. In his formative teenage years, Darious was deprived of positive environmental stimulation, recreation, programs, activities, and even material possessions. At nineteen, Darious was held in confinement for 414 *consecutive* days. 2PCR-1407, 3927-29.

Dr. Grassian testified to the conditions and effects of solitary confinement, better termed as "confinement in conditions of

isolation and restricted environmental, social, and occupational stimulation." 2PCR-1504. There is virtually no opportunity for any meaningful social engagement and very little perceptual stimulation. 2PCR-1504-05.

It is well understood that "[t]he use of isolation may cause a more severe impact on adolescent and young adult offenders compared to their adult counterparts due to these developmental differences." 2PCR-4045. Thus, "juveniles [in particular] do terribly in solitary," often leading to their time being extended. 2PCR-1514-15. Grassian explained:

> [T]he process of brain development continues into your mid 20s, and what that most importantly consists of is an increasing ability to modulate intense emotion, intense affect, things associated with the amygdala and the nucleus accumbens, these more deeper parts of the brain, the ability to modulate the effect of those and to be able to have more control by the prefrontal cortex that inhibits response. So, you have these young kids who have virtually no control over their emotions, their emotions are out of control, and so they get themselves into lots of trouble. When you put them in a situation that's as stressful as prison, they do very poorly, then they get disciplined and end up in solitary for that. So, you actually will see in solitary confinement settings, if you have a big prison, that there's a disproportionate representation in solitary of

> people who are juvenile and people with significant mental illness.

2PCR-1515-16.

Prisons began phasing out the use of solitary confinement for juveniles in the 1980s. 2PCR-1514. But, like what happened to Darious, juveniles are often placed in confinement when incarcerated at adult facilities for protective reasons. 2PCR-1515. Regardless of the reason the person is placed in solitary confinement, the impacts on the person are the same. 2PCR-1524.

Based on his conversations with Darious, Dr. Grassian believes that his experience, including the deprivation of stimulation, was "certainly entirely consistent with [Grassian's] understanding of what solitary confinement would have been like for [Darious] in Florida." 2PCR-1522. He explained that after reviewing Darious's history, and the fact that he was so young and was in solitary for so long, Grassian "cannot think of a case that had more glaring evidence of vulnerabilities. I literally...I mean, I can't think of one." 2PCR-1520.

"[O]h, grandma dead."

Darious was able to earn his GED while in the heavily structured prison environment. However, when Darious was released from prison in his mid-20's, he was "without a marketable skill set, without education, without a safe place to land." 2PCR-1157.

While incarcerated, Darious's family continued to struggle with substance abuse issues, poverty, and legal troubles. 2PCR-1156. He came home to the same chaos and instability—Lawanda, Darious, Larry, and aunts continued to pick up new cases and bounced in and out of jail, and Lawanda was again incarcerated shortly after his release. 2PCR-1156-57, 1159.

Grandma Nancy was the only consistent contact Darious had while he was in prison. 2PCR-1289. Darious planned to live with her after his release. As soon as he got out, Darious went directly to Grandma's home and eagerly knocked on her door. 2PCR-1289. Rather than Nancy, Darious's cousin Shantel opened the door. She looked at him and simply said, "oh, grandma dead." 2PCR-1290. Unbeknownst to Darious, Grandma Nancy had died while he was in prison, and Darrell had told the family to keep the news from him. 2PCR-1289. When Darrell came around the corner, he saw Darious

on the porch with his head down. 2PCR-1290. Darrell regrets the decision to keep her death from Darious. 2PCR-1290.

Dr. Johnson testified that Grandma's death was one of the most hurtful things in Darious's life. "The only real parent or mother figure in his life, his source of joy, had passed away while he was incarcerated and he didn't know about it." 2PCR-1409. The little family support he had was gone, and he never had an opportunity to mourn her loss.

Dr. Vinson testified about the impact of Darious 's grief, just as he was learning to "reenter society as a young man." Darious "had that normal developmental challenge on top of not having personal, professional, or educational resources available to him." 2PCR-1157.

Nevertheless, Darious remained motivated to live a better life and to help his mother get better. He wanted nothing more than for his mother to love him, and for her to want to be his mother. 2PCR-707. But Darious could not save Lawanda from herself. She was unable to keep clean and sober.

"[D]umb stuff that made me laugh..."

Darious tried hard to provide for his family, including his two children. 2PCR-1159. Linda testified that Darious was a happy and active father. "[H]e loved his daughter. He was happy when he was with her," and "he used to get her and everything." 2PCR-1251-52. Darrell echoed Linda's sentiment; Darious "loved his daughter" and helped care for her. 2PCR-1293.

Rather than return to the streets, Darious got a job at the Busy Bee Carwash. But, as Darrell explained, his shifts would vary, "so, it wasn't something that he could really make a solid living off of doing." 2PCR-1159.

Darrell did not support Darious in his attempts to keep straight. And because Darious looked up to him, Darrell's opinion mattered. 2PCR-1287. Linda testified that even though Darrell loved Darious, the relationship "wasn't beneficial to Darious." 2PCR-1246, 1255. From the time they were kids, Darrell actively steered Darious away from positive life choices and took advantage him. 2PCR-1287. Darrell made fun of Darious and teased him. Darrell told Darious to do "dumb stuff that made [him] laugh." Darrell even made Darious do dangerous things like put his hand in an ant pile. 2PCR-1288.

This dynamic continued into their adult years. Linda testified that she was concerned when Darious got out because "Darrell wasn't doing the right things out in the streets." 2PCR-1255. Rather than encourage and support Darious after his release, Darrell only denigrated and sabotaged Darious's attempts at anything positive. Darrell sold drugs—sometimes even to his own aunt Lawanda. And every day, when he saw Darious going off to work, Darrell taunted him and told him that "he ain't going to make no money." 2PCR-1291. Darious eventually returned to the only source of income he knew—selling drugs. 2PCR-1159.

Darious deeply regrets taking advantage of the power he had over Darious. 2PCR-1288. Darious was like a little brother to Darious and he took advantage of him. 2PCR-1289-90. He now feels terrible that for the years he spoke down to Darious, and in some ways feels responsible for how Darious's life turned out. "Cause he looked up to me, I think I could have did a better job at having him do right, you know, instead of having him being like a personal toy for me." 2PCR-1288.

"[E]xtreme risk of unhealthy life outcomes"

Trial counsel's decision to rely on Dr. Rapa rather than seek out a qualified expert deprived the jury of important information regarding Darious's mental health, cognitive impairments, and life history of trauma. While counsel did present some evidence of trauma history to the sentencing judge, *the jury* knew nothing of Darious's mental health challenges.

The understanding of *trauma* is critical to a complete, particularized mitigation story. At the postconviction hearing, Drs. Vinson and Johnson testified to the concept, history, and impact of trauma. Trauma is defined as "a deeply distressing or disturbing experience or condition" that "have the potential to negatively impact someone physically or psychologically." 2PCR-1371, 1135. Trauma comes in various forms: interpersonal trauma, natural disasters, community violence, and structural trauma, 2PCR-1135-36, and can have "wide and lasting impacts" on an individual's physical and mental health, achievement, cognition, and relationships. 2PCR-1372.

Childhood trauma is particularly significant, because its impacts can last "well into adulthood, well beyond the pre-adolescent stages of development." 2PCR-1371-72. Research

conducted in the 1990's established that specific childhood traumas, known as Adverse Childhood Experiences, have a causal relationship to "disease, disability, and mortality." 2PCR-1373.

To assess a person's exposure to ACEs, and the degree of severity of childhood trauma, researchers have developed the ACE Questionnaire. This instrument consists of a simple additive index covering ten of the most prevalent types of traumas. 2PCR-1373-74. 2PCR-1372, 1423. The literature has expanded, and the instrument has evolved, but the current ACEs Questionnaire consists of the original ten areas: emotional, physical, and sexual abuse; emotional and physical neglect; domestic violence, with an emphasis on the mother; household member substance misuse and use disorder; parental separation; household member mental illness; and parental/household member incarceration. 2PCR-1423, 1374.

In addition to exposure to trauma and risk factors, the analysis must also consider "protective factors," or circumstances that "reduce, mediates or attenuates the negative effect" of traumas. These can include support in school, positive friendships, healthy parents, surrogate parents through teachers or other positive adults in their lives." 2PCR-1141, 1377-78. "[F]olks who have protective

elements in their lives may buffer, or reduce, or eliminate completely, the negative consequences of a risk factor." 2PCR-1377.

Scientific research indicates that trauma is linked "to harmful changes in the brain, particularly the hyperarousal continuum, the amygdala, the prefrontal cortex." 2PCR-1448. In particular, cumulative trauma and social disadvantage "is linked to diminishe[d] cognition, decision-making, a whole host of other social-emotional outcomes." 2PCR-1447. At the extreme end of cumulative trauma and social disadvantage, compounding risk factors in the presence of a deficit of protective factors results in person in need of resources, "at extreme risk of unhealthy life outcomes." 2PCR-1447.

Dr. Johnson opined that Darious suffers from at least eight of the ten ACE risk factors and a "fundamental deficit of protective factors." Darious ACEs risk factors included emotional and physical abuse, emotional and physical neglect, parental separation, domestic violence, household substance abuse, and incarceration of a household member. 2PCR-1409-10, 827. Johnson also considered a ninth factor, that Darious had a parent with mental health issues. He explained that records establish that Lawanda was medicated

throughout her life for chronic depression. 2PCR-1410. In addition, Darious suffered from exposure to community violence, grief in the loss of significant adult figures and the deaths of friends, neglect at school, and substantial incarceration and placement in an adult facility as a juvenile. 2PCR-1411.

Less than one percent of that sample population has a score of eight or more risk factors. Less than four percent have a score of eight. 2PCR-1411. Of the high-risk adolescents in Florida, including justice-involved youth, Darious's exposure to trauma is at an "extreme level." 2PCR-1411.

Dr. Vinson explained that there is a "dose-response relationship" between trauma and life outcomes. 2PCR 1140. And for Darious, the trauma was constant. There were "windows with his grandmother, where things were more stable, but even with that, it was against the backdrop of his mother's ongoing substance use, his father's ongoing absence, and then after Mr. Louis' death, it was in the backdrop of a community that was in crisis." 2PCR-1156.

Drs. Vinson and Johnson also discussed the impact of Darious's experience being incarcerated as a child which the

sentencing judge and jury never heard. As Vinson noted, "as a child psychiatrist who was evaluating him and thinking about what this meant for him and his life, [his confinement] is certainly something that should be considered and thought about." 2PCR-1155.

In prison, Darious had little ability to communicate with family or friends, and he did not receive regular visits. 2PCR-1153. As a child prisoner in an adult prison, Darious became a man while in a cage, far away from any nurturing, love, or support. Darious was unable to explore his sense of self, who he was, what he wanted to do in life, or even what he was good at. 2PCR-1155.

Dr. Johnson explained even those with "tremendous amounts of trauma" identify being a child in the adult system as "one of the things that really changed them, changed their outlook, diminished their hopelessness [sic], and actually set them on a darker path." 2PCR-1405. Children "tend to have externalizing behavior that's a part of processing being in this type of environment as a child," 2PCR-1406, which can translate to "aggression; it could be resisting; it could be crying all night. It could be any sorts of behaviors that could be deemed misconduct or aggression." 2PCR-1406.

Like Dr. Fichera, Dr. Johnson found that Darious had an overabundance of risk factors, but "fundamental deficit of protective factors." 2PCR-1409. However, Johnson emphasized what Fichera had missed: the *cumulative* trauma "*is* the story." 2PCR-1414. Dr. Johnson, an expert and leading researcher of trauma, testified that Darious has one of the worst trauma histories he has seen.

"[P]oster adult, for the development of difficulties with executive functions and memory"

At the postconviction hearing, psychologist Robert Ouaou, Ph.D. testified that he performed a battery of neuropsychological testing designed to "capture intelligence and domains of cognitive function." 2PCR-1562. Neuropsychological testing "lay[s] out a map of function, for example intelligence, or the abilities related to memory, attention and concentration." 2PCR-1546. Neuropsychological testing can assist in determining why a person exhibits specific behaviors. 2PCR-1546, 1549-50.[20]

---

[20] When conducting neuropsychological testing, Dr. Ouaou includes numerous effort measures, both stand-alone and imbedded, to ensure the participant is paying attention, giving their full effort, and remaining mentally healthy enough to engage. 2PCR-1564-65.

Dr. Ouaou explained, the frontal lobe is the executive of the brain. "[A] fully-developed, healthy frontal lobe functions in a way to allow us to have forethought, to control impulses, to appreciate emotions of others and ourselves, to have insight into our behavior and our conditions." 2PCR-1552. However, many factors can impair healthy development of the brain, including the frontal lobe. Risks include injury, trauma, abuse, neglect, and genetic causes. 2PCR-1552-53.

To assess Darious's intellectual functioning, Ouaou administered the WAIS-IV, a "comprehensive collection of assessments of different cognitive functions [. . .] in different domains of reasoning and problem-solving and verbal abilities[,] spatial abilities and attention and concentration." 2PCR-1567. The test measures different skills including verbal intelligence and nonverbal intelligence, processing speed, visual-spatial information, and working memory. 2PCR-1569.

Dr. Ouaou's testing confirmed that Darious exhibits significant deficits in executive functioning. 2PCR-1583. On the WAIS-IV, Darious obtained a full-scale IQ score of 78, placing him in the borderline range of intellectually functioning. Ouaou explained,

Darious's "overall thinking and reasoning abilities exceed those of only 7% of adults his age." 2PCR-1575.

Dr. Ouaou also conducted other measures including the Wechsler Memory Scale–Fourth Edition, the Rey Complex figure test, California Verbal Learning Test–Second Edition, the Wisconsin Card Sorting Test and the Delis Kaplan. Ouaou opined that Darious "exhibited significant deficits on [these] neurocognitive measures of learning, memory and executive functions," indicating learning and memory impairments. 2PCR-4094.

These results are corroborated by information Ouaou obtained from records and collateral interviews of family members. 2PCR-1583. Lawanda described herself to as "slow" and recognized Darious also struggled with "learning how to do [] basic abilities" like bathing, dressing, and understanding general concepts. 2PCR-1559.

Dr. Ouaou testified that Darious has a history of head injury. As a child, Darious was hit in the front of his head, which left him bleeding and feeling "woozy." 2PCR-1560-61. Ouaou testified that Darious reported to Dr. Vinson that he suffered injuries to his head

from his mother's beatings and from a peer who hit him in the head with a rock.[21] 2PCR-1144, 1169.

Ouaou concluded that Darious's trauma, abuse and neglect, are "significant risk factors for abnormal development of the brain" and that exposure to these risk factors during adolescence "lead to impairments in memory and executive function." 2PCR-1576. Darious "demonstrated objective indicators on current testing of acquired brain damage related to traumatic brain injuries and the known neurodevelopmental consequences of childhood trauma and neglect." 2PCR-4095. Ouaou opined that Darious is the "poster child" or "poster adult, for the development of difficulties with executive functions and memory. . ." 2PCR-1582.

The lower court's prejudice findings

Despite the wealth of mitigation presented in postconviction, the lower court found only "minimal mitigation." 2PCR-1916. Not

---

[21] Ouaou acknowledged there were no medical records documenting the head injury, but there were no medical records from Wilcox's childhood at all. Dr. Vinson explained, in her experience, populations facing similar life stressors to Wilcox are "not going to see a doctor unless it's a time of crisis and something has gone really wrong. And, so, records may not exist." 2PCR-1180.

only did the court fail to engage in the requisite analysis, the conclusion directly contradicts the remainder of the order in which the court repeatedly finds that counsel presented "a sufficient mitigation case." 2PCR-1912-16. On the one hand, it appears the jury heard enough about Wilcox from his mother—i.e. the substantial evidence in postconviction is irrelevant—and on the other, the court has found that all of the mitigation together is "minimal." This finding misapprehends the nature and meaning of what constitutes cumulative evidence under *Strickland*.

The postconviction court made sweeping conclusions, but didn't assess the totality of the evidence, particularly in light of the trial court affording only "little weight" to the mitigation presented.[22] In doing so, the court failed to assess how the un-presented evidence "might well have influenced the jury's appraisal of

---

[22] The trial court noted that Dr. Fichera's testimony at the *Spencer* hearing corroborated evidence of Wilcox's "dysfunctional childhood" but did not establish "an increased likelihood" of increased criminality. R5-870. The U.S. Supreme Court has rejected "any requirement of a 'nexus' between the proposed mitigation and the crime committed," however, Wilcox presented substantial testimony in postconviction showing that he suffers from brain abnormalities that have contributed to his life outcomes. *Smith v. Texas*, 543 U.S. 37 (2004).

[Wilcox's] moral culpability," *Wiggins*, 539 U.S. at 525, had the jury been afforded the opportunity to hear it. Indeed, the court failed to engage with the mitigation at all. The postconviction court is not at liberty to disregard the credible, unrebutted testimony presented in postconviction.

Deficient performance and prejudice can still exist even if some mitigation is presented at trial, when the description, detail and depth of mitigation presented in postconviction far exceeds what the jury was told. *See also Johnson v. Sec'y, Dept. of Corr.,* 643 F. 3d 907, 936 (11th Cir. 2011). Or, even when counsel presents "a superficially reasonable mitigation theory." *Sears v. Upton*, 561 U.S. 945, 954 (2010). "[C]ounsel's effort to present *some* mitigation evidence should [never] foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.* at 955.

Even where, as here, subject matter of the trial and postconviction evidence overlaps to some degree, prejudice may be established under *Strickland* where trial counsel fails to adequately describe the nature and extent of abuse the petitioner suffered. *Wiggins*, 539 U.S. at 535-36 (finding deficiency and prejudice

"[g]iven both the *nature and extent* of the abuse petitioner suffered") (emphasis added) ; *Williams*, 529 U.S. at 370, 398 (finding prejudice based on counsel's omission of "*graphic description* of [the petitioner's] childhood" including "documents . . . that *dramatically described* mistreatment, abuse, and neglect") (emphasis added).

Courts must engage with the evidence presented in considering whether that evidence might have added up to something that would have mattered to the jury. *Porter*, 558 U.S. at 413. It is not relevant, as the court determined here, whether the "jury could have heard [the evidence] and still have decided on the death penalty, that is not the test." *Rompilla*, 545 U.S. at 393 (internal citations omitted).

"Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)). Here, the sentencing judge and jury heard little about Darious's passions and frailties. The evidence presented in postconviction demonstrates an abundance of compelling mitigation that went unpresented.

Moreover, this is simply not among the most aggravated, least mitigated cases, as evidenced by the jury's mere 7-to-5 vote. While the trial court found and afforded "great weight" to four aggravators, this Court found that the court had misapplied the avoid arrest aggravator. As argued above, Mr. Wilcox submits that the prior violent felony aggravator was also misapplied because it is neither factually or legally sound.

In light of the reduced aggravation and wealth of available mitigation, "[]this is not a case in which the new evidence 'would barely have altered the sentencing profile. . ." *Porter*, 558 U.S. at 41 (quoting *Strickland*, 466 U.S. at 700) . Wilcox presented substantial evidence in postconviction that was never presented at trial. The description, details, and depth of abuse, neglect, and trauma in Wilcox's background that were brought to light in postconviction proceedings far exceeded what the jury was told. *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011).

Particularly, when "only one juror would have made a critical difference" there is, at the very least, a reasonable likelihood that the outcome of the penalty phase would have been different had trial counsel effectively investigated and presented a complete

mitigation case. *See Ferrell v. State*, 29 So. 3d 959 (Fla. 2010); *Phillips v. State*, 608 So. 2d 778 (Fla. 1992).

B. Trial Counsel Was Ineffective for Failing to Investigate and Challenge the State's Case in Aggravation.

This Court has long recognized Counsel's "strict duty" to conduct an adequate and reasonable investigation of both mitigation **and evidence that negates aggravation**. *State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000) (citing *Rose v. State*, 675 So. 2d 567, 571 (Fla. 1996)); *see also Wiggins*, 539 U.S. at 524 (citing Guideline § 11.4.1(c) (1989)). Counsel "should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible." Guideline §10.11 (I).

In his motion for postconviction relief, Wilcox argued that trial was ineffective for failing to mitigate the State's case in aggravation. At sentencing, the trial court found that "the Defendant [had] been previously or contemporaneously convicted of another capital felony or of a felony involving the use or threat of violence to some person," R5-861, and accorded the aggravator "great weight." R5-862. To

establish this aggravator, the State relied solely on Wilcox's conviction for second-degree murder and armed robbery. R5-861.

Penalty phase counsel objected to the application of and instruction on the aggravator, S15-492, yet failed to present any evidence that would have established that it does not apply to Mr. Wilcox's case.

The investigation of Wilcox's prior was limited to obtaining the police report and conducting a brief interview of Cory Waters. Trial counsel asked that Cory sign a short and undetailed affidavit. It read that Cory was "familiar" with Darious; "Darious Wilcox did not possess a gun. . ."; and "Duane Smith was the individual who possessed the gun and fired it. . ." 2PCR-740.

Walsh did not offer the affidavit to the sentencing judge or jury. Instead, counsel agreed to the following stipulation:

> On February 3rd, 1993, Darious Wilcox, along with three co-defendants, was convicted of second-degree murder, armed robbery and grand theft related to a shooting that occurred in Miami Dade County. Darious was convicted as a principal from the offenses and was not the individual who shot the victim. At the time of the offense, Darious was 14 years of age.

T20-1208.

In closing argument, the State capitalized on this stipulation:

> He's part of a group looking for someone to rob. They find a game of dice. They are going to be robbing the people playing dice. Gambling. He gets out of a vehicle to collect the money. Somebody else gets out of the vehicle and shoots one of the victims. That's what you know about that instance.

T21-1222.

Rather than contest that the aggravator applied, Walsh told the jury that it was up to the State to prove that Darious had direct contact with the victim: "Whether or not that was there, I leave it up to you." T20-1249.

At the evidentiary hearing, Cory Waters testified that Wilcox wasn't known to carry a gun, that he didn't take any part in planning the robbery, and that *Darious never made contact* with Mr. Lovett. 2PCR-1319. He explained that, Darious, and several other kids had plans to "joyride" and go to parties. 2PCR-1316-17. He sat with Darious in the back seat behind Smith while Steve drove. Cory brought a gun "just in case, you know, if anything go down at least I could protect myself." 2PCR-1316-17. Cory accidentally shot off a round while playing around, so Smith took the gun from Cory. 2PCR-1316.

Cory testified that Smith instructed Steve to drive the car further south while the group continued to joyride. 2PCR-1316-17. When they passed a street with a group playing a dice game, Smith told Steve to stop the car. 2PCR-1317. Cory remembers,

> [Duane] went to the dice game and boom, all of a sudden I just . . . I heard a shot, and he had done shot the guy.

2PCR-1317-18. Cory testified that the victim fell back a few feet from the circle of money left on the ground. 2PCR-1318. Cory could see Smith picking up money, and that's when Darious got out of the car. 2PCR-1318. Darious returned to the car with some money in his hand, 2PCR-1318, but Cory emphasized that Darious **never went near the victim**: "The victim was like three feet away from like where the money was at." 2PCR-1318. Smith returned to the car, said "let's go" and handed the gun back to Cory. 2PCR-1318.

Cory also testified that, if asked, would have told counsel that in pretrial detention after their arrest, Darious told Cory, "Man, if I knew Duane was going to do something like that, I wouldn't have even got in the car with Duane." 2PCR-1323.

At the postconviction hearing, counsel admitted that Cory Waters was willing to testify to Darious's limited role in the prior

second-degree murder case. 2PCR-1065. Yet, counsel could not explain why he did not present this powerful mitigation testimony to the jury.

In denying relief on this claim, the lower court adopted the State's erroneous argument that Walsh *did* provide an explanation:

> Walsh chose that course of action because he had to address the existence of the prior murder conviction, but did not want to draw more attention to it, especially since Waters said that Wilcox had gotten out of the car and took items off the dead body. For that reasons, Walsh had not considered calling Waters as a mitigation witness.

2PCR-2088. This finding misapprehends the testimony of Walsh and Cory Waters.

Walsh testified that he did *not* consider whether to call Waters, 2PCR-1066. When asked on cross-examination whether he would be concerned that calling Waters could open the door to testimony that Wilcox "was at the scene and he was seen taking things, taking something off of the person that was shot and killed," Walsh responded, "I guess that's possible, sure." 2PCR-1090.[23] Walsh's

[23] On cross-examination, Walsh testified that he did not agree that the probable cause affidavit reflects that Wilcox "is "seen

equivocal agreement with the State's suggestion that "it is possible" there was a strategic reason not to call Waters is, at best, a *post-hoc* rationalization of his failing to do so. In any event, the court's findings, and the State arguments which the court adopts, overlook Walsh's testimony that the prior "was already out there, so we had to deal with it." 2PCR-1091. However, counsel failed *deal with it* at all.

In *Rhodes v. State*, this Court held that in a capital case, "[t]estimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." 547 So. 2d 1201, 1204 (Fla. 1989). Cory Waters was willing and available to testify to Wilcox's limited role in the crime that was used to aggravate his sentence to death. 2PCR-1322, 1328.

Rather than present the true picture of what occurred that night, trial counsel presented the jury with a stipulation that Wilcox

---

probably taking something off the body of the dead victim." 2PCR-1090. Walsh directed the State to refer to the record. 2PCR-1090.

was previously convicted of second-degree murder, and the probable cause affidavit inaccurately describing the crime. Abundant evidence was available to trial counsel refuting the State's version of the events. Had trial counsel properly investigated and presented Cory Waters to testify about what really happened to the sentencing judge and jury, there is a reasonable probability that the prior violent felony aggravator would not have applied.

C. The Lower Court's Credibility Findings

While this Court defers to a lower court's credibility determinations, Mr. Wilcox respectfully submits that the lower court's findings that some witnesses were credible only "in part" is not entitled to deference because they are not supported by competent, substantial evidence. *Blanco v. State*, 702 So.2d 1250, 1252 (Fla.1997) ("As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'") For instance, the court found Dr. Ouaou credible "in-part," because Ouaou "did not review an MRI of

the Defendant." 2PCR-1914. The court's finding is incorrect, no imaging was performed in this case—there is no MRI to review.

Moreover, the court "notes" that Ouaou "did not diagnose the Defendant with any abnormalities and did not render a diagnosis of the Defendant." 2PCR-1912. This finding is again belied by the record. Ouaou provided unrebutted testimony that Wilcox does have brain abnormalities. 2PCR-1575.

Similarly, while lauding Dr. Vinson's "multiple board certifications," the postconviction court determined that portions of her testimony were "not credible" because her answers were "evasive." The court gave a single answer in which Vinson's testimony was taken out of context: "in response to a direct question Vinson testified, 'it's difficult to answer your question.'" 2PCR 1916. The court's finding suggests that Dr. Vinson was trying to avoid the question, but this is not supported by the record. The transcript reflects that Vinson was asked whether her opinions were based on studies conducted after 2009. Vinson's full answer was: "It's difficult to answer that question, because medical knowledge builds upon what was done before. And, so, even if a paper is written in 2023, it may have citations from 2007, and we see that

commonly." 2PCR-171. Her explanation, overlooked by the trial court, demonstrates her willingness to answer the question as best she could.

The court also notes that Dr. Vinson did not conduct malingering testing or render a diagnosis. 2PCR-1913. This finding overlooks that Vinson was not retained to render a diagnosis. As she testified, she was asked to review Wilcox's experiences and discuss the impact they had on his life and development. A trauma-informed interview does not require tests of malingering, and the facts upon which Vinson relied are supported and corroborated by the record and witness testimony. Most importantly, the lower court's criticism overlooks that psychiatrists generally do not perform "testing."

The court found Dr. Grassian's testimony about the impact of solitary confinement to be "credible," but noted that Grassian does not have "personal knowledge as to the locations and conditions" where Wilcox was housed. 2PCR-1913-14. Grassian provided details of how confinement cells are designed and explained a person's typical routine. Having been involved in a solitary confinement class action lawsuit in Florida in 2001, Grassian

"toured quite a number of prisons" including confinement sections and testified that Florida's solitary confinement cells are "pretty typical" to the general description he offered in court. 2PCR-1521. The court's credibility determination overlooks Grassian's testimony that Wilcox's experience, including the deprivation of stimulation, was "certainly entirely consistent with [Grassian's] understanding of what solitary confinement would have been like for [Wilcox] in Florida." 2PCR-1522.

The court also "notes" that Dr. Grassian did not conduct neuropsychological testing in order to make render any conclusions specific to Wilcox, and that Wilcox "did not present any evidence of a neuropsychological workup during the evidentiary hearing." 2PCR-1914. Again, these findings are belied by the record. Dr. Grassian is a psychiatrist and psychiatrists do not perform "neuropsychological testing." Moreover, the court's finding overlooks that Dr. Ouaou, a qualified neuropsychologist, *did* conduct a comprehensive neuropsychological test battery, which was the subject of his written report, Exh. 30, and hours of testimony at the postconviction hearing. 2PCR-1543-1630.

The lower courts findings that Drs. Ouaou, Grassian, and Vinson are credible only "in part" is not supported by competent, substantial evidence and not entitled to this Court's deference.

ARGUMENT II

The Lower Court Erred in Denying Wilcox a New Penalty Proceeding in Light of *Hurst v. Florida* and *Hurst v. State* in Violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Corresponding Provisions of the Florida Constitution.

On January 12, 2016, the U.S. Supreme Court invalidated Florida's capital sentencing statute, holding that it violated capital defendants' right to a jury trial under the Sixth Amendment because it did "not require the jury to make the critical findings necessary to impose the death penalty." *Hurst v. Florida*, 577 U.S. at 98.

On remand, this Court held that in addition to the Sixth Amendment protections set forth in *Hurst v. Florida*, the Eighth Amendment and the Florida Constitution required that the jury unanimously find beyond a reasonable doubt that specific aggravating circumstances were proven, that the aggravating circumstances are sufficient to impose the death penalty, and that

the aggravating circumstances outweigh the mitigating circumstances. *Hurst v. State*, 202 So. 3d at 53-59.

This Court further determined that *Hurst* claims must be subject to individualized harmless error review, requiring the State to prove beyond a reasonable doubt, and not through pure speculation, that the *Hurst* error did not affect the jury's recommendation. *Id.* at 67-68. Because this Court could not determine whether a jury found aggravators beyond a reasonable doubt or whether the jury would have conclusively found the aggravation sufficiently outweighed the mitigation, the error could not be harmless. *Id.* at 68. This Court "decline[d] to speculate as to why seven jurors in [*Hurst*] recommended death and why five jurors were persuaded that death was not the appropriate penalty." *Id.*

Subsequently, this Court applied *Hurst* retroactively to cases final after the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *Mosley*, 209 So. 3d 1248. This meant that every defendant with a death sentence based on a non-unanimous jury verdict and finality date after June 24, 2002, was entitled to a new penalty phase regardless of the aggravating factors. *See Pagan v. State*, 235 So. 3d 317, 319 (Fla. 2018) (granting *Hurst* relief in a 7–5

case even though the prior violent felony and during the course of a felony aggravators were supported by jury findings).

Florida courts were inundated with postconviction motions from capital defendants, all of whom had been sentenced under an unconstitutional death penalty scheme. According to data collected by the Death Penalty Information Center (DPIC), of the nearly 400 capital defendants in Florida at the time, more than 150 were eligible for *Hurst* relief.[24]

In 2020, in *State v. Poole*, this Court receded from *Hurst v. State*, holding that a death sentence could be imposed whenever a jury found one or more statutorily enumerated aggravators beyond a reasonable doubt, either at the guilt or penalty phase. 297 So. 3d 487, 502-03 (Fla. 2020). This Court also receded from its prior decisions concerning the need for unanimity in death penalty

---

[24] *See Resentencing Status of Florida Prisoners Sentenced to Death by Non-Unanimous Juries*, DEATH PENALTY INFO. CTR. https://deathpenaltyinfo.org/stories/florida-prisoners-sentenced-to-death-after-non-unanimous-jury-recommendations-whose-convictions-became-final-after-ring (last visited May 24, 2024) [hereinafter "*Hurst* Data"]; *see also Asay v. State*, 210 So. 3d 1, 20 (Fla. 2016) (noting 386 capital defendants as of December 22, 2016).

proceedings, holding that neither the Sixth Amendment nor the Florida Constitution's prohibition against cruel and unusual punishment require unanimous jury recommendations—or jury recommendations at all *Id.* at 505.

Despite this seismic shift in this Court's capital jurisprudence, the legislature left § 921.141, Florida Statutes (2017), and its unanimity requirement untouched for nearly three years. It was not until the defendant in the one of the highest profile death penalty cases in recent history received a life sentence following a jury vote of 9–3 that legislature moved to change the law and reduced the number of jurors required to vote for death to a "super majority" of 8–4. § 921.141(2)(c), Fla. Stat. (2023). Notably, the legislature felt that reverting to a simple majority "would be problematic justice."[25]

A. Wilcox's *Hurst* Litigation

Wilcox filed his initial motion for postconviction relief just one month after *Hurst v. Florida*, wherein he raised *Hurst* error;

---

[25] Fla. S. Comm. on Rules, video of hearing at 14:30-15:51 (Mar. 22, 2023) (available at https://www.flsenate.gov/media/videoplayer?EventID=1_nty0d3lq-202303220830&Redirect=true) (Sen. Blaise Ingoglia).

however, he moved to stay all proceedings until this Court considered its impact on Florida capital defendants in *Hurst v. State*. PCR-659. Once this Court determined the retroactive scope of *Hurst* in *Mosley*, Wilcox promptly amended his postconviction motion.

This Court's ruling on the application of *Hurst* was clear: the error was only harmless when the jury had returned a unanimous recommendation for death. *See Davis v. State*, 207 So. 3d 142 (Fla. 2016). With a 7–5 vote, it was without question at the time that the error in Wilcox's case was not harmless and that the postconviction court was required to grant Wilcox a new penalty phase. PCR-868. Indeed, the State argued that the *Hurst* error was harmless but conceded that the controlling caselaw entitled Wilcox to *Hurst* relief. PCR-851-52, 868.

The postconviction court, presided over by Judge Backman, set the *Huff* hearing on Wilcox's motion for February 12, 2018. However, despite the requirements of Rule 3.851(f)(5)(A) and the State's concession that an evidentiary hearing was warranted, on

January 18th, the court "[i]nexplicably"[26] summarily denied all relief.[27] PCR-889.

Wilcox appealed to this Court, asserting three claims: 1) the lower court erred in failing to conduct a *Huff* hearing; 2) his sentence violates the Sixth and Eighth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution in light of *Hurst v. Florida* and *Hurst v. State*; and 3) the court erred in summarily denying his meritorious claims. Initial Br., SC18-146 (Fla. Sept. 4, 2018).

Although Wilcox requested that this Court grant *Hurst* relief, this Court did not address the merits of Wilcox's claims and instead remanded for the postconviction court to hold a *Huff* hearing and rectify Judge Backman's "[i]nexplicabl[e]" failure. 2PCR-50.

Just four months later, this Court issued *State v. Poole*, and receded from *Hurst v. State* "except to the extent it requires a jury

---

[26] *Wilcox v. State*, SC18-146, 2019 WL 4391268, at *1 (Fla. Sept. 13, 2019).

[27] Judge Backman left the bench in December 2018.

unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." 297 So. 3d at 507.

Although Wilcox's jury returned a bare majority vote of 7–5 for death and his case was final on April 20, 2015, the postconviction court denied Wilcox's *Hurst* claim on the basis of *Poole*:

> [T]his Court must apply Poole to the Defendant. Pursuant to Poole this Court finds the jury unanimously convicted the Defendant of armed kidnapping and armed robbery and therefore also unanimously found the prior or contemporaneous violent felony aggravator.

2PCR-1907. The lower court's ruling is flawed in significant respects and has resulted in an unconstitutionally disparate and arbitrary application of the death penalty to Wilcox.

B. There is no Rational Basis that Would Justify Denying *Hurst* Relief to Wilcox Where Other Similarly Situated Defendants Received the Benefit of *Hurst*.

As Wilcox argued below, his death sentence violates the Sixth Amendment in light of *Hurst v. Florida* and *Hurst v. State* because the trial judge, not the jury, made the findings of fact necessary for imposition of a death sentence. The court's denial of Wilcox's *Hurst* claims, when numerous other similarly situated defendants have been given the benefit of those rulings violates Wilcox's Sixth

Amendment right to a jury trial and his Fourteenth Amendment rights to due process and equal protection of the laws. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

This Court's decision in *Poole* created Wilcox's class of one, resulting in the arbitrary denial of the benefit of the *Hurst* decisions without a rational basis for doing so. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citations omitted); *see also Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006) (requiring an "extremely high degree of similarity" between the plaintiff and those similarly situated). Indeed, this denial flouts the fundamental fairness interests enshrined in the Fourteenth Amendment's concept of Due Process. *See Carmell v. Texas*, 529 U.S. 513, 533 (2000) ("[T]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."). A death sentence "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578,

584-85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-885, 887, n.24 (1983)).

When Wilcox filed his amended motion for postconviction relief, the state of the law was clear: every death-sentenced prisoner whose sentence became final after *Ring v. Arizona*, and whose jury recommendation was not unanimous, was entitled to relief under *Hurst v. Florida* and *Hurst v. State*.

Of the nearly 400 death-sentenced individuals in Florida at the time, 158 were eligible for *Hurst* relief. *Hurst* Data; *see also Asay*, 210 So. 3d at 20. Of those, 150 were granted relief[28] and two litigants waived postconviction proceedings, leaving six *Hurst*-eligible defendants.[29] Of the six, Wilcox is the only defendant sentenced to death by a mere jury vote of 7–5.

---

[28] According to DPIC's *Hurst* Data, 145 defendants were granted *Hurst* relief, and five were granted relief on other grounds.

[29] As of this Court's decision in *Poole*, five *Hurst* challenges remained pending, including the cases of Duane Owen, Andrew Gosciminski, Carlton Francis, James Herard, and Wilcox. The Court denied Owen's *Hurst* claim; Gosciminski died before the postconviction court ruled on his *Hurst* claim; and Francis is incompetent. Herard's claim remains pending on direct appeal before this Court. Recommending death, Poole's jury voted 11–1,

This disparate treatment is even more glaring when looking solely at the 7–5 cases, which comprise 22 of the total 158 *Hurst*-eligible cases. All of these defendants who sought relief were granted a new penalty phase—except Wilcox.[30] There is no question that Wilcox was treated unequally compared to these similarly situated *Hurst*-eligible defendants.

The timing of Wilcox's case is neither a constitutionally valid basis nor appropriate justification for treating Wilcox different than any other 7–5 *Hurst*-eligible case and applying *Poole*. Wilcox should not suffer the ultimate punishment because a judge denied his unquestionable right to a *Huff* hearing, thereby prolonging the completion of postconviction proceedings. But for circumstances outside of Wilcox's control, he would have received relief.

The postconviction court's complete abdication of its responsibility to fairly decide Wilcox's eligibility for the death

---

Owen's jury voted 10–2, Gosciminski's jury voted 9–3, and Francis's and Herard's juries voted 8–4.

[30] Two cases were granted relief on other grounds, one defendant waived postconviction proceedings, and Wilcox was denied relief.

penalty post-*Hurst* is egregious. With over 25 years of experience on the bench and presiding over capital cases, Judge Backman was a seasoned circuit court judge well aware of *Huff v. State* and Rule 3.851's requirement that he conduct a hearing before ruling on a motion to vacate judgments of conviction and sentence in a capital case. The summary denial of Wilcox's claims in the face of clearly established state and federal law resulted in both a denial of his substantive due process rights and a violation of his right to equal protection under the law. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S 535 (1942).

The injustice here is akin to that in *Lee v. State*, 340 So. 2d 474 (Fla. 1976), where in response to the landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972), overturning the death penalty, every Florida death sentence was commuted to life—except Lee's.

Lee had been sentenced to death one week before *Furman*. The trial court commuted his sentence to life, but the State appealed to the district court. While on appeal, Florida reinstated the death penalty. *Dixon v. State*, 283 So. 2d 1 (Fla. 1973). In light of these developments, the district court vacated the trial court's reduction

of Lee's sentence and reinstated death. *Lee*, 340 So. 2d at 475. On appeal, this Court reversed and remanded; however, Lee was once again sentenced to death. *Id.* On direct appeal once more, this Court vacated Lee's death sentence and entered a life sentence, citing "the constitutional mandate of equal protection." *Id.*

Wilcox is the **only** *Hurst*-eligible defendant on Florida's death row with a 7–5 verdict who sought and was denied *Hurst* relief. There can be no rational basis for denying Wilcox relief.

C. The Court's Denial of Wilcox's *Hurst* Claim has Resulted in an Arbitrary and Capricious Sentence, Where the Application of the Death Penalty is Not Narrowly Tailored in Accordance With Longstanding Constitutional Requirements.

It is well established that the death penalty may not be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.; *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); *see also id.* at 313 (White, J., concurring) ("[T]he death

penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

Wilcox's case is particularly egregious given that his jury recommended death by the narrowest of margins—a threshold too low even under Florida's newly revised capital sentencing statute that now requires an 8–4 vote. Indeed, no other defendant will be sentenced to death in Florida with a 7–5 jury verdict, leaving Wilcox as the only *Hurst*-eligible defendant whose sentence is unconstitutional under both the old and new statutes.

A constitutional death sentence requires a balancing of aggravating and mitigating factors, and the application of *Poole* to Wilcox flouts the requirement that death be reserved for "the most aggravated and unmitigated of most serious crimes." *Dixon*, 283 So. 2d at 7. This is not the most aggravated and least mitigated of capital cases. Despite the State's presentation of four aggravators and trial counsel's minimal mitigation presentation of a single witness at penalty phase, Wilcox's jury returned a mere 7–5 recommendation for death. Moreover, on direct appeal, this Court

struck the avoid arrest aggravator; and in postconviction, Wilcox presented credible, uncontradicted evidence rebutting the applicability of the prior violent felony. Additionally, Wilcox presented substantial, compelling mitigation at his evidentiary hearing that, at the very least, would have had an impact on just one juror.

The arbitrariness of Wilcox's death sentence is even more evident when considering the results of the *Hurst* resentencing proceedings. Of the eighteen 7–5 cases remanded for new penalty phases, 14 have resulted in life sentences and three remain pending.[31] To date, not one defendant with a prior 7–5 jury recommendation has been resentenced to death.[32] There is no meaningful difference between Wilcox and these other capital defendants, and this Court cannot ignore the disparate and arbitrary result that the denial of his claim creates.

---

[31] Eric Patrick died while pending resentencing.

[32] Of all the *Hurst* cases that were remanded, 78 defendants have been resentenced to life, and only 17 have been resentenced to death, meaning that juries have voted for life in more than 82% of *Hurst*-resentencing cases. Forty-one cases remain pending.

D. The *Hurst* Error Here is Not Harmless.

The postconviction court further erred in finding Wilcox's *Hurst* error harmless under *Poole* because his "jury unanimously convicted [him] of armed kidnapping and armed robbery [and] therefore also unanimously found the prior or contemporaneous violent felony aggravator." 2PCR-1907. In reaching this result, the court relied on an aggravator that was neither argued nor found at trial. The State asserted, and the jury was instructed, that the "prior felony" portion of this aggravator was solely directed at Wilcox's prior second-degree murder and armed robbery convictions, not the contemporaneous felonies. T21-1258-59. The State explicitly declined to pursue the contemporaneous felony route to avoid improper doubling because it sought to rely on the kidnapping and burglary convictions for the "in the course of a felony" aggravator. R5-772-73. Consequently, the trial court emphasized at sentencing and in its written order that it did not consider or rely on the contemporaneous felonies when analyzing this aggravating factor. T23-1394; R5-862.

Hurst error cannot be deemed harmless relying on this aggravator at all as the jury never made any findings of fact

concerning its existence. To uphold a death sentence on the basis of a judicially imputed jury finding flies in the teeth of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). When the trial court gave the "prior violent felony" instruction to the jury, the court explained that "the prior offense must have been life threatening in nature and in which the perpetrator came into contact with the human victim." T21-1258-59. Whether the facts of Wilcox's participation in the prior case rose to the level of a prior violent felony for purposes of aggravation was an issue of fact for the jury to decide, which it did not do. The jury returned a verdict form noting only the vote count of 7–5 for death without any specific findings of fact.

Indeed, the trial record is devoid of conclusive evidence that Wilcox ever made contact with the victim, Robert Lovett; and in postconviction, Wilcox definitively established that he **did not** make contact with Mr. Lovett through the testimony of his codefendant, Cory Waters.

In light of this Court's striking of the "avoid arrest" aggravator on direct appeal and evidence undermining the existence of the "prior violent felony," just two aggravators remain: CCP and "in the course of a felony." Here again, the jury made no findings, and

Wilcox submits that the last aggravator is inapplicable as the State relied on his convictions for armed kidnapping and armed robbery.[33] Importantly, the State relied on *only* the armed kidnappings of McMorris, Hankerson, and Arnold, as well as the armed robbery of Hankerson. R5-865. Those convictions, however, are inappropriate bases to establish this aggravator in this case because there is no "causal relationship between the felony and the death." 2 Subst. Crim. L. § 14.5(f) (3d ed.).

Nimoy Johnson's death was not "the predictable result" of the kidnappings of McMorris, Hankerson, and Arnold, *State v. Hacker*, 510 So. 2d 306, 306 (Fla. 4th DCA 1986), but rather was "collateral to and separate from" them. *State v. Williams*, 776 So. 2d 1066, 1072 (Fla. 4th DCA 2001) (quotation omitted).

Under the State's theory, T20-1098, 1177, the causal relationship is precisely the opposite—the armed kidnappings and armed robbery resulted from the death. Because the causal

---

[33] Wilcox has asserted a challenge to this aggravator in his Petition for Habeas Corpus filed contemporaneously with this Brief in which he argues appellate counsel was ineffective for failing to challenge the application and finding of the aggravator on direct appeal.

relationship required by common law does not exist here, "in the course of a felony" cannot apply.

E. The Retroactive Application of *State v. Poole* to Wilcox's Case Violates Due Process Under the Ex Post Facto Clause.

Article I, § 10 of the U.S. Constitution prohibits state ex post facto laws. *See, e.g.*, *Weaver v. Graham*, 450 U.S. 24 (1981); *Lindsey v. Washington*, 301 U.S. 397 (1937). Federal Due Process erects the same prohibition against state judicial action. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *see also Marks v. United States*, 430 U.S. 188 (1977).

Wilcox acknowledges that this Court has rejected arguments challenging *Poole* as violative of the Ex Post Facto Clause; however, Wilcox maintains that due process precludes a court from unexpectedly changing a criminal statute's construction and applying the change retroactively. *Bouie*, 378 U.S. at 362. This Court's construction of § 921.141, Florida Statutes, in *Hurst v. State* constitutes substantive law, and due process demands that this Court must not apply *Poole* retroactively to deny Wilcox relief.

F. Conclusion

A constitutional death sentence requires that this grave decision be based on the balancing of aggravating and mitigating factors, not the timing of a judge's "[i]nexplicabl[e]" error. The lower court's denial of Wilcox's *Hurst* claims when numerous other similarly situated defendants have been given the benefit of those rulings violates Wilcox's Sixth Amendment right to jury trial, his Fourteenth Amendment rights to due process and equal protection of the laws, his Eighth and Fourteenth Amendment immunities against arbitrary and indecent execution of a death sentence, and his federal Article I, § 10 immunity against ex post facto punishment. Like in every other post-*Ring* case with a 7–5 jury recommendation, Wilcox is entitled to a new sentencing proceeding void of the unconstitutional errors of his prior sentencing.

This Court should vacate Wilcox's death sentence and either impose a life sentence or remand to the trial court for a new penalty phase that comports with the Sixth and Eighth Amendments.

This Court should reverse.

ARGUMENT III

The Lower Court Erred in Summarily Denying Several Sufficiently Pled, Meritorious Claims in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. Fla. R. Crim. P. 3.851(f)(5)(A)(i); *see also Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2 (Fla. 2000) ("[A]n evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"); *Truehill v. State*, 358 So. 3d 1167 (Fla. 2002); *Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question whether the movant has met this burden, the Court will presume that an evidentiary hearing is required, *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007), and "where there is no evidentiary hearing held below [the appellate court] must accept the defendant's factual allegations to the extent they are not refuted by the record." *Nordelo v. State*, 93 So. 3d 178, 185 (Fla. 2021) (citing *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999)).

A. Wilcox Is Entitled to an Evidentiary Hearing on His Claim of Pretrial Ineffective Assistance of Counsel.

In Claim 2 of his motion for postconviction relief, Wilcox alleged that he was denied a reliable adversarial testing at the guilt phase of his capital trial due to ineffective assistance of counsel and judicial error during pretrial proceedings because he was permitted to proceed pro se despite not being competent to knowingly and voluntarily waive his Sixth Amendment right to the assistance of counsel. PCR-729. Wilcox further alleged that appointed counsel had a duty to investigate and challenge whether he was competent to knowingly and voluntarily waive this right, and counsel failed to do so. Because of trial counsel's ineffectiveness, the trial court erroneously found that Wilcox was competent to proceed pro se. Thus, Wilcox was denied his constitutional right to counsel under Sixth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution and the right to a fundamentally fair trial.

Counsel's highest duty is the duty to investigate and prepare. *See* Guideline §10.7.

> Counsel cannot responsibly advise a client about the merits of different courses of action,

> the client cannot make informed decisions, and **counsel cannot be sure of the client's competency to make such decisions**, unless counsel has first conducted a thorough investigation with respect to both phases of the case.

Guideline §10.7, Commentary. (emphasis added). Moreover, counsel must start investigating *at the beginning* of the representation. *Id.* Here, as established above, counsel abandoned their obligations from the very outset of this case. No investigation of Wilcox's background or mental health was done from the time he was arrested through his decision to proceed pro se. Even after, counsel made no effort to ascertain whether Wilcox was competent to do so.

It was incumbent upon the trial court and counsel to ensure that qualified experts were appointed to conduct competency evaluations of Wilcox and to ensure that the trial court immediately scheduled a hearing to determine competency as required under Rule 3.210(b). Counsel did neither.

Because counsel failed to timely seek the assistance of qualified professionals to assess Wilcox's mental health, and failed to ensure that Wilcox was properly evaluated once his competency

was called into question, the trial court was led to believe that Wilcox was "intelligent, articulate, [and] bright." S8-41.

In his motion for postconviction relief, Wilcox alleged that he has since been thoroughly examined by mental health experts whose opinions all bear upon this claim. Neuropsychological testing reveals that, contrary to Dr. Brannon's belief, Wilcox's intelligence is closer to intellectually disabled than "below average." He suffers from acquired neurologic damage, abysmal memory and executive functioning deficits, poor impulse control, significant deficits in executive functioning, and poor abstract reasoning. Wilcox's lowest neuropsychological test scores relate to verbal comprehension, precisely the skills necessary to not only to represent oneself at trial, but also make an "intelligent" decision to discharge counsel.

Although Wilcox was arguably competent to stand trial, he suffers from deficits to the point where he was not competent to conduct trial proceedings by himself or knowingly, intelligently, and voluntarily waive counsel. Counsel's failure to secure an adequate mental health evaluation of Wilcox resulted in the trial court's erroneous finding.

Wilcox also alleged that trial counsel was deficient for failing to correct the trial court's erroneous belief that Wilcox had an "absolute right" to represent himself. T6-25, 106, 139; S8-41. Counsel failed to inform the court of its error.

In *Faretta*, the U.S. Supreme Court held that the Sixth and Fourteenth Amendments include a constitutional right to proceed without counsel when a criminal defendant "voluntarily and intelligently elects to do so." 42 U.S. at 807. However, contrary to the trial court's belief, and the postconviction court's, that right is not unfettered or "absolute." *See Indiana v. Edwards*, 554 U.S. 164 (2008). The Supreme Court in *Edwards* determined:

> [T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.

Id. at 177 (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

The *Edwards* Court based its decision on several factors. First, it recognized that standards to determine competency to proceed "assume representation by counsel and emphasize the importance of counsel," whereas, "an instance in which a defendant who would

choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard." *Id.* 175. The Court reasoned that the *Faretta* right to self-representation rests "in part on pre-existing state law set forth in cases all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right." *Id.* (citing *Faretta*, 422 U.S. at 813, and n.9).

Second, the Court recognized that competency to stand trial with the assistance of counsel and competency to waive the right to the assistance of counsel are separate and distinct questions requiring separate and distinct standards. The nature of mental illness "cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself." *Id.*

The Supreme Court also reasoned that dignity and autonomy of the individual underlie the right to self-representation; however, "a self-representation right at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense

without the assistance of counsel." *Edwards*, 554 U.S. at 176 (citations omitted) . A defendant's lack of capacity to conduct the trial risks not only an embarrassing spectacle, it "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id.* Moreover, "proceedings must not only be fair, they must 'appear fair to all who observe them.'" *Id.* at 177 (citing *Wheat v. United States*, 486 U.S. 153 (1988)).

An individual with an IQ of 78 who suffers from deficits in memory, executive functioning, impulse control, abstract reasoning, and verbal comprehension lacks the mental capacity to conduct his own defense or make such a decision. Counsel's failure to timely investigate and zealously advocate on behalf of his mentally, cognitively, and intellectually impaired client fell far below any objective standard of reasonableness for the performance of counsel in a capital case. As a result, Wilcox was denied the right to counsel in violation of the Sixth Amendment.

Counsel's failings and the trial court's decision to permit him to proceed without counsel resulted in substantial prejudice in that he was denied the right to counsel under the Sixth Amendment. "[T]he Sixth Amendment's guarantee of counsel is one of the

fundamental rights essential to a fair trial." *Roy v. Wainwright*, 151 So. 2d 825, 826 (Fla. 1963) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). The denial of counsel in a capital trial is structural error requiring reversal. Thus, no further showing of prejudice is necessary for relief to be granted.

To the extent that Wilcox may be required to show prejudice, the prejudice resulting from counsel's failure to challenge Wilcox's competency to waive counsel is evident. Wilcox had neither the skills nor the resources to conduct his own defense. Because he was incarcerated, Wilcox was unable to perform any investigation on his own, to secure necessary witnesses to present a defense, and was denied access to exculpatory information. Without counsel to assist him, Wilcox was unable to obtain or view DVD recordings of the sworn police statements of State witnesses, which contained significant impeaching information. Wilcox was also unable to secure experts to effectively challenge scientific evidence, including pathology and crime scene evidence presented by the State. Wilcox was unable to challenge the reliability of the State's cell phone evidence or challenge the admission of expert testimony by law enforcement officers who were not qualified experts in cell phone

technology. Particularly prejudicial was the State's presentation of DNA evidence that went unchallenged because Wilcox was without the knowledge or ability to challenge it effectively.

Allowing a person who is borderline intellectually disabled to represent himself under any circumstances, no less when his life is in the balance, violates the underpinnings of *Faretta* and does nothing to affirm his dignity or autonomy. Wilcox's lack of capacity to conduct his trial undercut the fairness of the proceeding and "the most basic of the Constitution's criminal law objectives." *Edwards*, 554 U.S. at 176. The result is a proceeding that was neither fair nor appears fair.

The postconviction court denied this claim without an evidentiary hearing, finding that the record establishes that the trial court conducted a "thorough and detailed *Faretta* inquiry" and that counsel was not ineffective for failing to challenge the proceedings. 2PCR-1908. The court reasoned that "there is no evidence that supports the conclusion that trial counsel should have raised the issue of competency pursuant to Rule 3.210 and 3.211." 2PCR-1908. The court also found the claim of trial court error procedurally barred "as it could have and should have been raised

on direct appeal." 2PCR-1908. Wilcox submits that the court's denial of this claim is flawed on all fronts.

First, this claim is not procedurally barred because it could not have been raised on appeal. Claims of ineffective assistance of trial counsel are not properly raised on direct appeal absent a showing of fundamental error. *Steiger v. State*, 328 So. 3d 926, 929 (Fla. 2021). Moreover, Wilcox pled *non-record* facts regarding counsel's performance, Dr. Brannon's performance, his IQ and cognitive abilities, and his competence to waive counsel that could not be resolved by the trial record alone. The lower court misapprehends the claim that was presented.

The lower court also misapprehends this claim as a challenge to Wilcox's competency to proceed pursuant to Rule 3.201 or 3.211. However, Wilcox's claim in fact argues that he was denied effective assistance because trial counsel failed to argue that Wilcox was competent to waive counsel pursuant to *Indiana v. Edwards*, 554 U.S. 164 (2008). In denying relief, the lower court conflates "competency to proceed" with "competency to waive counsel."

Moreover, the court cannot paradoxically complain that "there is no evidence that supports the conclusion that trial counsel

should have raised the issue of competency," 2PCR-1908, and, at the same time, deny evidentiary development. This legally sufficient claim raised questions of fact that required an evidentiary hearing.

B. The Lower Court Erred In Summarily Denying Wilcox's Claim that the State violated *Brady* and/or *Giglio* by withholding Witnesses' Recorded Statements.

Wilcox was denied an adversarial testing at trial due to the State's withholding of material, exculpatory evidence and/or the presentation of false evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

To ensure that adversarial testing occurs, a prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985) (quoting *Brady*, 373 U.S. at 87). A claimant must establish that the government possessed evidence that was suppressed, that the suppressed evidence was exculpatory or impeachment, and that the evidence was material. *Id.*; *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527

U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. *Kyles*, 514 U.S. at 433-34.

A proper materiality analysis under *Brady* must contemplate the cumulative effect of all suppressed information. The materiality inquiry is not a "sufficiency of the evidence" test. *Id.* at 434. The burden of proof for establishing materiality is less than a preponderance. *Williams*, 529 U.S. 362; *Kyles*, 514 U.S. at 434. In other words, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35. Rather, the suppressed information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witnesses' testimony. *United States v. Scheer*, 168 F.3d 445, 452-53 (11th Cir. 1999).

Moreover, the prosecution's disclosure must be "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure." *Edelen v. United States*,

627 A.2d 968, 970 (D.C. 1993) (citations omitted); *accord Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995). A *Brady* violation occurs "if the material came so late that it could not be effectively used." *United States v. Beale*, 921 F.2d 1412, 1426 (11th Cir. 1991).

The standard for prejudice is lower where the State relies on false or misleading testimony and argument in order to secure a conviction. *Giglio*, 405 U.S. 150. Where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, a new trial is required if there is any reasonable possibility that the false evidence may have affected the judgment of the jury. *Id.* at 154; *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). "[T]he proper question under *Giglio* is whether there is any reasonable likelihood that the false testimony could have affected the court's judgment as the factfinder in this case." *Guzman v. State*, 868 So. 2d 498, 507 (Fla. 2003). Additionally, a prosecutor has a duty to correct testimony he or she knows is false. *Routly*, 590 So. 2d at 400; *see also Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989), *cert. denied*, 493 U.S. 932 (1989).

At trial, Richaunda testified that the victim Nimoy Johnson, her next-door neighbor, had threatened her household because he believed they had broken into his home. She claimed that Mr. Johnson later told her that after thinking it over, he no longer believed they were responsible. S10-254-58. Richaunda's testimony contradicted what she had previously told Detective Hardy. Hardy's arrest affidavit states that on February 3rd, Richaunda, Shaquira, Terrell, and Willie "denied any knowledge or involvement with the burglary of their neighbor's residence a week prior to the murder." R1-4. However, in her recorded sworn statement—taken the same day that Hardy prepared the arrest affidavit—Richaunda claimed Mr. Johnson had told her he had been "robbed." Further, she denied that her brother, Terrell, had anything to do with the prior burglary or murder.

Wilcox attempted to impeach Richaunda with her sworn statement but, without a transcript, he had to rely on Hardy's arrest affidavit. S10-283-86. The State objected, arguing that Wilcox could not impeach Richaunda with the affidavit because Richaunda had not written it. At that point, for the first time, the State disclosed that Richaunda's recorded statement contradicted Hardy's

affidavit. Hardy's arrest affidavit further states that Richaunda gave a second sworn statement on February 7th wherein she again stated she was unaware of the burglary, R1-5; however, in her recorded statement, she admits that she spoke to Mr. Johnson about it. In both recordings, Richaunda brought up the burglary before Hardy mentioned it ("around the time that Dread was robbed or whatever I wasn't getting weed from him anymore.").

In a similar vein, Hardy's affidavit states that Terrell reported he never heard a gunshot because he was asleep. At trial, however, he testified that he had gotten out of bed and spoken with Wilcox outside; he returned inside and heard one gunshot as he was "halfway up the stairs." T15-668. On cross, Terrell again insisted that he was awake when he heard the gunshot and denied telling Hardy he was asleep. T15-684-85. Likewise, Hardy's affidavit stated that Terrell denied any knowledge of the burglary. R1-4. However, at trial, Terrell denied being present when Nimoy Johnson made the threats about retaliation for the burglary, which contradicts Richaunda's February 3rd sworn statement. T15-656-57.Repeatedly citing "the perils of self-representation," the trial court denied Wilcox's requests for transcripts of the State's primary witnesses'

recorded statements and witness jail calls because the State refused to prepare any transcripts. S-283-86. Wilcox's defense at trial was that Terrell Collier was the actual killer and that he was framed. Thus, any information that contradicted the witness's testimony would be valuable, even if only for impeachment. The State agreed to give Wilcox the DVD copies of the statements and calls, knowing full well that he would not be able to view the recordings because he was incarcerated.

Wilcox argued that failing to provide transcripts of the statements constituted a discovery violation because, as an incarcerated defendant, he was unable to view the DVDs the State had provided.

On direct appeal, Wilcox argued that the State's refusal to transcribe Richaunda's recorded statement constituted a violation of Florida's discovery rules. This Court determined that "the State did not violate either the spirit or the technical requirements of the criminal discovery rules" because "[t]he rules do not require the State to produce and disclose information which is not within the State's actual or constructive possession." *Wilcox*, 143 So. 3d at 376.

The State refused to prepare transcripts citing "the extensive costs," T-68-70; yet, it had at least ten other recorded witness statements transcribed. The only statements not transcribed are those most helpful to Wilcox. Notwithstanding Florida's discovery obligations, the State still had an obligation under the Sixth, Eighth and Fourteenth Amendments to disclose the exculpatory information, including impeachment those statements contained.

Wilcox was entitled to the exculpatory information—transcribed or not. Thus, the State was required to produce the material in an accessible format. For example, even if Wilcox was represented, the State would not be permitted to provide discovery in an inaccessible format using proprietary software the Defense does not have access to.

The State's obligations under *Brady* and *Giglio* are not abrogated by the fact that Wilcox chose to proceed pro se. Wilcox cannot be forced to surrender one constitutional right to assert another. *United States v. Simmons*, 390 U.S. 377 (1968). Wilcox's right to representation cannot foreclose other constitutional protections.

The State waited until the middle of Wilcox's cross-examination of Richaunda to disclose that Hardy's arrest affidavit was materially incorrect; there were material inconsistencies between the witnesses' sworn police statements and the testimony given at trial. The State's failure to timely disclose the material inconsistencies constitute *Brady* and *Giglio* violations.

Prejudice is clear. Terrell and Richaunda were damning witnesses who put Wilcox in the area at the time of the crime, as the State emphasized. These statements were vital to defense preparation, and Wilcox had no other means to obtain them.

Richaunda, Terrell, and Ward all had motive to lie to exculpate themselves from both the prior burglary and the subsequent murder of Mr. Johnson. Their evolving, contradictory statements to police and at trial demonstrate that they lacked any credibility. Had the State timely provided Wilcox with the contradictory information contained in the witnesses' untruthful and inconsistent sworn statements, Wilcox would have been able to effectively impeach these witnesses. There is, at the very least, "a reasonable probability that, had the evidence been disclosed to the defense, the

result of the proceedings would have been different." *Kyles*, 514 U.S. at 433-34.

The postconviction court summarily denied Wilcox's claim, finding that it was "conclusively resolved as a matter of law and by reliance on the record." 2PCR-1917. Without hearing any evidence, the court determined that the "sole and complete cause of Defendant's inability to view the contents of the DVD recordings was his decision to proceed while incarcerated in the Broward County Jail" and further noted that the Sheriff "is not required to operate a law office" and provide facilities for the defendant to view his discovery. 2PCR-1918.

Focusing only on the disclosure of DVDs versus transcripts, the lower court gave no consideration to Wilcox's claim that the State had a duty to disclose *the information* contained in the recordings. Whether the information is stored electronically, as media, or in written form is not the issue. Pursuant to *Brady*, the question is whether the State withheld material, exculpatory *information* from the defense.

As to whether the State violated *Giglio*, the recordings themselves are irrelevant. The question is not what Wilcox knew at

trial. Rather, the court must determine whether the State allowed untrue testimony to come before the jury. These questions of fact can only be resolved with evidentiary development. Wilcox seeks remand for an evidentiary hearing, and thereafter, relief is warranted.

C. Wilcox is Entitled to an Evidentiary Hearing on His Claims of Newly Discovered Evidence.

In Claim 5 of his motion for postconviction relief, Wilcox argued that newly discovered evidence establishes that the forensic science used to convict and sentence him to death was neither reliable nor valid.

Newly discovered evidence establishes that the forensic science used to convict and sentence Wilcox to death was neither reliable nor valid, thus, he was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. To the extent that exculpatory impeachment evidence was withheld, the State violated *Brady* and/or *Giglio*.

DNA testing relies upon "the calculation of population frequency statistics and population genetics." *Brim v. State*, 695 So. 2d 268, 270 (Fla. 1997). While the science of DNA is generally

accepted, "there may be problems in a particular case with how the DNA was collected, examined in the laboratory, or interpreted, such as when there are mixed samples, limited amounts of DNA, or biases due to the statistical interpretation of data from partial profiles." Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United States: A Path Forward, at 3-12 (2009).

Contrary to the lower court's findings, these problems are apparent in Wilcox's case. On January 12, 2017, the State of Florida issued a "Notice Pursuant to Rule 3.220(b)(4)" to another death-sentenced inmate, Richard Knight. The notice disclosed that the American Society of Crime Laboratory Directors/Laboratory Accreditation Board advised the Broward Sheriff's Office Crime Laboratory that there was "inappropriate use of the statistic known as the Combined Probability of Inclusion (CPI) to calculate statistical significance of occurrence of genetic profiles when allelic dropout is known and/or suspected to have occurred." The lab gave

notice to defendants wherein "DNA population genetic calculations may have been inaccurately tabulated."[34]

This disclosure demonstrates that the Broward Sheriff's Office Crime Laboratory was incorrectly tabulating population genetic calculations when it was investigating Wilcox's case. This evidence was either withheld from Wilcox at the time of trial or, if not knowingly withheld, constitutes newly discovered evidence. Had Wilcox known of BSO's improper procedures, it would have provided invaluable impeachment of the State's DNA evidence.

Under *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), to obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. *Id.* (citing *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994)). Second, the evidence "must be of such nature that it would probably produce an

---

[34] The State did not provide a notice to Wilcox. Postconviction counsel only received the records after litigating the issue pursuant to Rule 3.852, to which BSO objected.

acquittal on retrial." *Id.* (citing *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991)). Newly discovered evidence satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)).

Obviously, Wilcox did not know, nor could he have known through the use of due diligence, that the Broward Sheriff's Office was improperly tabulating DNA population genetic calculations when investigating his case. This information could only be known once the State disclosed it.

Further, this impeachment evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* "The probative power of DNA typing can be so great that it can outweigh all other evidence in a trial." *Hayes v. State*, 660 So. 2d 257, 263-64 (Fla. 1995). The State knew the impact of DNA evidence on juries and that Wilcox was without the resources or knowledge to challenge it. The State made much of this testimony in closing argument to rebut Wilcox's claim that his cousin, Terrell, is actually responsible for these crimes. This evidence went unchallenged because it was unknown to Wilcox that

the methods and practices of the BSO Crime Laboratory were substandard and scientifically unsound. Had Wilcox been able to impeach the DNA evidence, the jury would have had a reasonable doubt as to his culpability.

To the extent that the State withheld this information from Wilcox in violation of *Brady*, the resulting prejudice is apparent. Had this impeachment information been available to Wilcox, there is, at the very least, a reasonable probability that the result of the proceedings would have been different.

The lower court summarily denied Wilcox's claim, finding that the record reflects there is no newly discovered evidence. 2PCR-1919. This was error.

The very nature of a newly discovered evidence claim is that information is new, and therefore, not part of the existing record. Moreover, despite summarily denying the claim, the court did consider additional evidence—the substance of the BSO notice included in Wilcox's claim, disclosing that it made errors in DNA mixture cases. By considering this non-record evidence without allowing Wilcox to present testimony about the notice, or the

breadth of the errors BSO made, the court denied Wilcox a full and fair hearing on the claim.

The court's errors require remand for an evidentiary hearing, and thereafter, relief is warranted.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Wilcox respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding, or, in the alternative, remand to the trial court for a full and fair opportunity to be heard at an evidentiary hearing, and grant such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ Brittney N. Lacy

BRITTNEY NICOLE LACY
Staff Attorney
Fla. Bar No. 116001
lacyb@ccsr.state.fl.us
ccrcpleadings@ccsr.state.fl.us

PAUL KALIL
Assistant CCRC-South
Fla. Bar No. 174114
kalilp@ccsr.state.fl.us

COLIN WAGNER
Staff Attorney
Fla. Bar No. 1054120
wagnerc@ccsr.state.fl.us

Capital Collateral Regional
Counsel-South
110 S.E. Sixth Street, Suite 701
Fort Lauderdale, Florida 33301
(954) 713-1284 Tel.
(954) 713-1299 Fax

COUNSEL FOR WILCOX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been provided by electronic service to counsel for Appellee, Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, *capapp@myfloridalegal.com*, this 24th day of March, 2024.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Initial Brief is produced in Bookman Old Style 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.210. Counsel further certifies that this brief contains 26,486 words and that a Motion to Exceed Word Limitations is being filed simultaneously with this brief.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

Filing # 206381911 E-Filed 09/06/2024 04:58:13 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-1498

DARIOUS WILCOX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, BROWARD COUNTY, FLORIDA

LOWER CASE NO. 08-3736CF10A

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT BASED ON *ERLINGER V. UNITED STATES*

BRITTNEY N. LACY
Assistant CCRC-South
Florida Bar No. 116001
lacyb@ccsr.state.fl.us

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 174114
kalilp@ccsr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL – SOUTH
110 SE Sixth Street, Suite 701
Fort Lauderdale, Florida 33301

September 6, 2024 **COUNSEL FOR WILCOX**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CITATIONS TO RECORD iii

PRELIMINARY STATEMENT 1

SUMMARY OF ARGUMENTS 1

ARGUMENT 2

Introduction 2

I. *Erlinger v. United States* shows that Wilcox must be granted *Hurst* relief despite this Court's decision in *State v. Poole*. 5

II. The Sixth Amendment, as reiterated in *Erlinger*, requires unanimous jury findings on prerequisite facts to impose death. 19

III. In light of *Erlinger*, prejudice is established as to Wilcox's claim of ineffective assistance of counsel at the penalty phase. 19

CONCLUSION AND RELIEF SOUGHT 20

CERTIFICATE OF SERVICE 22

CERTIFICATE OF COMPLIANCE AND FONT 22

TABLE OF AUTHORITIES

Cases

Alleyne v. United States, 570 U.S. 99 (2013) 18

Apprendi v. New Jersey, 530 U.S. 466 (2000) 3, 16, 17

Blakely v. Washington, 542 U.S. 296 (2004) 17, 18

Coker v. Georgia, 433 U.S. 584 (1977) 12

Erlinger v. United States, 144 S. Ct. 1840 (2024) ..... passim

Kansas v. Carr, 577 U.S. 108 (2016) 13, 14

Mathis v. United States, 579 U.S. 500 (2016) 18

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) 4

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 16

Porter v. McCollum, 558 U.S. 30 (2009) 20

Ring v. Arizona, 536 U.S. 584 (2002) 3, 4, 18

Shepard v. United States, 544 U.S. 13 (2005) 18

State v. Poole, 297 So. 3d 487 (Fla. 2020) ..... passim

Strickland v. Washington, 466 U.S. 668 (1984) 20

Tuilaepa v. California, 512 U.S. 967 (1994) 11, 12

United States v. Booker, 543 U.S. 220 (2005) 18

United States v. Haymond, 588 U.S. 634 (2019) 18

United States v. O'Brien, 560 U.S. 218 (2010) 18

Statutes

Fla. Stat. § 775.082(1) 14

Fla. Stat. § 921.141 (2010) 3, 14, 15, 18

CITATIONS TO RECORD

Citations to the record are as follows: "R(volume)-___", "T(volume)-___", and "S(volume)-___": record, trial transcripts, and supplemental record on direct appeal; "PCR-___": postconviction record on appeal following the lower court's summary denial of Wilcox's initial Rule 3.851 motion; and "2PCR-___": postconviction record for the current appeal.

PRELIMINARY STATEMENT

On June 21, 2024, the United States Supreme Court held in *Erlinger v. United States*, 144 S. Ct. 1840 (2024), that the Sixth Amendment jury right and Fifth Amendment Due Process Clause require that a unanimous jury make any factual determinations beyond a reasonable doubt that a defendant's prior offenses are sufficient to impose a penalty enhancement.

Mr. Wilcox is before this Court on appeal of his Rule 3.851 motion in which he asserted that his death sentence violates the Sixth Amendment pursuant to *Hurst v. Florida*, 577 U.S. 92 (2016), because a judge, not a jury, made all required findings of fact before imposing his death sentence. Wilcox's jury made only an advisory recommendation for death by a bare majority vote of 7–5. It made no findings of fact concerning the existence or weight of aggravation or mitigation.

SUMMARY OF ARGUMENTS

I. The Supreme Court's decision in *Erlinger* is dispositive here—Mr. Wilcox is entitled to *Hurst* relief because the judge alone made all findings of fact necessary to impose a death sentence. The lower court's application of *State v. Poole*, 297 So. 3d. 487 (2020), to deny Mr. Wilcox *Hurst* relief left intact a death sentence imposed in violation of the Sixth Amendment and Fourteenth Amendment Due Process Clause. *Erlinger*

establishes that *Poole* was wrongly decided and is irreconcilable with the Supreme Court's Sixth Amendment and Due Process jurisprudence. Wilcox is entitled to a new penalty phase that comports with the requirements of *Hurst v. Florida* and *Erlinger*.

II. Mr. Wilcox's sentence violates the Sixth Amendment because the jury did not unanimously find beyond a reasonable doubt each element required to impose a death sentence. The *Erlinger* opinion reaffirms the holding in *Hurst v. Florida*, that a unanimous jury must find the elements that sufficient aggravating circumstances exist and that any mitigating circumstances are insufficient to outweigh the aggravating circumstances. Wilcox is entitled to unanimous jury findings as to every element required to impose death. Relief is warranted.

III. The *Erlinger* decision further establishes that Mr. Wilcox was prejudiced by penalty phase counsel's ineffective assistance when he failed to investigate and present a wealth of available mitigation. In light of the substantial mitigation presented in postconviction and the absence of any jury-found aggravation, prejudice is clear. Penalty phase relief is warranted.

ARGUMENT

Introduction

Under Florida's statute, death eligibility is dependent upon a finding of

certain statutorily defined facts in addition to the jury verdict unanimously finding the defendant guilty of first-degree murder. § 921.141, Fla. Stat. (2010). At the time of Wilcox's trial, Florida's capital sentencing scheme permitted a jury to return only a recommendation as to penalty and allowed the judge alone to find the statutorily defined facts necessary to impose a death sentence. § 921.141(3). In *Hurst v. Florida*, the Supreme Court struck down Florida's capital sentencing scheme as violative of the Sixth Amendment right to a jury trial and Fourteenth Amendment Due Process Clause, relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). *Hurst v. Florida* held that a jury must find the additional statutorily defined facts required to render the defendant death eligible. 577 U.S. at 97. These statutorily defined facts include both that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id.* at 100. "[A] jury's mere recommendation is not enough." *Id*. at 94.

On remand, this Court held in *Hurst v. State*, that, in addition to the Sixth Amendment and due process requirements set forth in *Hurst v. Florida*, the Eighth Amendment requires a unanimous jury to find beyond a reasonable doubt that statutory aggravating circumstances exist, that the aggravating circumstances are sufficient to impose the death penalty, and

that the aggravating circumstances outweigh the mitigating circumstances. 202 So. 3d 40, 53-59 (Fla. 2016). Thereafter, this Court applied *Hurst* error retroactively to cases final after the Supreme Court decided *Ring*. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

The Supreme Court had previously determined in *Ring* that "if a State makes an increase in a defendant's punishment contingent on the finding of a fact, that fact—*no matter how the State labels it*—must be found by a jury beyond a reasonable doubt," 536 U.S. at 602 (emphasis added). *Erlinger* clarified that a jury determination is required for "even seemingly straightforward factual questions." 144 S. Ct. at 1860. *Erlinger* reaffirms the holdings in both *Hurst v. Florida* and *Hurst v. State*: The Sixth Amendment right to a jury trial and the Fourteenth Amendment Due Process Clause require that "virtually 'any fact' that 'increase[s] the prescribed range of penalties to which a criminal defendant is exposed'" must be resolved by a unanimous jury beyond a reasonable doubt. 144 S. Ct. at 1851 (quoting *Apprendi*, 530 U.S. at 490).

Despite the fact that Wilcox's jury made no specific determinations as to the statutorily defined facts necessary to impose death, including the existence of sufficient aggravation and the insufficiency of mitigation to overcome aggravation, and the fact that his case was final more than a

decade after *Ring*, the postconviction court denied Wilcox *Hurst* relief. The postconviction court relied on *State v. Poole*, wherein this Court receded from *Hurst v. State* and determined that a death sentence could be imposed whenever a jury found one or more statutorily enumerated aggravating circumstances beyond a reasonable doubt either at the guilt or penalty phase. 297 So. 3d at 502-03. *Erlinger* establishes that Wilcox is entitled to *Hurst* relief because *Poole* was wrongly decided and the application of *Poole* to Wilcox left intact a death sentence imposed in violation of the Sixth Amendment and Due Process Clause.

I. *Erlinger v. United States* shows that Wilcox must be granted *Hurst* relief despite this Court's decision in *State v. Poole*.

The *Erlinger* decision conclusively establishes that *Poole* was wrongly decided. In *Erlinger*, the Supreme Court overturned a sentencing court's factual findings regarding a defendant's prior felony convictions for purposes of increasing the defendant's punishment where there existed a question as to whether the convictions qualified to enhance the penalty. 144 S. Ct. 1840. Although the sentencing judge could find the existence of the conviction itself and its underlying elements, the Supreme Court held that a judge can find no more than that without violating the Sixth Amendment. *Id*. at 1854.

Erlinger reaffirms the requirements of *Hurst v. Florida*, where the Supreme Court determined—as a matter of federal constitutional law—that

the facts "that sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances" are elements of the offense that must be found by a jury. 577 U.S. at 100. *Hurst v. Florida* reasoned that because Florida's capital sentencing scheme makes specific, enumerated findings prerequisite to death sentences, those findings must be found by a jury. *Id.* at 99-100 ("[T]he Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'") (quoting § 775.082(1), Fla. Stat.).

1. The existence of a concurrent felony does not abrogate the requirement that the jury must make fact findings as to the sufficiency of aggravation as required by *Hurst v. Florida*.

Poole, however, has altogether abandoned *Hurst v. Florida's* requirement that the jury determine whether "sufficient aggravating circumstances exist." 577 U.S. at 100. As *Erlinger* establishes, *Poole's* reliance on the existence of concurrent felonies, without jury findings as to aggravation, is not alone sufficient to impose a death sentence. The lower court's reliance on Wilcox's concurrent armed kidnapping and armed robbery convictions to satisfy the "prior or contemporaneous violent felony aggravator" is improper. 2PCR-1907.

Wilcox's jury was instructed on four aggravators: 1) he was convicted

of a prior felony, during which he must have come into contact with the victim; 2) the crime was committed while Wilcox was engaged in or attempting to commit robbery, kidnapping, or burglary; 3) the "dominant reason" the crime was committed was to avoid a lawful arrest; and 4) the crime was committed in a cold, calculated and premeditated manner ("CCP"). T21-1258-59. The jury was told that if it found beyond a reasonable doubt that an aggravating factor existed, it must also assign weight to the factor. T21-1265. The jury was also instructed on five nonstatutory mitigators.

Wilcox's jury returned a recommendation for death by only a bare majority vote of 7–5. Although the aggravators on which the jury was instructed require factual determinations and assignments of weight, the jury made no such findings, let alone unanimous findings beyond a reasonable doubt. The trial court imposed a death sentence after the judge alone made the factual findings that all four aggravating circumstances and five non-statutory mitigators exist. R5-867-71. On appeal, this Court struck the "avoid arrest" aggravator leaving three aggravating circumstances at issue.

Because the jury returned only a recommendation for death without specifying its basis or making any findings as to aggravation or mitigation, *Hurst* error is clear. The trial court was not permitted to usurp the role of the jury and make its own findings; the same is true in postconviction.

Poole is further distinguishable from Wilcox's case. The *Poole* jury was instructed on both the contemporaneous felony aggravator and the "in the course of a felony" aggravator. 297 So. 3d at 493. This Court held that because "the jury in Poole's case unanimously found that, during the course of the first-degree murder . . . Poole committed the crimes of attempted first-degree murder[,] . . . sexual battery[,] . . . armed burglary, and armed robbery," "this satisfied the requirement that a jury unanimously find an aggravating circumstance beyond a reasonable doubt." *Id*. at 508.

In Wilcox, the State was clear that the concurrent felonies were not to be considered in support of the prior or contemporaneous felony aggravator; and in sentencing, the trial court clarified that it was not relying on the convictions for that aggravator.[1] T21-1259; T23-1394. Instead, the State presented the concurrent felonies to support "in the course of a felony" aggravation. Much like in *Erlinger*, the inquiry here did not end with the mere existence of concurrent convictions; the jury was required to consider whether the crime "was committed while [Wilcox] was engaged or an accomplice in the commission or attempt to commit the crime of robbery, burglary or kidnapping." T21-1259. The jury made no such finding, yet in

[1] Mr. Wilcox respectfully submits that by failing to pursue this argument below, the State has waived the issue for this appeal.

postconviction, the court denied Wilcox's *Hurst* claim.

As reiterated in *Erlinger*, findings of fact necessary to enhance punishment, "even seemingly straightforward factual questions," require a jury determination. 144 S. Ct. at 1860. The postconviction court is not permitted, as it did here, to create its own finding out of whole cloth. The jury was not instructed to consider the convictions for the contemporaneous felony aggravator; yet, the postconviction court determined that the existence of the concurrent felonies alone satisfied the requirements for the contemporaneous aggravator, and therefore, sufficient aggravation existed to overcome *Hurst* error. 2PCR-1907. In doing so, the postconviction court usurped the role of the jury in violation of the Sixth Amendment and wholly ignored the dictates of *Hurst v. Florida*.

In support of the prior or contemporaneous violent felony aggravator, the jury was instructed to consider Wilcox's felony conviction from age 14.[2] As argued in the initial brief, testimony taken at the postconviction hearing establishes Wilcox was not aware his codefendant intended to rob or harm anyone, he did not plan the robbery, he did not carry a gun, and he did not encourage Duane Smith, his co-defendant. After the crime, Wilcox got out of

[2] Mr. Wilcox was questioned without an adult and pled nolo contendere in exchange for a 10-year sentence.

the car and grabbed money from the ground. *See* 2PCR-1315-23. The jury was told that it must find that Wilcox "came into contact" with the victim. T21-1258. The jury made no such finding.

Erlinger's reasoning informs the analysis here. As the Supreme Court noted, in arguing aggravating factors, "[o]ften, a qualitative assessment about 'the character and relationship' of the offenses may be required." 144 S. Ct. at 1855 (quoting *Wooden v. United States*, 595 U.S. 360, 369 (2022)).

As for the final factor in aggravation, that the crime was "cold, calculated, and premediated," the jury received lengthy instructions requiring factual determinations but yet again made no findings.

Without jury findings, and given that 5 jurors voted for life, it is obvious the jury did not find each aggravator unanimously and beyond a reasonable doubt. Additionally, there is no indication the jury considered or weighed the sufficiency of aggravation. Nor is there any way to determine whether the jurors for death considered aggravating circumstances they should not have. Indeed, there is no telling whether the seventh juror would have voted differently without considering the avoid arrest aggravator this Court struck on direct appeal. As clarified in *Erlinger*, reliance on these aggravators without a jury determination as to their existence and sufficiency violates the Sixth Amendment and Due Process Clause.

2. *Poole* further circumvents *Hurst v. Florida* and the Sixth Amendment by permitting judges sitting alone to find that insufficient mitigating circumstances exist to outweigh the aggravating circumstances.

In *Poole*, this Court determined that *Hurst v. Florida* does not control the constitutionality of section 941.121(3)(b) because *Hurst* concerns "eligibility" to receive a death sentence and a judge's finding under the statute is a "selection finding." 297 So. 3d at 501, 503. Despite *Hurst v. Florida*'s express language to the contrary, *Poole* found that a "selection finding" is not an element under *Apprendi*, because it is "mostly a question of mercy" that is too "subjective" to "be analogized to an element of a crime." *Id.* at 503. And further, the *Poole* Court noted, even if the "selection finding" is a fact, it does not "increas[e] the legally authorized range of punishment," but rather the finding of one or more aggravators does. *Id.* In doing so, the *Poole* Court has rewritten *Hurst* error. As *Erlinger* establishes, *Poole*'s holding is incorrect on each of these points.

i. *Poole*'s eligibility–selection distinction is irreconcilable with *Apprendi* and its progeny.

Relying on Eighth Amendment jurisprudence, *Poole* cites *Tuilaepa v. California*, 512 U.S. 967 (1994), for the general proposition that the Supreme Court's death penalty cases "'address two different aspects of the capital decision making process: the eligibility decision and the selection decision.'"

297 So. 3d at 501 (quoting *Tuilaepa*, 512 U.S. at 971). However, *Tuilaepa* is inapposite; the language *Poole* omitted from the quotation reveals why:

> our capital punishment cases *under the Eighth Amendment* address two different aspects of the capital decision making process: the eligibility decision and the selection decision.

512 U.S. at 971 (emphasis added) (citing *Coker v. Georgia*, 433 U.S. 584 (1977)). *Tuilaepa*'s citation to *Coker* is telling. *Coker* held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape." 433 U.S. at 592. Thus, the "eligibility" inquiry referenced in *Tuilaepa* determines whether the offense is categorically eligible for a death sentence as a matter of Eighth Amendment law. This explains why *Tuilaepa* addressed only the issue of "whether three of [California's] penalty factors are unconstitutionally vague under . . . the Cruel and Unusual Punishments Clause of the Eighth Amendment . . ." *Tuilaepa*, 512 U.S. at 969-70. *Tuilaepa* is distinguishable on all other relevant grounds. Most notably, the *Tuilaepa* jury made specific findings during the guilt phase as to both the first-degree murder charge and the "special circumstances" which included a separate finding that the "murder [occurred] during the commission of a robbery." *Id.* at 970. At penalty, the jury was further instructed "to consider the relevant sentencing factors" before it returned a unanimous determination for death. *Id.* at 970. Accordingly, *Tuilaepa* raises no relevant Due Process Clause or

Sixth Amendment issue or authority upon which this Court can rely on to limit the impact of *Hurst v. Florida*.

Moreover, the subjectivity of section 921.141(3)(b) does not affect whether it requires findings of fact that implicate *Apprendi*. *Poole* cites another Eighth Amendment case, *Kansas v. Carr*, 577 U.S. 108, 119 (2016), for the proposition that "whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy," placing section 921.141(3)(b) "in stark contrast to the 'aggravating-factor determination,' which is 'a purely factual determination.'" 297 So. 3d at 503. Similar to *Tuilaepa*, *Carr* contained no holding directly relevant to the Sixth Amendment and Due Process Clause issue here. 577 U.S. at 118-19. As relevant to *Poole*, *Carr* addressed the issue of whether "the Eighth Amendment requires capital-sentencing courts in Kansas 'to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt.'" *Id.* (internal citation omitted). *Carr* does not imply that a judge, rather than a jury, should decide the "question of mercy." *Id.* at 115. In fact, in *Carr*, a jury "found unanimously that the State proved the existence of the four aggravating circumstances beyond a reasonable doubt *and that those aggravating circumstances outweighed the mitigating circumstances*." *Id.* at 115 (emphasis added).

If *Carr* has any relevance at all to Florida's death penalty scheme, it stands for two propositions. First, a jury is capable of performing the section 921.141(3)(b) balancing inquiry regardless of that inquiry's "subjectivity." *Id.* at 115. And second, the question of whether the facts establishing mitigating circumstances exist is separate from whether the mitigating circumstances themselves outweigh the aggravating circumstances, warranting "mercy." *Id.* at 119 ("It *would* be possible . . . to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance, leaving the judgement whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof."). Notably, Wilcox's jury was not given a mercy instruction.

Section 921.141(3)(b) needs to be *affirmatively answered* in the negative before Section 921.141(3) is satisfied such that it "results in findings by the court that such person shall be punished by death." § 775.082(1), Fla. Stat. Section 921.141(3) is, thus, an element. Three implicit factual findings dictate the finding of this element: 1) whether the facts establishing the mitigating circumstances exist; 2) what weight to assign each mitigating circumstance; and 3) whether the mitigating circumstances outweigh the aggravating circumstances. *Poole* allows a judge to answer all three of these factual questions and find the element in violation of *Apprendi* and its

progeny.

In every application of Section 921.141(3)(b), the judge wields the authority to reject the existence of the facts establishing mitigating circumstances outright, thereby exposing the defendant to a death sentence. Whether the state has proven one aggravator or sixteen, Section 921.141(3)(b) as construed by *Poole* allows a judge to deny that *any* facts establishing mitigation exist. Similar risks apply to the second and third implicit factual findings. Under *Poole*, the judge has the authority to negate the established mitigating circumstances by assigning them no or little weight without the constitutionally prescribed check—*the jury*.

ii. *Erlinger* demonstrates that the *Poole* decision is antithetical to the purpose of the jury right.

Erlinger highlights that this Court's limiting of *Hurst v. Florida* based on the semantic eligibility-selection distinction contradicts the Framers' purpose underlying the jury right. 144 S. Ct. at 1848-51. *Erlinger* traced the Framers' purpose in adopting the Fifth Amendment's Due Process Clause and Sixth Amendment's jury provisions, determining that both work in conjunction as "checks on governmental power [that] the framers appreciated, were 'anchors' essential to prevent a slide back toward regimes like the vice-admiralty courts they so despised." 144 S. Ct. at 1850 (quoting Letter from T. Jefferson to T. Paine (July 11, 1789), reprinted in 15 Papers of Thomas

Jefferson 266, 269 (J. Boyd ed. 1958)). In the Pre-Revolutionary War Era, British imperial authorities thought "colonial juries 'were not to be trusted' because they found for defendants too often," 144 S. Ct. at 1848, so they manipulated jurisdictional rules to "direct[] more and more cases to vice-admiralty courts where crown-appointed judges, rather than local juries, decided the defendant's fate." *Id.* (citing *Jones v. United States*, 526 U.S. 227, 245-46 (1999). In this historical context, the "founders saw representative government *and trial by jury* as 'the heart and lungs' of liberty*."* *Id*. at 1848 (emphasis added) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)).

Recognizing the jury right as both necessary to securing liberty and historically threatened by seemingly innocuous procedural rules, the Framers sought to codify a jury right immune to threats posed by pretextual procedural manipulations and to modern "sentencing innovations." *Id*. at 1851; *see, e.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340, n.3 (1979) (Rehnquist, J., dissenting) (noting extension of imperial vice-admiralty jurisdiction to deprive defendants of jury right); *Apprendi*, 530 U.S. 466. Thus, the Framers adopted the Due Process Clause and the Sixth Amendment, which checked government overreach by "ensur[ing] that a judge's power to punish would 'derive wholly' from, and remain always 'controlled' by the jury

and its verdict." *Erlinger*, 144 S. Ct. at 1849 (quoting *Blakely v. Washington*, 542 U.S. 296, 306 (2004)). Thereby, the Framers secured the jury's centrality in judicial proceedings as "a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306; *Erlinger*, 144 S. Ct. at 1850.

From *Apprendi* to *Erlinger*, the Supreme Court has consistently read the Due Process Clause and the Sixth Amendment in light of the Framers' purpose in adopting them: to protect against the familiar threat "that the jury right could be lost not only by gross denial, but by erosion." *Apprendi*, 530 U.S. at 483 (quoting *Jones,* 526 U.S. at 247-48). *Apprendi* gave substance to the Framers' purpose by demanding close scrutiny when faced with a "constitutionally novel and elusive distinction" such as that "between 'elements' and 'sentencing factors.'" 530 U.S. at 494. *Erlinger* connects the Framers' purpose to the narrative thread running through *Apprendi* and its progeny. Specifically, states and the federal government have "sought to experiment with new trial and sentencing practices. But in case after case, [the Supreme] Court has cautioned that, while some experiments may be tolerable, all must remain within the Fifth and Sixth Amendments' guardrails." *Erlinger*, 144 S. Ct at 1850 (citations omitted); *see, e.g.*, *Apprendi*, 530 U.S. at 477 (rejecting "merely using the label 'sentence enhancement' to

describe" an element of the offense and avoid jury scrutiny); *Ring*, 536 U.S. at 609 (rejecting labeling elements "aggravating circumstances"); *Blakely*, 542 U.S. at 300, 302 (rejecting "exceptional sentence" based on facts not in guilty plea or jury verdict); *United States v. Booker*, 543 U.S. 220, 236 (2005) (rejecting removal of elements to Federal Sentencing Guidelines to avoid jury); *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (applying *Apprendi* inquiry to "sentencing factor" that increased mandatory minimum); *United States v. Haymond*, 588 U.S. 634 (2019) (plurality opinion) (applying *Apprendi* inquiry to judicial finding that defendant violated supervised release); *Mathis v. United States*, 579 U.S. 500, 505 (2016) (avoiding *Apprendi* issue by limiting judge to "determine what crime, with what elements, the defendant was convicted of"); *United States v. O'Brien*, 560 U.S. 218 (2010) (avoiding *Apprendi*-violative statutory construction); and *Shepard v. United States*, 544 U.S. 13, 25-26 (2005) (same).

Erlinger establishes that *Poole* subverts the Framers' purpose of "ensur[ing] that a judge's power to punish would 'derive wholly' from, and remain always 'controlled' by the jury and its verdict." 144 S. Ct. at 1849 (quoting *Blakely* 542 U.S. at 306). Florida's capital sentencing scheme does not expose a capital defendant to a death sentence unless a judge *affirmatively finds* that "there are insufficient mitigating circumstances to

outweigh the aggravating circumstances." § 921.141(3)(b), Fla. Stat. Because *Poole* permits a judge alone to make that affirmative finding and to make any of the three implicit factual findings such that an affirmative finding under section 921.141(3)(b) is guaranteed, *Poole*'s holding as to section 921.141(3)(b) violates the Sixth Amendment and the Due Process Clause as construed by *Apprendi* and *Erlinger*.

II. The Sixth Amendment, as reiterated in *Erlinger*, requires unanimous jury findings on prerequisite facts to impose death.

As demonstrated throughout Fifth and Sixth Amendment jurisprudence, the Constitution requires "a unanimous jury to find every fact essential to an offender's punishment." *Erlinger*, 144 S. Ct. at 1850. *Erlinger* is clear, a defendant is "entitled to have a jury resolve" the relevant inquiries necessary to enhance his sentence "unanimously and beyond a reasonable doubt." *Id*. at 1852. There can be no debate that the jury in Wilcox's case failed to return any findings as to either prong of section 921.141(3).

III. In light of *Erlinger*, prejudice is established as to Wilcox's claim of ineffective assistance of counsel at the penalty phase.

Erlinger impacts this Court's analysis of Claim I of Wilcox's Rule 3.851 appeal wherein Wilcox asserts that penalty phase counsel was ineffective for failing to investigate and present mitigation. Prejudice is established if there is "a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The postconviction court denied Wilcox's claim finding "overwhelming evidence of aggravation and minimal evidence of mitigation," noting that "the jury and trial judge were presented with abundant evidence to support the finding beyond a reasonable doubt of a prior violent felony aggravator and the cold, calculated, and premediated [sic] aggravator." 2PCR-1916. This determination is not only irreconcilable with the record, but also contrary to *Hurst v. Florida* and *Erlinger*.

The prejudice analysis requires the Court to consider "the totality of the available mitigation evidence" presented both at trial and in postconviction and "reweig[h] it against the evidence in aggravation. *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)) (alteration in original). In light of *Erlinger*, the Court is left with no aggravation and a wealth of mitigation not previously presented. Prejudice is clear; therefore, Wilcox is entitled to relief.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Wilcox respectfully urges this Court to reverse the lower court and grant *Hurst* relief and/or a new penalty phase proceeding due to ineffective assistance of counsel.

Respectfully submitted,

/s/ Brittney N. Lacy

BRITTNEY N. LACY
Staff Attorney
Fla. Bar No. 116001
lacyb@ccsr.state.fl.us
ccrcpleadings@ccsr.state.fl.us

PAUL KALIL
Assistant CCRC-South
Fla. Bar No. 174114
kalilp@ccsr.state.fl.us

Capital Collateral Regional
Counsel-South
110 S.E. Sixth Street, Suite 701
Fort Lauderdale, Florida 33301
(954) 713-1284 Tel.
(954) 713-1299 Fax

COUNSEL FOR WILCOX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been provided by electronic service to counsel for Appellee, Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, *capapp@myfloridalegal.com*, this 6th day of September 2024.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Initial Brief is produced in Arial 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.210. Counsel further certifies that this brief is not more than 20 pages.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South