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 2

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

Filing # 209127202 E-Filed 10/18/2024 04:22:44 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

REPLY BRIEF OF APPELLANT

BRITTNEY N. LACY
Assistant CCRC-South
Florida Bar No. 116001
lacyb@ccsr.state.fl.us
pleadings@ccsr.state.fl.us

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 174114
kalilp@ccsr.state.fl.us

MICHAEL T. COOKSON
Staff Attorney
Florida Bar No. 1057838
cooksonm@ccsr.state.fl.us

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

October 16, 2024

COUNSEL FOR WILCOX

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT IN REPLY 1

REPLY TO ARGUMENT I 1

Penalty Phase Ineffective Assistance of Counsel 1

A. Penalty Phase Investigation 1

B. Mental Health Mitigation 11

C. Prejudice 21

D. Challenging the Aggravation 30

E. Credibility Findings 31

REPLY TO ARGUMENT II 34

Hurst Error 34

REPLY TO ARGUMENT III 35

CONCLUSION AND RELIEF SOUGHT 36

CERTIFICATE OF SERVICE 37

CERTIFICATE OF COMPLIANCE AND FONT 37

TABLE OF AUTHORITIES

Cases

Bevel v. State, 983 So. 2d 505 (Fla. 2008) 30

Caldwell v. Mississippi, 472 U.S. 320 (1985) 29

Dunn v. Reeves, 594 U.S. 731 (2021) 1, 2, 3, 4

Espinosa v. Florida, 505 U.S. 1079 (1992) 29

Gideon v. Wainwright, 372 U.S. 335 (1963) 4

Hayward v. State, 24 So. 3d 17 (Fla. 2009) 30

Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) 17

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) 34

Poole v. State, 297 So. 3d 487 (Fla. 2020) 34

Porter v. McCollum, 558 U.S. 30 (2009) 20, 22, 28

Reaves v. State, 639 So. 2d 1 (Fla. 1994) 30

Roberts v. Dretke, 356 F.3d 632 (5th Cir. 2004) 5, 6

Snelgrove v. State, 921 So. 2d 560 (Fla. 2005) 29

State v. Mullens, 352 So. 3d 1229 (Fla. 2022) 18, 19

Strickland v. Washington, 466 U.S. 668 (1985) 4, 6

Wiggins v. Smith, 539 U.S. 510 (2003) 11, 21, 23

Wilcox v. State, 143 So. 3d 359 (Fla. 2014) 1

Williams v. Taylor, 529 U.S. 362(2000) 24

Other Authorities

Alice Thornewill, et. al., A Matter Of Life Or Death - Mental Health Experts Play A Key Role In Evaluating The Mitigating Evidence That Informs A Defendant's Sentence, Vol 47, No. 7, July/August 2016 13

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, § 10.11 (2003) 12

American Psychiatric Association, *Antisocial Personality Disorder*, *in* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 301.7 (5th ed. 2013) 15, 17

American Psychiatric Association, *Major Depressive Disorder: Diagnostic Features*, *in* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 163 (5th ed. 2013) 16

American Psychiatric Association, *Posttraumatic Stress Disorder*, *in* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 309.81 (5th ed. 2013) 16

ARGUMENT IN REPLY

REPLY TO ARGUMENT I

Penalty Phase Ineffective Assistance of Counsel

The State avers that trial counsel was not deficient because he "obtained all the available records in Wilcox's life and had two qualified mental health experts review them," while also arguing that any time constraints were the fault of Wilcox's choice to proceed pro se. Further, the State maintains Wilcox was not prejudiced because the evidence presented in postconviction is "more details on the same information." State's Answer Brief-41 ("AB"). These arguments are belied by the record[1] and misconstrue the applicable law.

A. Penalty Phase Investigation

Relying on *Dunn v. Reeves*, 594 U.S. 731 (2021), the State claims that capital litigants are required to present the testimony of "[e]very defense counsel involved in the discussion regarding the

[1] The State likewise misconstrues the facts of the case. Wilcox's cousin, Richaunda Curry did not witness an altercation between Wilcox and Nimoy Johnson. AB-2. She witnessed "Johnson angrily approach [Willie] *Ward* and Ward's friend. . ." *Wilcox v. State*, 143 So. 3d 359, 366 (Fla. 2014) (emphasis added).

issue being raised" and, "the failure to account for all counsel involved in the decision is fatal to any ineffectiveness claim." AB-45.

The State's invocation of *Reeves* as the source of a *per se* rule is improper. Mr. Reeves raised an IAC claim based on his trial counsel's failure to hire an expert to develop mitigation. 594 U.S. at 733. The U.S. Supreme Court found the state court's denial of Reeves' claim was reasonable under AEDPA because the "record was silent as to the reasoning behind counsel's actions." *Id.* at 743 (quoting *Reeves v. State*, 226 So. 3d 711, 751 (Ala. Crim. App., 2016)).

Reeves rejected the proposition that counsel's testimony is strictly necessary to establish IAC. The Court reasoned:

> [T]he Alabama court reasonably concluded that the incomplete evidentiary record—which was notably "silent as to the reasons trial counsel … chose not to hire Dr. Goff or another neuropsychologist"—doomed Reeves' belated efforts to second-guess his attorneys. The Eleventh Circuit, however, recharacterized this case-specific analysis as a "categorical rule" that *any* prisoner will *always* lose if he fails to call and question "trial counsel regarding his or her actions and reasoning."
>
> **We think it clear from context that the Alabama court did not apply a blanket rule,**

> **but rather determined that the facts of this case did not merit relief.**

Id. at 742 (emphasis added) (internal citations omitted).

Relying on this non-existent *per se* rule, the State argues Wilcox's IAC claim must fail because *some* lawyers from the Office of Criminal Conflict and Regional Counsel ("CCCRC") assigned at the guilt phase did not testify. While the months of CCCRC's failures to investigate and prepare Wilcox's case provide context to the incompetent and negligent representation overall, the crux of Wilcox's IAC claim concerns penalty phase representation.

The record is not silent on this issue. Attorney Joseph Walsh's and mitigation specialist Kerry Sheehan's unrebutted testimony establishes that no attorneys had done any work on Wilcox's case. No mitigation specialist or investigator was hired until after Wilcox moved to proceed pro se in November, 2008, which meant no records were sought for the initial nine months of the case, nor were any mitigation interviews conducted. 2PCR-977. After reappointment, Walsh received no files from CCCRC. 2PCR-1080. The issue in *Reeves* was whether the defendant was required to "call and question 'trial counsel regarding his or her actions and

reasoning.'" *Reeves*, 594 U.S. at 742. Where the record reflects that CCCRC counsel did no work on the case, there are no "actions and reasoning" to question them about. *Id.*

The State blames Wilcox for his counsel's failures, pointing to is choice to proceed pro se at the guilt phase as the sole reason counsel was "severely limited" in time to prepare. AB-49. This argument is fundamentally flawed for two reasons: First, it exempts from scrutiny CCCRC, the entity appointed to represent Wilcox; and second, it fails to acknowledge trial counsel's own delays and failures in handling Wilcox's penalty phase proceeding.

The Sixth Amendment right to counsel "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1985). "The purpose is simply to ensure that criminal defendants receive a fair trial." *Id.* at 689. The right to effective assistance of counsel is, at base, structural. *See Id.; cf. Gideon v. Wainwright*, 372 U.S. 335 (1963) (deriving the right to appointed indigent defense from constitutional "emphasis on procedural and substantive safeguards designed to assure fair trials").

CCCRC was appointed to maintain the integrity of the adversarial process. Instead, it fell below an objective standard of reasonableness by doing nothing on Wilcox's case for 29 weeks. By the time CCCRC retained Sheehan and Walsh, the attorney-client relationship between Wilcox and his appointed counsel, CCCRC, had disintegrated. Rather than acknowledge CCCRC's profound failures, which drove Wilcox to proceed pro se,[2] the State praises Walsh for giving "this case his best." AB-58. Wilcox cannot be blamed for the chaos and dysfunction at CCCRC, whether due to funding, "a shortage" of attorneys qualified to handle death penalty cases , or simply neglect. *See* 2PCR-1050.

The State compares Wilcox's choice to proceed pro se to *Roberts v. Dretke*, 356 F.3d 632 (5th Cir. 2004), where the defendant actively impeded trial counsel's efforts and then claimed counsel was ineffective. AB-50. The State's reliance on *Roberts* is misplaced. There is no comparison between Roberts, who "advised [trial counsel] of his desire to be convicted and sentenced to death,"

[2] The State complains Wilcox never mentioned his concerns in court; however, Wilcox did tell the court when moving to proceed pro se and filing his own discovery motions. *See* R1-51-59; T6-23.

Roberts, 356 F.3d at 634, and Wilcox, who maintained his innocence and made every effort to cooperate with counsel. Wilcox assisted counsel in the investigation and cooperated with the defense expert. Indeed, Wilcox pleaded that CCCRC *do more* to assist him.

"A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Contrary to the State's argument, Wilcox's choice does not create a "special consideration" of counsel's performance. AB-49. The fact that Wilcox was compelled to proceed pro se does not negate counsel's failures in the months leading up to that moment nor after reappointment.

With five months to prepare, Walsh waited five weeks to hire a mitigation specialist and more than two months to begin witness interviews. 2PCR-1081, 996, 729. Walsh squandered months of critical preparation time. The State contends that these delays had no bearing on Sheehan's and Walsh's representation. AB-58. Yet, both admitted they couldn't do what needed to be done. 2PCR-

1019. Sheehan explained that the lack of time is precisely why she felt she "didn't do a good enough job." 2PCR-1019.

This is not the case, as the State suggests, where trial counsel failed to "scour the globe on the off-chance something will turn up," or drew "a line when they have good reason to think further investigation would be a waste." AB-65. Sheehan spent less than 40 hours, substantively, investigating Wilcox's mitigation. *See* 2PCR-714-26.

The State discounts Walsh's case load and personal matters, arguing that his "other commitments did not affect his work on the case." AB-19. This argument is belied by the record. Walsh *did* admit that his personal troubles "would have some effect on [his] performance." Walsh further explained,

> The amount of effect it would have, I can't say, but certainly at the time it was a pretty important thing for me to deal with. I think I had a number of appointments with doctors. I had to have scans done to kind of monitor the size of my spleen and my liver. So, it certainly was a period of time that was. . ., it was remarkable for me.

2PCR-1092 (ellipses in original).

The State points out that on cross examination, when asked whether he felt working on another case "detracted" from his ability to represent Wilcox, Walsh responded, "you're going to have to walk and chew gum at the same time doing work like this." 2PCR-1081. But his answer did not end there:

> You know, one thing that I hadn't discussed earlier was, something I had completely forgotten about, and I know I had had the board certification test, the preparation for that test, but the thing I had forgotten about was that I had a medical issue pop up kind of . . .

2PCR-1081. In fact, Walsh experienced a serious cancer scare and underwent months of doctor's appointments. 2PCR-1083. Reflecting back, he said, "that was definitely something that contributed, I think, at the time." 2PCR-1083.

Nevertheless, Walsh waited until just *two weeks* before the penalty phase to file his only motion for a continuance. R3-527. The State contends that Walsh "could not have a year or two to prepare a mitigation case," because the same jury was to be used. AB-49. Counsel requested time citing outstanding records and an intention to file additional motions, including moving for a new jury panel

(arguing the existing panel was not death qualified). S15-511-18. Frustrated that Walsh had not brought the records issue to its attention prior, the court denied the motion to continue and indicated it would deny a motion for a new jury panel. S15-512, 514, 518. The court mentioned that six months had passed since the jury was present,[3] noting the difficulty in everyone agreeing on dates, (518-19); but did not find this as a basis for denying the continuance. Moreover, Walsh failed to raise any of the concerning hardships he faced.

The State attempts to bolster what little work was done by cherry-picking from Sheehan's testimony, noting that she "routinely reviewed records and prepared summaries of them" for Walsh. AB-16. Sheehan prepared just four summaries of her six witness interviews, one of which was simply a compilation of the information found in the other three summaries. *See* 2PCR-693, 700, 707, 728. Sheehan interviewed each of the six witnesses only once, three of whom were interviewed as a group in "an introductory interview." 2PCR-996. Attempting to detract from this

[3] Guilt phase ended four and a half months earlier.

fact, the State points to the length of the interviews. AB-15-6. Billing records show that Sheehan and Walsh spent less than 5.5 hours interviewing *all six* witnesses. 2PCR-714-26.

The State contends that the group interview spanned 3.5 hours and Lawanda's interview lasted 3 hours. AB-56, 17. Sheehan testified that the former lasted "probably three, three and a half hours," after looking at billing records showing 4.80 hours for the field interview, which she clarified "also includes travel time" from Palm Beach to South Miami and back. 2PCR-1027.

Similarly, the State cites to Walsh's recollection that he met with Lawanda for "about three hours or so;" however, billing records show that the meeting was much shorter. *See* 2PCR-722. The entire trip lasted 4.40 hours, which included driving roundtrip from Palm Beach to Miami, entering the jail, interviewing Lawanda, traveling to meet with Cory Waters, and interviewing Waters.

The State ignores Sheehan's testimony explaining what it takes to conduct a proper mitigation investigation, which includes building trust with clients and witnesses over time to gather complete and sensitive information. 2PCR-970, 987-88, 990-91.

Sheehan testified that mitigation is "an ongoing process," noting, "I don't think you could get to know someone in five hours. . ." 2PCR-990-91.

The State excuses trial counsel's failure to develop the mitigation witnesses further. However, under *Strickland,* the issue is "not whether counsel should have presented" mitigating evidence, but rather "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was itself reasonable." *Wiggins v. Smith,* 539 U.S. 510, 523 (2003).

Not only did Walsh fail to offer any reason, strategic or otherwise, for not calling Wilcox's additional family members, he could not have made a reasonable strategic decision to forgo presentation of mitigating evidence because he had not conducted a reasonable investigation. *See Id.*

B. Mental Health Mitigation

In a capital case, 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." American Bar Association Guidelines for the

Appointment and Performance of Counsel in Death Penalty Cases, § 10.11, Commentary (2003). Counsel waited more than three months to hire any expert, (2PCR-744), and contrary to the State's position that Rapa was "an experienced and well-trained psychologist," (AB-63), nothing in the record supports that Rapa was the *appropriate* expert. A Ph.D. does not make someone "well-trained" or even qualified to conduct a mitigation evaluation in a capital case, even if they have forensic experience:

> Mitigation evaluations differ from other types of forensic mental health assessments in that they require a thorough biographical examination of the experiences, life stages and capabilities that may have affected a defendant's life course. Mitigation evaluations are comprehensive in scope and therefore often lengthy, typically involving multiple interviews and a review of all available records. As a result, mitigation evaluations may span over the course of weeks or even months to ensure that sufficient attention is given to the defendant's history.
>
> Despite being retained by the defense, mitigation evaluations must be objective and based on a thorough understanding of how certain factors may be mitigating. Forensic mental health professionals must understand how developmental factors (such as early childhood abuse), criminogenic factors and clinical factors affect an individual's risk level.

> An examination of protective factors, such as social support, education and resilient personality traits, is also important because these factors may buffer the effect of risk factors.

Alice Thornewill, et. al., A Matter Of Life Or Death—Mental Health Experts Play A Key Role In Evaluating The Mitigating Evidence That Informs A Defendant's Sentence, Vol 47, No. 7, July/August 2016, https://www.apa.org/monitor/2016/07-08/jn.

Walsh offered no testimony about Rapa's experience in developing mitigation for a capital case, nor did the State. Furthermore, Walsh did not, as the State contends, testify that Rapa came highly recommended. AB-63. Walsh explained that CCCRC "had kind of said, 'here's your expert.'"[4] 2PCR-1055.

Wilcox's postconviction experts did not simply disagree with

[4] The State incorrectly asserts that Phil Massa, CCCRC director, recommended Rapa and suggests this carried more weight because he was "the first chair who had intended to try the case." Attorney Robert Gershman was assigned lead counsel to represent Wilcox at the guilt phase. Massa was never assigned to represent Wilcox. AB-52. Moreover, the inference that Massa's suggestion should carry more weight as a lead attorney is belied by Walsh's testimony that his relationship with Massa was difficult, and Sheehan's testimony about her experience working with Massa: "I didn't feel that he took this kind of case seriously, or seriously enough." 2PCR-975.

the trial experts. Thus, reliance on *Brant v. State*, 197 So. 3d 1051 (Fla. 2016) and *Asay v. State*, 769 So. 2d 974 (Fla. 2000), is misplaced. AB-51, 63. Wilcox presented unrebutted testimony by two experts explaining that Rapa's findings were simply wrong and that her ultimate conclusions contradicted the results of her own testing.

The State characterizes Dr. Vinson's assessment of Dr. Rapa's work "rank speculation." AB-60. However, the State offered no evidence rebutting Dr. Vinson's testimony that Rapa's conclusions were unfounded. Now, the State complains that a qualified expert cannot review another expert's methods and conclusions or opine on their validity—a common and accepted practice the State itself routinely utilizes. AB-60. Dr. Vinson, a triple board-certified psychiatrist, is more than qualified to review Dr. Rapa's methods and conclusions and offer her differing opinion.[5]

The State further complains that Vinson critiqued Rapa without conducting any testing of her own. AB-60. This argument

[5] The State presented no evidence supporting its argument that Wilcox's history "clearly supported" an ASPD diagnosis. The State itself is unqualified to make that finding. AB-60.

reflects a fundamental misunderstanding of the role of psychiatrists and psychologists. Generally, psychiatrists do not perform psychological testing. Moreover, Vinson did not critique Dr. Rapa's testing; she critiqued Rapa's conclusion that Wilcox met the criteria for Antisocial Personality Disorder ("ASPD") despite her testing showing no "significant psychopathological qualities or traits." 2PCR-3393.

Further, Rapa opined that Wilcox "likely . . . would have met full criteria" for a conduct disorder with onset prior to age 15, a prerequisite to finding ASPD. 2PCR-3396. However, in coming to this conclusion, Rapa did not review any school or medical records nor did she conduct any collateral interviews or review Sheehan's interview summaries.

Dr. Vinson explained, "the symptoms of [ASPD] are very nonspecific . . . and what you see when you look at the risk factors for antisocial personality disorder, the risk factors for depression, and the risk factors for PTSD, is there's a lot of overlap and they are nearly identical." 2PCR-1160; *compare* American Psychiatric Association, *Antisocial Personality Disorder*, *in* DIAGNOSTIC AND

STATISTICAL MANUAL OF MENTAL DISORDERS 301.7 (5th ed. 2013) (including as diagnostic criteria *inter alia* "irritability and aggressiveness," "reckless disregard for safety of self or others," and "lack of remorse") *with* American Psychiatric Association, *Posttraumatic Stress Disorder*, *in* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 309.81 (5th ed. 2013) (including "negative alterations in cognitions and mood" evidenced by *inter alia* "persistent negative emotional state (e.g. fear, horror, anger, guilty, or shame)" and "feelings of detachment or estrangement from others").

Indeed, the symptoms that Rapa relied on to make her diagnosis, "irritable," "frustrated," "losing home," and "disengaged" are all "consistent with depression or trauma-related disorders." 2PCR-802; American Psychiatric Association, *Major Depressive Disorder: Diagnostic Features*, *in* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 163 (5th ed. 2013) (noting irritability and frustration as diagnostic features); *see Posttraumatic Stress Disorder*, DSM-5 309.81 (including among diagnostic criteria "feelings of detachment or estrangement from others").

The State mischaracterizes Dr. Vinson's testimony concerning the role race plays in how patients are diagnosed and treated as "social racism." AB-60. Dr. Vinson never used this ambiguous and misleading term when describing scientific research shows Black men are diagnosed with "conduct disorder and antisocial personality disorder" at different rates than others, but are also diagnosed with "bipolar and depression . . . at lower rates." 2PCR-1162; *see Antisocial Personality Disorder*, DSM-5 662 (noting "[ASPD] appears to be associated with low socioeconomic status and urban setting concerns" and may "be misapplied to individuals in settings in which seemingly antisocial behavior may be part of a protective survival strategy").

This is not, as the State asserts, a situation where Wilcox is suggesting counsel should have second guessed his expert just to do so. The State's reliance on *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995) is misplaced. In *Hendricks*, counsel hired two mental health experts to evaluate the defendant's mental status *at the time of the crime* and advise whether counsel should pursue an insanity or diminished capacity defense. *Id.* at 1037. The experts met with

the defendant and reviewed the police report and defendant's taped confession. *Id*. In postconviction, the defendant argued counsel's failure to conduct a social history investigation and provide the information to the mental health experts undermined the expert's conclusion so much so that counsel shouldn't have relied on them in making the choice to forego presenting a mental defense. *Id*. at 1038. However, neither expert indicated they needed additional materials to render their opinion, and the record was devoid of any "evidence that the conclusions of the experts were tentative, snap judgments, or otherwise based on anything less than a full analysis of complete data." *Id*. at 1037. While the court found that an attorney is entitled to rely on the conclusions and must not be forced to "second-guess their experts," its reasoning illustrates that the rule is not absolute.

The State's reliance on *State v. Mullens*, 352 So. 3d 1229 (Fla. 2022), is similarly flawed. As in *Hendicks*, the Court determined that counsel was not deficient for failing to second guess his expert, however, the Court specifically found that there was no basis for trial counsel to question the trial expert's findings. *Id.* at 1239 ("the

record does not demonstrate that trial counsel had an objective basis for questioning the validity of [the trial expert's] test administration."). Unlike the expert opinions in *Hendricks* and *Mullens*, here, Rapa's inappropriate methods and inaccurate findings were replete with errors and inconsistencies that would be obvious to any experienced capital attorney.

The State further argues that Walsh chose not to present Rapa to prevent the jury from hearing about disciplinary reports in Wilcox's DOC records. AB-19. According to the State, "Walsh testified that he was loath to put any facts before the jury that might show that Wilcox would be a danger in an incarcerated future." AB-67. The State grossly exaggerates Walsh's testimony. On cross examination, the State asked Walsh a series of questions about Rapa. The State next asked whether Walsh had reviewed Wilcox's DOC records.[6] 2PCR-1112. Walsh responded that he "would have reviewed them, yes." 2PCR-1113. The State *then* asked,

> . . . if those records showed substantial DRs, bad behavior [. . .], that's something you wouldn't want the jury to see, correct, or know

[6] Of the "routine" review of records and summaries Sheehan prepared for Walsh, Wilcox's DOC history spanned 12 lines of text.

about if you could avoid it?

2PCR-1113. Walsh responded, "certainly it is good mitigation to have good behavior while incarcerated in a case like this. So, I would think bad behavior would not look very good."[7] 2PCR-1113. The State never asked whether the content of the records impacted Walsh's decision to not call Rapa. *See* 2PCR-1112-13. This is mere supposition on the State's part.

Walsh's failure to present a qualified expert was not remedied by Dr. Fichera's *Spencer* hearing presentation. AB-58. The question for the reviewing court is whether trial counsel's omissions could reasonably have affected *the jury*. *See Porter v. McCollum*, 558 U.S. 30, 41 (2009). The fact that the judge, alone, heard Fichera's testimony does not excuse Walsh's failure to present it to the jury.

---

[7] The State mischaracterizes Wilcox's DOC records, describing them as "replete with official notations of Wilcox's bad and violent behavior." AB 18. Having spent his formative teenage and adolescent years in prison, Wilcox struggled, but his records by no means show significant violence or harm.

The State argues both that Wilcox failed to tell counsel about his experience in solitary confinement so counsel was not deficient for failing to present the information and that counsel made a strategic decision not to use records showing Wilcox was in solitary confinement to prevent the jury from learning about his behavior in prison. Both cannot be true, and neither are.

In any event, Walsh failed to properly prepare Fichera. And because Walsh inexplicably provided Rapa's report to Fichera, the State was able to capitalize on Rapa's inaccurate and prejudicial findings through Fichera's testimony without Rapa having to answer to her own errors and inconsistencies. *See* T22-1343; 1334-38.

"*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy." *Wiggins*, 539 U.S. at 527. Trial counsel's understanding and appreciation of Wilcox's background was cursory at best. Having failed to conduct a reasonable, strategic investigation, counsel could not have made a reasonable decision to forgo the presentation of available evidence. Moreover, any strategy attributed to counsel's decision to not present mental health testimony to the jury was negated by counsel's failure to recognize the inaccuracies and contradictions in Rapa's report.

C. Prejudice

In making the prejudice determination, this court "must consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas

proceeding—and reweigh it against the evidence in aggravation." *Porter*, 558 U.S. at 41 (internal citations omitted).

The State, like the lower court, believes prejudice cannot be established because Walsh "showed the jury the total dysfunction of [his] mother and other significant adults in his life." AB-57. However, here, the State and postconviction court commit the same error as in *Porter*. It is unreasonable to "discount to irrelevance" the additional evidence presented in postconviction. *Porter*, 558 U.S. at 43.

Contrary to the State's argument, the jury did not hear about the "total dysfunction" of Lawanda "and the other significant adults in [Wilcox's] life," or the constant chaos in the home. AB-58. A close reading of Lawanda's testimony reveals none of the detail the State now suggests. Despite the inference drawn by the State, Lawanda never testified that she "engaged in prostitution for money, drugs, and supplies."[8] AB-75. Lawanda never mentioned prostitution. She

[8] The State takes issue with Dr. Johnson's testimony that, Lawanda was sexually trafficked because of the "possibility that Lawanda initially began and continued to be a prostitute, in part, of her own volition to support her drug habit, making her the victim of

told the jury that she "dated men" to get things she needed. T20-1187. It is not reasonable to assume the jury would have made the same inference the State makes.

The State ignores the wealth of compelling mitigation presented in postconviction through the testimony of Wilcox's family and friend/prior co-defendant. The State argues that the postconviction testimony "contained substantially the same information as Lawanda's." AB-75. This is simply untrue. While the subject matter of the trial and postconviction evidence overlaps to some degree, *Strickland* prejudice may still be established where trial counsel fails to adequately describe the nature and extent of the mitigating evidence. *Wiggins*, 539 U.S. at 535-36 (finding deficiency and prejudice "[g]iven both the nature and extent of the abuse petitioner suffered"), *Williams v. Taylor*, 529 U.S. 362, 370,

---

her own drug use and the exploitation of men using her, rather than being trafficked against her will." AB-61.

The State's suggestion is as absurd as it is offensive. Lawanda was *10 years old* when she was first given Schedule I and II drugs, and was preyed on by pimps while she was still a child. A child cannot consent to sexual intercourse, much less a particularly vulnerable child suffering from drug addiction, mental illness, and intellectual dysfunction.

398 (2000) (finding prejudice where trial counsel omitted "graphic description[s] of [petitioner's] childhood" including "documents . . . that dramatically described mistreatment, abuse, and neglect").

Wilcox's cousin, Darrell Howard, friend and prior co-defendant, Cory Waters, and Aunt, Linda Kelly, offered significant details about Wilcox's childhood, including details Lawanda did not know. The jury never heard the extent of the violence, abuse, neglect, poverty, and deprivation Wilcox experienced. As the witnesses explained, while Wilcox's "Grandma," Nancy, and her partner, Louis Davis, provided *some* love and care for Wilcox, Nancy's home was not a safe haven[9]—indeed, Lawanda and her siblings brought chaos and dysfunction into the home constantly. Wilcox was subjected to the drug abuse, negligence, and violence of the very adults who were supposed to protect him.

The State minimizes the gravity of Lawanda's abuse of Wilcox

[9] On the one hand the State argues that Nancy "offered a stable positive influence in his life," (AB-10), and on the other hand the State claims the additional testimony about Wilcox's home life is cumulative because Fichera testified at *Spencer* that "Wilcox had little residence stability, his grandmother was overwhelmed caring for five grandchildren." AB-77.

as "she punished him with spankings and locking him in a bathroom." AB-10. However, the State ignores the appalling details of the abuse and neglect Wilcox suffered. Wilcox's aunt, Sandra Waterman, told trial counsel[10] that Lawanda "treated him terrible." 2PCR-708. "She beat him for nothing." 2PCR-701-02. Dr. Johnson described Lawanda's physical abuse of Wilcox as "irrational acts of violence" wherein Lawanda hit Wilcox with "whatever object there was." 2PCR-1383. Dr. Vinson told the court that Lawanda's abuse left marks on Wilcox. 2PCR-1144. When Wilcox was eight years old, Nancy went to Georgia with one of Wilcox's cousins, leaving him behind with Lawanda. 2PCR-1143. Wilcox was left without consistent access to food, supervision, or anyone to care for him for several months. Wilcox described this time as being akin to "hell." 2PCR-1143.

The State minimizes Wilcox's lack of support at home and school as "[n]o adult pushed Wilcox to go to school but rather left it up to him." AB-24. This mischaracterizes the postconviction

[10] Sheehan provided details of her interview of Waterman in a letter to Walsh June 22, 2009. 2PCR-700. Walsh did not speak with Waterman or develop this information.

evidence. The adults in Wilcox's life not only failed to make sure he made it to school, but failed to assist with his work, support his development, show up to meetings with teachers, or advocate on his behalf. When the school held a meeting on Wilcox's academic needs, neither Lawanda or Nancy showed up. 2PCR-800. Dr. Vinson explained that because Wilcox struggled in school and was made fun of when he "falter[ed] over words," "rather 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.

The jury never heard the events in Wilcox's life leading up to his arrest at fourteen for the prior conviction the State relied on in aggravation. From ages 10-13, critical years leading up to Wilcox's court involvement, Wilcox experienced more tragedy and trauma than most do in a lifetime. At age 10, he lost the only father figure he knew and watched his Grandma torn apart from grief and lack of support. 2PCR-1148. He was forced to move to one of the most dangerous neighborhoods in the country and his family was less stable than ever. 2PCR-1148-49; 2PCR-830-34. In those few short

years, Lawanda was arrested at least four times and his aunt Gloria was arrested twice during that time. 2PCR-1400-01; 2PCR-4030-31. His mother abandoned two of his newborn brothers at the hospital after they were born positive to cocaine. 2PCR-1403.

Darrell Howard's and Cory Waters's testimonies added much more than only "incidents of neighborhood fights, a head injury, and teasing of Wilcox," (AB-75), both witnesses offered dramatic details about the poverty, violence, and death that Wilcox witnesses as an adolescent boy. They described how Wilcox saw people in his own neighborhood lying on the ground, dying or already dead from gunshot wounds. 2PCR-1278-80, 1312-14. Wilcox's own cousin, Howard, was shot nine times in the neighborhood. 2PCR-1286. Counsel was aware that two of Wilcox's friends were murdered when he was a child, but never explored the information further. *See* 2PCR-1305. The jury never heard how dangerous the neighborhood was, or that "[i]f you made it out of Circle Plaza, you were blessed." 2PCR-1311.

Walsh could not recall whether he had even asked Wilcox about where he grew up. 2PCR-1057. Sheehan testified that she

was not aware of the neighborhood details and her witness summaries are devoid of any notes about Perrine or Circle Plaza. 2PCR-989; *see also*, 2PCR-682-734.

The State argues both that Walsh presented evidence of "cumulative trauma and social disadvantages" to the jury, (AB-48), and that Walsh's failure to present mental health evidence to the jury was remedied by presenting Fichera at the *Spencer* hearing, because the judge was the "actual sentencer." AB-58. Both cannot be true and neither are. The record is clear, the jury never heard such evidence. In cases alleging ineffective assistance at penalty phase, reviewing courts must engage with the evidence presented in postconviction and consider whether that evidence might have added up to something that would have mattered *to the jury*. *Porter*, 558 U.S. at 413 (emphasis added). This applies to all of the additional mitigation evidence, including mental health mitigation.

Without knowing how the abuse and neglect Wilcox suffered affected the development of his brain, or how having a damaged brain influenced Wilcox's behavior, or that he functions at a borderline intellectually disabled level and suffers from deficits in

executive functioning, the jury was unable to make a reasoned determination about whether Wilcox should live or die. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

The State's argument disregards the significance of the jury's role at sentencing. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Snelgrove v. State*, 921 So. 2d 560 (Fla. 2005). The sentencing court is required "to pay deference to a jury's sentencing recommendation," giving it "great weight." *Espinosa v. Florida*, 505 U.S. 1079 (1992). Here, the jury was told that "only under the rarest of circumstances would [the court] impose a sentence other than what you recommend." T21-1258. In reaching its recommendation, the jury heard only a fraction of the compelling mitigation evidence.

Given that the jury recommended death by a mere 7-5 vote, having heard from only one mitigation witness, there is, at the very least, a reasonable probability that the jury would have returned a life verdict had the additional compelling mitigation offered in postconviction been presented.

D. Challenging the Aggravation

In arguing that Walsh was not deficient for failing to challenge the prior violent felony aggravator ("PVF"), the State relies on three entirely inapposite cases. Mr. Hayward was previously convicted of firing an Uzi into a crowded parking lot, demanding money, and then shooting the victim in the back. *Hayward v. State*, 24 So. 3d 17 (Fla. 2009). Mr. Bevel was previously convicted of pointing a gun at the victim's head while attempting to rob him. *Bevel v. State*, 983 So. 2d 505 (Fla. 2008). Mr. *Reaves* was convicted of robbing a hotel clerk at gunpoint. *Reaves v. State*, 639 So. 2d 1 (Fla. 1994). In contrast, Wilcox's involvement in his prior case was minimal.

This record reflects that Wilcox did not, as the State argues, "g[e]t out of the car along with his co-defendant who brandished a gun, ordering the victims to get down on the ground," nor was he an "actively involved principal of the prior felonies." AB-69-70. And at no point did Wilcox use "the gun violence/murder to complete the joint robbery." AB-69-70.[11]

[11] Indeed, the State stipulated to Wilcox *not* being the killer.

Cory Waters's uncontroverted testimony establishes that Wilcox did not know about the robbery, did not assist in planning it, and did not carry or use a gun. *See* 2PCR-1000, 1006, 1317-18. Rather, Duane Smith shot the victim and Wilcox—then just 14 years old—got out of the car and grabbed money off the ground.

The State infers that Walsh made a strategic decision to not call Waters because he may have been "concerned" that the State would be able to point out that Wilcox "was at the scene and was seen taking things, taking something off of the person that was shot and killed[.]" 2PCR-1090. But Walsh did not agree that is why he chose not to call Waters. Walsh simply responded, "I guess that's possible, sure." 2PCR-1091.

Had counsel properly challenged the State's case in aggravation, there is a reasonable probability that the prior violent felony aggravator would not have applied.

E. Credibility Findings

The State complains Dr. Ouaou "speculated about possible effects of solitary confinement" but did not conduct "a particularized, as applied study" to determine the effects. AB-67-8.

This is misleading. Neuropsychologists perform testing to discover or rule out brain abnormalities. There is not a neuropsychological test for the effects of solitary confinement.

In the same vein, the State claims Ouaou cannot opine as to the impact of trauma on Wilcox's brain because Ouaou "is a researcher not a clinician. . ." AB-73. Dr. Ouaou is a licensed psychologist, qualified to administer testing and render diagnoses. As he explained, testing supported his conclusions that Wilcox's trauma may be responsible for some of his deficits.[12] The State takes issue with the fact that Ouaou did not rely on a 2003 beta test. But, the Beta test is not recognized as a reliable measure of intellectual functioning. 2PCR-1628.

Further, the State attempts to undermine Ouaou by accusing him of "speculat[ing] that Wilcox's executive function would grow worse between 2009 and 2015." AB, 62. Only a misreading of the transcript can explain this accusation. The State itself quotes Ouaou's contrary testimony at length. AB, 62 n.12. When asked

[12] Dr. Ouaou's report was also admitted as Defense Exhibit 29.

whether "there is a potential that [Wilcox's] results in 2009 could have even been more impaired," Ouaou said, "you know, obviously that's hypothetical, there was no testing then, but, I mean, *I'd bet the farm that they were worse.*" (2PCR-1584). The clear import of Ouaou's carefully qualified statement was that Wilcox's results might have *improved* because of plasticity.[13] (2PCR-1583-84).

The State confuses Dr. Ouaou, a neuropsychologist, with Dr. Johnson, a sociologist. The State complains about Johnson's testimony that Lawanda suffered from depression and drug addiction and Nancy Wilcox suffered from depression, inferring that Johnson was improperly offering a medical opinion.[14] However, the State ignores Dr. Johnson's subsequent testimony that he did not offer a diagnosis, he merely relied on facts that are in the record.

---

[13] The State's attempt to impugn Ouaou's credibility on the grounds "that the experts testified that the brain reaches full development around 24 to 25" is, likewise, indefensible. AB-62. Ouaou's own testimony, as recited by the State, was explicitly grounded in his understanding that brain development *slows* in adulthood. AB-62 n.12; 2PCR-1583.

[14] The lower court found Dr. Johnson credible in-part, but did not provide any reasoning other than the court disagreed with his conclusion that additional mitigation was required. The court found his substantive testimony credible.

Indeed, in its Response, the State relies on the same facts Dr. Johnson did: Lawanda's testimony that "she suffers from depression and addiction." AB-10.

Contrary to the State's position, the lower courts credibility findings are not supported by competent, substantial evidence and not entitled to this Court's deference.

REPLY TO ARGUMENT II

Hurst Error

The State incorrectly argues *Poole v. State*, 297 So. 3d 487 (Fla. 2020), eliminated the retroactive application of *Hurst v. State* to capital litigants in postconviction. *Poole* did not address retroactivity or impact the Court's decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

Further, the State asserts any *Hurst v. State* error is harmless in light of *Poole*, because the jury "unanimously found the three aggravating factors that survived review." AB-90. The State misstates the record facts—the jury made *no* findings as to any aggravators.

The State argues that Wilcox's prior felony conviction and

convictions of the concurrent charges of kidnapping and armed robbery meet the requirement as set out in *Poole*, because a jury found each beyond a reasonable doubt. These arguments are unavailing.

Contrary to the State's argument that Wilcox's prior felony convictions "were uncontested at the trial and any reasonable jury would have unanimously found that aggravator," whether Wilcox's prior felony met the requirements of the aggravator was a contested issue at trial.

Moreover, the jury's convictions for armed robbery and kidnapping do not render Wilcox's *Hurst* error harmless. AB-91. The State presented Wilcox's concurrent felonies in support of the "in the course of a felony aggravator," the jury was not instructed to apply these felony convictions to the existence of a contemporaneous felony. The former requires additional fact-finding that the jury did not make. The court cannot simply substitute its own findings for that of the jury.

REPLY TO ARGUMENT III

In Reply to the State's Answer to this sub-claim, Mr. Wilcox

relies on the arguments in his Initial Brief.

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.

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

MICHAEL T. COOKSON
Staff Attorney
Fla. Bar No. 1057838
cooksonm@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 18th day of October, 2024.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Reply 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 6,589 words.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

Filing # 210389960 E-Filed 11/06/2024 12:01:53 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 REPLY BRIEF OF APPELLANT

BRITTNEY N. LACY
Assistant CCRC-South
Florida Bar No. 116001
lacyb@ccsr.state.fl.us
ccrcpleadings@ccsr.state.fl.us

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 174114
kalilp@ccsr.state.fl.us

MICHAEL T. COOKSON
Staff Attorney
Florida Bar No. 1057838
cooksonm@ccsr.state.fl.us

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

November 6, 2024

COUNSEL FOR WILCOX

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

REPLY TO ARGUMENT I 1

a) *Erlinger v. United States* informs Wilcox's claim of *Hurst* Error because *Hurst v. Florida* Applies Retroactively to Wilcox Under this Court's Decision in *Mosely v. State.* 1

b) The State Relies on an Unreasonably Narrow Reading of *Apprendi* and its Progeny. 2

c) The State's Reliance on McKinney is Misplaced Because *McKinney* Pertains Only to Appellate Reweighing. McKinney Has No Bearing on the Violations of *Apprendi*, *Ring*, and *Hurst* that Render Wilcox's Death Sentence Unconstitutional. 6

d) *Erlinger* Applies Retroactively to Wilcox and Shows that *State v. Poole* was Wrongly Decided 9

REPLY TO ARGUMENT II 12

REPLY TO ARGUMENT III 13

CONCLUSION AND RELIEF SOUGHT 13

CERTIFICATE OF SERVICE 14

CERTIFICATE OF COMPLIANCE AND FONT 14

TABLE OF AUTHORITIES

CASES

Alleyne v. United States, 570 U.S. 99 (2013) 3, 5

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 11

Apprendi v. New Jersey, 530 U.S. 466 (2000) 3, 4, 5

Blakely v. Washington, 542 U.S. 296 (2004) 3, 5

Clemons v. Mississippi, 494 U.S. 738 (1990) 7

Dettle v. State, SC22-0417 (Fla. Oct. 24, 2024) 2

Eddings v. Oklahoma, 455 U.S. 104 (1982) 6

Erlinger v. United States, 602 U.S. 821 (2024) ..... passim

Harris v. United States, 536 U.S. 545 (2002) 3

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

Mahn v. State, 714 So. 2d 391 (Fla. 1998) 11

Martin v. Hunter's Lessee, 14 U.S. 304 (1816) 12

McKinney v. Arizona, 589 U.S. 139 (2020) 6, 7, 8, 9

Mosely v. State, 209 So. 3d 1248 (Fla. 2016) 1, 2

NAACP v. Alabama ex rel. Patterson, 360 U.S. 240 (1959) 11

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

Schriro v. Summerlin, 542 U.S. 348 (2004) 8

Southern Union Co. v. United States, 567 U.S. 343 (2012) 3

State v. Poole, 297 So. 3d 487 (Fla. 2020) 1, 2

Tyler v. Magwire, 84 U.S. 253 (1872).....12

United States v. Booker, 543 U.S. 220 (2005) 3

United States v. Haymond, 588 U.S. 634 (2019) 3

Witt v. State, 387 So. 2d 922 (Fla. 1980) 2, 10

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.

The State’s Answer Brief is referred to as “AB” and the State’s Supplemental Answer is referred to as “Supp. AB”

ARGUMENT IN REPLY

REPLY TO ARGUMENT I

a) *Erlinger v. United States* informs Wilcox's claim of *Hurst* Error because *Hurst v. Florida* Applies Retroactively to Wilcox Under this Court's Decision in *Mosely v. State.*

The State argues that *Erlinger v. United States*, 602 U.S. 821 (2024), has no bearing on Wilcox's claim of *Hurst* error because *Hurst v. Florida*, 577 U.S. 92, does not apply retroactively to Wilcox. Supp. AB-7. The State derives this proposition from *State v. Poole*, 297 So. 3d 487 (Fla. 2020). However, the State fundamentally misunderstands this Court's holding in *Poole* — it did not, as the State argues, alter *Hurst v. Florida*'s retroactive application.

In *Mosely v. State*, 209 So. 3d 1248, this Court held that *Hurst* error, as established in *Hurst v. Florida* and *Hurst v. State,* applied retroactively on collateral review to cases that became final after the U.S. Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). This Court determined that *Hurst v. Florida* "applied the exact reasoning of *Ring* to Florida's death penalty sentencing scheme." *Mosely*, 209 So. 3d at 1273. As such, Florida's death penalty sentencing scheme "was actually rendered unconstitutional by *Ring*," *Id*. at 1283, and "the machinery of post-conviction

relief [was] necessary to avoid individual instances of obvious injustice." *Id.* at 1275 (quoting *Witt v. State*, 387 So. 2d 922 (Fla. 1980)).

In *Poole*, this Court receded from its decision in *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." 297 So. 3d at 507*. Poole* did not address the retroactivity *Hurst* or overturn *Mosley*. *See Id.* Indeed, this Court recently reaffirmed the retroactivity of *Hurst v. Florida* and *Hurst v. State*, reasoning that the *Hurst* decisions "are in some sense procedural . . . they are of substantive character, too, for they speak to the defendant's right to a unanimous determination of facts on which turn his or her eligibility for a sentence of death." *Dettle v. State*, SC22-0417, *13 (Fla. Oct. 24, 2024).

Hurst v. Florida applies retroactively to Wilcox.

b) The State Relies on an Unreasonably Narrow Reading of *Apprendi* and its Progeny.

The State argues *Erlinger* neither applies to Wilcox nor establishes *Poole* was wrongly decided. The State's argument rests on the premise that "*Apprendi* and *Ring* affected only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based." Supp. AB-3.

Insofar as it relates to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the State's argument is patently incorrect. *Apprendi* was not so constrained; it was not even a capital case. *See Id.* at 469-70. Rather, the Supreme Court has applied *Apprendi*'s operative rule in myriad contexts. *See e.g.*, *Ring*, 536 U.S. 584 (capital sentencing); *Blakely v. Washington*, 542 U.S. 296 (2004) (sentencing pursuant to plea bargain); *United States v. Booker*, 543 U.S. 220 (2005) (sentencing guidelines); *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fines); *Alleyne v. United States*, 570 U.S. 99 (2013) (mandatory minimums); *Hurst v. Florida*, 577 U.S. 92 (capital sentencing); *United States v. Haymond*, 588 U.S. 634 (2019) (mandatory minimum for violation of supervised release); *Erlinger*, 602 U.S. 821 (mandatory minimum predicated on facts of prior offense).

Contrary to the State's argument, the Supreme Court has expanded *Apprendi* and *Ring*, not limited them to their facts. *Accord Erlinger*, 602 U.S. at 833 (noting *Apprendi*'s inquiry is "a principal we have since reiterated in response to a variety of other recent sentencing innovations"); *see Alleyne*, 570 U.S. at 103 (overruling *Harris v. United States*, 536 U.S. 545 (2002), as inconsistent with *Apprendi* because "*Harris* drew a

distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum").

Insofar as the State attempts to delimit *Apprendi* and *Ring*, it ignores "the dispositive question," which is not whether a fact is labeled aggravating or mitigating, but rather, whether the fact's existence authorizes an increased punishment. *See Ring*, 536 U.S. at 602. Florida's capital sentencing statute requires findings "that sufficient aggravating circumstances exist as enumerated in subsection (5), *and* that there are insufficient mitigating circumstances to outweigh the aggravating circumstances" before a death sentence can be imposed. § 921.141(3)(a)-(b), Fla. Stat. (2010) (emphasis added). Regardless of their label, each of these facts "is an 'element' that must be submitted to a jury." *See Hurst v. Florida*, 577 U.S. at 97 (quoting *Apprendi*, 530 U.S. at 494).

In his supplemental initial brief, Wilcox argued *Poole*'s semantic distinction between "eligibility" and "selection" findings cannot limit *Apprendi*'s operative rule. In response, the State offers yet another semantic distinction, this time, between aggravating and mitigating circumstances.[1] Supp. AB-3. Without any "basis in principle or logic," this

[1] The State claims, "*Ring* reiterated the distinction between facts of mitigation versus aggravation." Supp. AB-3. Granted, *Ring* acknowledged such a distinction, but in the context of defining the scope of Ring's

distinction cannot exempt the mitigation finding from *Apprendi*'s operative rule either. *See Alleyne*, 570 U.S. at 116.

The Framers enacted the Due Process Clause and the Sixth Amendment to prevent erosion of the right to trial by jury through semantic distinctions and unprincipled technicalities. *See Erlinger*, 602 U.S. at 829-32. From *Apprendi* to *Erlinger*, the Supreme Court has guarded the Framer's intent by rooting out and rejecting semantic distinctions that erode the jury right. Nevertheless, the State suggests that the content and efficacy of the jury right rest on little more than semantics. This approach would undermine the Due Process Clause and Sixth Amendment interest at the core of *Apprendi*—"to ensure that a judge's power to punish would 'derive wholly' from, and remain always 'controlled' by, the jury and its verdict." *Erlinger*, 602 U.S. at 831 (quoting *Blakely*, 542 U.S. at 306).

---

argument. *Ring,* 536 U.S. at 597 n.4 (citing *Apprendi*, 530 U.S. at 490-91 n.16). In determining the significance of this distinction, *Ring*'s citation to *Apprendi* is instructive. *See Id*. *Apprendi* distinguished aggravating and mitigating facts insofar as the latter operated *within the authorized sentencing range*. 530 U.S. at 490-91 n.16. Where, as here, the existence or nonexistence of mitigating facts *alters the authorized sentencing range*, this distinction cannot defeat *Apprendi*'s operative rule. *See Alleyne*, 570 U.S. at 116.

c) The State's Reliance on McKinney is Misplaced Because *McKinney* Pertains Only to Appellate Reweighing. McKinney Has No Bearing on the Violations of *Apprendi*, *Ring*, and *Hurst* that Render Wilcox's Death Sentence Unconstitutional.

The State attempts to limit the impact of *Hurst v. Florida* by asserting that *McKinney v. Arizona*, 589 U.S. 139 (2020), "specifically rejected the defendant's argument that [the Supreme Court's] holding in *Hurst* required a jury to *reweigh* aggravating and mitigating circumstances." Supp. AB-6 (emphasis added). However, *Apprendi*, *Ring*, *Hurst*, *Erlinger*, and Wilcox's claim all involve unconstitutional sentencing proceedings conducted in the first instance by trial courts, not reweighing by appellate courts. Accordingly, *McKinney* is inapposite.

McKinney decided the explicitly narrow issue of whether "after the Ninth Circuit identified an *Eddings*[2] error, the Arizona Supreme Court could not itself *reweigh* the aggravating and mitigating circumstances." 589 U.S. at 142 (emphasis added). In 1992, an Arizona jury had convicted McKinney on two counts of first-degree murder. *Id*. at 141. The trial judge found two aggravating circumstances for each murder, weighed them against the mitigating circumstances, and sentenced McKinney to death. *Id*. The Arizona Supreme Court affirmed his convictions and sentences on direct

[2] *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

appeal in 1996, six years before *Ring*. *Id.* However, 20 years later the United States Court of Appeals for the Ninth Circuit found, "the Arizona courts had failed to properly consider McKinney's posttraumatic stress disorder [ ] and had thereby run afoul of [the Supreme] Court's decision in [*Eddings*]." *Id.* at 142.

On remand, McKinney returned to the Arizona Supreme Court where he "argued that he was entitled to resentencing by a jury." *Id.* at 142. Rejecting this argument and reweighing the circumstances itself pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1990), the Arizona Supreme Court, once again, upheld McKinney's death sentence. 589 U.S. at 142.

The Supreme Court granted certiorari and held, “state appellate courts may conduct a *Clemons* reweighing of aggravating and mitigating circumstances, and may do so in collateral proceedings as appropriate and provided under state law.” *Id.* at 147. In declining to overrule *Clemons*,[3] the Supreme Court said, “in a capital sentencing proceeding . . . a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate

[3] At trial, Mr. Clemons’s jury made the requisite aggravation and mitigation findings necessary to impose death. *Clemons*, 494 U.S. at 743. Wilcox’s jury did not make *any* findings.

sentencing decision within the relevant sentencing range." *Id.* at 145. The State takes this quotation out of context.

The quoted language references a tangential Eighth Amendment issue, namely, whether the Constitution requires states to precondition death sentences on the weighing of aggravating and mitigating circumstances. *See Ring*, 536 U.S. at 606-07 (distinguishing between narrowing elements required by Eighth Amendment and Sixth Amendment protections applied thereto); *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004), 354 . In contrast, *Ring* and *Hurst* addressed whether *the state legislature* made the existence of a fact essential to the death penalty. *Hurst*, 577 U.S. at 99 (quoting *Ring*, 536 U.S. at 592) ("Under state law, 'Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made.'"); *Summerlin*, 542 U.S. at 354.

As Justice Scalia noted in *Summerlin*, the Supreme "Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty." 542 U.S. at 354. It follows that neither *Ring* nor *Hurst* exceeded their scope by categorically mandating that a jury weigh aggravating and mitigating circumstances.

Thus, the argument that "*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances," 589 U.S. at 145, is not accurate.

Hurst found, as a matter of federal constitutional law, that Florida preconditioned death sentences on the facts "that sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Hurst*, 577 U.S. at 100. Because Florida law made *both* facts essential to Wilcox's death sentence, *both* needed to be found by a jury. *Id.* Instead, a judge usurped the jury's role. *McKinney* does not cure this constitutional defect. This Court should grant relief.

d) *Erlinger* Applies Retroactively to Wilcox and Shows that *State v. Poole* was Wrongly Decided.

The State argues that *Erlinger* does not apply to Wilcox because the opinion "announced no new law or rules." Supp. AB-7. The parties agree that *Erlinger* announced no new rule. *Erlinger*, like *Ring*, applied *Apprendi*. 602 U.S. at 835 (noting "this case is as nearly on all fours with *Apprendi* and *Alleyne* as any we might imagine"). Thus, *Erlinger* applied long-standing constitutional principles. However, contrary to the State's

argument, this means that *Erlinger* applies to Wilcox.[4] *Cf. Witt*, 387 So. 2d at 924 (addressing the retroactive application of changes in decisional law); *see also Teague v. Lane*, 489 U.S. 288 (1989) (applying retroactivity analysis to cases that announce a "new rule").

The State offers little substantive rebuttal of Wilcox's *Erlinger* argument. Instead, the State relies on the conclusory assertion that *Erlinger* had nothing "to do with the holding in *Hurst*." Supp. AB-7. This assertion is erroneous.

Erlinger expressly grounded itself in the *Apprendi* line of cases, including *Hurst v. Florida* and *Ring*. 602 U.S. at 833-34. *Erlinger* noted, "the principles *Apprendi* and *Alleyne* discussed are so firmly entrenched that we have now overruled several decisions inconsistent with them. *See*, *e.g., Hurst v. Florida* (overruling *Hildwin v. Florida* and *Spaziano v. Florida*); *Alleyne* (overruling *Harris v. United States*); *Ring v. Arizona* (overruling *Walton v. Arizona*)." 602 U.S. at 833-34 (internal citations omitted). Thus,

[4] The State argues that "the rules announced in *Apprendi* and *Ring* do not apply retroactively," and therefore, *Hurst v. Florida* is not retroactive. Suppl. Answer, 7-8. As this Court held in *Mosley v. State* and reiterated in *Dettle v. State*, *Hurst v. Florida* is retroactive in Florida to "postconviction defendants whose sentences of death became final after the U.S. Supreme Court's decision in *Ring v. Arizona*." *Dettle*, SC22-0417, *4.

Erlinger's analysis of the historical content and operation of those principles informs the proper application of *Hurst* and *Ring*. *See Id.*

What is more, *Erlinger* clarified that the *Almendarez-Torres*[5] exception allows a judge who is imposing a heightened sentence predicated on a prior conviction to "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." 602 U.S. at 838 (quoting *Mathis v. United States*, 579 U.S. 500, 511-12 (2016)). The prior or contemporaneous felony aggravator that was applied to Wilcox required both a showing that his prior felony "involve[ed] the use or threat of violence to the person," § 921.141(5)(b), Fla. Stat. (2010), and involved direct contact between Wilcox and the victim. *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998).

Poole cannot eliminate the constitutional defects in Wilcox's sentence by retroactively revising the elements that were, in fact, essential to his death sentence. Such an approach would raise grave constitutional issues by allowing the *post-hoc* nullification of controlling Supreme Court precedent. *Cf. NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 243 (1959) (holding state supreme court "[was] foreclosed from re-examining the grounds for [the Supreme Court's] disposition" by rejecting previously

[5] *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

accepted premise upon which Supreme Court's decision rested); *Tyler v. Magwire*, 84 U.S. 253, 282-83 (1872) (noting that "[subordinate courts] have no power either to evade or reverse the judgement of [the Supreme Court] . . . as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect"); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

Erlinger is a straightforward application of *Apprendi* that applies to Wilcox. *See Erlinger*, 602 U.S. at 835. *Erlinger* clarifies that *Poole* relied upon an impermissibly narrow reading of *Hurst v. Florida* and replicated the precise constitutional defect at the core of every *Apprendi* case—a semantic "sentencing innovation" that "improperly invaded the jury's province." 602 at 833. "Judges may not assume the jury's factfinding function for themselves." *Id.* at 834.

This Court should grant relief.

REPLY TO ARGUMENT II

Because the State merged Wilcox's Arguments I and II in its Supplemental Answer, Wilcox relies on the arguments in his Supplemental Initial Brief and Reply to Argument I *supra*.

REPLY TO ARGUMENT III

The State's argument merged Wilcox's Argument III with his Arguments I and II. Thus, Wilcox relies on his Reply to Argument I *supra* and Arguments I and III in his Supplemental Initial Brief.

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
Assistant CCRC-South
Fla. Bar No. 116001
lacyb@ccsr.state.fl.us
ccrcpleadings@ccsr.state.fl.us

MICHAEL T. COOKSON
Staff Attorney
Fla. Bar No. 1057838
cooksonm@ccsr.state.fl.us

/s/ Paul Kalil
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 supplemental reply 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 November, 2024.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this supplemental reply 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 15 pages.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC23-1498

DARIOUS WILCOX,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

APPELLANT'S MOTION FOR REHEARING

COMES NOW APPELLANT, DARIOUS WILCOX, by and through his undersigned counsel, pursuant to Fla. R. App. P. 9.330, and herein moves this Court for rehearing and/or clarification of its opinion issued on May 21, 2026, in the above-captioned case. This motion for rehearing is timely filed pursuant to this Court's Order issued May 28, 2026. In support thereof, Mr. Wilcox states as follows:

On May 21, 2026, this Court issued a written opinion affirming the denial of postconviction relief by the circuit court. *Wilcox v. State*, SC2023-1498, SC2024-0785, 2026 WL 142742 (Fla. 2026). As to this Court's denial of Mr. Wilcox's argument that his death sentence is unconstitutional under the Sixth Amendment because a judge, not the jury, made all of the requisite findings to impose death as required by *Hurst v. Florida*, 577 U.S. 92, 97 (2016), this Court

maintains that "*Poole* supplies the governing legal standard, and under that standard, he is not entitled to relief." *Wilcox*, 2026 WL 142742, *11. The Court focuses most of its analysis on Mr. Wilcox's arguments that the Supreme Court's 2024 decision in *Erlinger v. United States*, 602 U.S. 821 (2024), further demonstrates the error in *State v. Poole,* 297 So. 3d 487 (Fla. 2020).

In denying relief, the Court has deprived Mr. Wilcox of his state and federal constitutional rights, including his right to jury fact finding of all facts requisite to impose death. This Court's ruling is flawed in significant respects and results in upholding an unconstitutional sentence of death. For the reasons set forth below, Mr. Wilcox seeks rehearing and/or reconsideration of the Court's opinion.

1. This Court Has Erred in Relying on Eighth Amendment Jurisprudence to Deny Sixth Amendment Protections.

The United States Supreme Court in *Hurst v. Florida*, explicitly held that in Florida the Sixth Amendment requires the jury to find the additional statutorily defined facts required to render the defendant death eligible. 577 U.S. at 97. These facts, as enumerated in Florida's sentencing statute when Wilcox was sentenced, included

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.

Mr. Wilcox supplemented his briefing in this Court following the Supreme Court's 2024 decision in *Erlinger v. United States*, 602 U.S. 821 (2024), which adds further support for finding Sixth Amendment error in Mr. Wilcox's case. In denying relief, however, this Court determined "neither the Sixth nor Eighth Amendment requires a jury to make the sufficiency and weighing determinations called for by the death-penalty statute." *Wilcox*, 2026 WL 142742, *13 (citing *Poole*, 297 So. 3d 487). In so doing, this Court has misapprehended the applicable governing law.

The Court's error is born from an improper analysis of the eligibility and selection distinction and conflates Sixth and Eighth Amendment law. *Poole* cites Eighth Amendment jurisprudence 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 v. California*, 512 U.S. 967, 971 (1994)).

The Court relies on *Tuilaepa* and *Kansas v. Carr*, 577 U.S. 108 (2016), to parse out the Florida statute and determine which portions require a jury determination and which do not. As a result, the Court found the second portion of the Florida Statute as identified by *Hurst v. Florida* was merely a selection finding and not a "fact" that must be found by the jury for purposes of the Sixth Amendment. *Poole*, 297 So. 3d at 503. However, both cases are inapposite. *Tuilaepa* and *Carr* concern the Eighth Amendment, a fact *Poole* omitted when addressing both cases.

Hurst v. Florida, which was decided more than two decades after *Tuilaepa*, explicitly held that the ***Sixth Amendment*** requires Florida juries to make the requisite findings of fact enumerated in Florida's capital sentencing statute. The Supreme Court did not come to the same conclusion it came to in either *Tuilaepa* or *Carr*, because it could not.

The nuance distinguishing *Tuilaepa* lies in the vastly different sentencing statutes. In California, juries are required to make specific findings during the guilt phase as to both the first-degree murder charge ***and*** the "special circumstances," *id.* at 970, that renders the capital defendant eligible for the death penalty. At a

separate penalty phase proceeding, the jury is further instructed "to consider the relevant sentencing factors" before returning a unanimous determination for death. *Id.* at 970. In other words, juries make the requisite findings of fact to impose death pursuant to the California statute, at the guilt phase portion of the trial.

Moreover, the issue in *Tuilaepa* is distinct and separate from that in Mr. Wilcox's case. 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 was made abundantly clear by *Tuilaepa*'s citation to *Coker v. Georgia*, 433 U.S. 584 (1977), wherein the Supreme Court held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape." 433 U.S. at 592. 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.

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*. This is also precisely why

the Supreme Court did not limit *Hurst v. Florida* in light of *Tuilaepa*. *Hurst v. Florida* doesn't even mention *Tuilaepa*.

Poole further cites to *Carr* 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. These quotes are immaterial to Mr. Wilcox's case. First, they are only dicta and do not offer a holding that undoes *Hurst v. Florida*; and second, the discussion is only relevant to the Eighth Amendment question addressed in *Carr*—whether a jury should be required to find mitigation beyond a reasonable doubt. Decided in the same term as *Hurst v. Florida, Carr* does not negate the Supreme Court's holdings in *Hurst v. Florida* concerning Sixth Amendment jury findings. Again, the same Court could have included similar language and addressed the second portion of the Florida statute, thereby limiting the jury findings of fact required under the Sixth Amendment. It did not, because it could not.

Similar to *Tuilaepa*, *Carr* contained no holding relevant to the Sixth Amendment and Due Process Clause issue here. 577 U.S. at

118-19. *Carr* addressed 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).

The Supreme Court clarified in *Hurst v. Florida* that a first-degree murder conviction alone is not sufficient for eligibility for a capital sentence in Florida. 577 U.S. at 96 ("A person who has been convicted of a capital felony shall be punished by death" only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Ibid.* "[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole." *Ibid.*). The Supreme Court further determined that each fact listed in the statute must then be determined by a jury:

> the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Id. at 100 (citing § 921.141(3), Fla. Stat.). The Supreme Court did not limit the findings required to only the existence of aggravating factors. Again, it could not. At the time of Mr. Wilcox's trial, Florida Statute 921.141 required both the existence of aggravators and mitigators be found in order to impose death. Indeed, the Court specifically determined Florida's statute failed to meet constitutional scrutiny because, while "it is true that in Florida the jury recommends the sentence, it does not make specific factual findings with regard to the existence of ***mitigating*** or aggravating circumstances and its recommendation is not binding on the trial judge." 577 U.S. at 98.

While this Court's decision in *Poole* walked back protections enumerated in *Hurst v. State*, it could not undo that which was mandated by the Supreme Court in *Hurst v. Florida*. The applicable jurisprudence is *Hurst v. Florida*, not *Poole*. The Court cannot disregard requirements of the Sixth Amendment because it has

determined that the Eighth Amendment does not also impose the same requirement.

2. The Court's Precedent Addressing Procedurally and Factually Distinguishable Cases is Inapplicable.

The Court's reliance on its own decisions in *Tanzi v. State*, *Ford v. State*, and *Knight v. State* with respect to *Erlinger* is misplaced. Each case is factually and procedurally distinguishable from Mr. Wilcox's case. When the Supreme Court decided *Hurst v. Florida* and this Court issued *Hurst v. State*, more than 158 capital defendants were eligible for relief, meaning their cases were final after the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), in June of 2002 and their juries returned non-unanimous recommendations for death. Mr. Tanzi, Mr. Ford, and Mr. Knight were not among those eligible for relief. This distinction is significant.

All three capital defendants had unanimous jury verdicts rendering any Sixth Amendment error harmless. Mr. Wilcox's jury returned a bare majority vote of 7-5. His case is no different than Mr. Hurst's wherein 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. *Hurst v. State*, 202 So. 3d 40, 68 (Fla. 2016). 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.*

Notwithstanding, Mr. Wilcox's case is analogous to that of *Erlinger*'s. The jury did not make any findings with respect to the clearly enumerated facts in the statute required to enhance his sentence.

3. *Poole* Contravened Basic Principles of the Rule of Law.

When *Hurst v. Florida* issued in 2026, there were nearly 400 capital defendants on death row in Florida. Of those, 158 were eligible for new penalty phase proceedings due to Sixth Amendment error because their sentences were non-unanimous and final after *Ring*, wherein the Supreme Court decided for the first time that the Sixth Amendment required jury findings for any fact necessary to elevate a life sentence to a death sentence. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (citing *Ring*, 536 U.S. 584). Following *Hurst v. Florida* and *Hurst v. State*, the legislature amended the capital sentencing statute and added the requirements enumerated in *Hurst v. Florida* requiring jury findings for each fact requisite to impose

death as listed in the statute.[1] *See* § 921.141, Fla. Stat. (Mar. 13, 2017).

In other words, by the time *Poole* issued, Florida's capital sentencing statute had already been amended to reflect the necessary requirements to meet constitutional scrutiny.

After *Poole* was issued, the legislature again amended the capital sentencing statute and removed the requirement that a jury must return a unanimous vote for death before a death sentence can be imposed; however, the statute still requires:

> (b) The jury shall return findings identifying each aggravating factor to exist. A finding that aggravating factors exists must be unanimous.

§921.141(2), Fla. Stat. (Apr. 20, 2023).

Thus, *Poole's* holding that certain aggravators can be found without jury findings was unnecessary. Every capital litigant tried after *Hurst v. Florida* (and *Poole*) was tried under a statute that required specific jury findings in order to impose death, making whether a jury implicitly found at least one aggravator a moot point.

---

[1] Additional protections were added as required by the Eighth Amendment under *Hurst v. State*. While this Court receded from the Eighth Amendment protections in *Poole*, the Sixth Amendment protections cannot be circumvented or overruled.

As a result, *Poole* impacted only six *Hurst* eligible defendants—six—namely, Mark Anthony Poole, Duane Owen, Andrew Michael Gosciminski, Carlton Francis, James Herard, and Darious Wilcox.[2]

Poole's purported error correction does not justify this concentrated, but grievous, impact. As a matter of policy, "it is more important that the applicable rule of law be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). *Stare decisis* may give way "when governing decisions are unworkable or are badly reasoned." *Payne v. Tennessee*, 501 U.S. 808, (1991). But, notwithstanding its flaws, this Court's caselaw governing the availability of *Hurst* relief was certainly *workable*. If a sentence was final after *Ring* and the jury was non-unanimous, then relief was granted. This formulaic approach was nothing if not *workable*.

Stare decisis is, likewise, less obligatory in cases construing constitutional provisions, but only "because in such cases 'correction

---

[2] Mr. Poole's jury voted 11-1 for death; Mr. Owen's voted 10-2; Mr. Gosciminski's jury voted 9-3; and the juries for Mr. Herard and Mr. Francis voted 8-4 for death. Mr. Gosciminski died before the lower court could rule on his *Hurst* claim. Mr. Owen was executed on a separate death sentence.

through legislative action is practically impossible.'" *Payne*, 501 U.S. at 828 (quoting *Coronado*, 572 U.S. at 407 (Brandies, J., dissenting)). Despite their foundations in constitutional law, *Hurst v. Florida* and *Hurst v. State* were both predicated on § 921.141, Fla. Stat. (2010). The Legislature could correct any prospectively applicable issues by amending § 921.141, Fla. Stat. (2010). In fact, the Legislature did precisely that. *See* § 921.141, Fla. Stat. (eff March 7, 2016).

Hurst v. Florida was predicated on Florida's then-existing capital sentencing statute and this Court's interpretations thereof. *See* 577 U.S. at 95-96 (citing § 921.141, Fla. Stat. (2010)). Less than two months after *Hurst v. Florida* was issued, the Legislature fundamentally amended this statute, eliminating references to the "advisory jury" and requiring unanimous jury findings "identifying each aggravating factor found to exist." § 921.141(b), Fla. Stat. (eff. March 7, 2016).[3]

---

[3] Shortly after issuing *Hurst v. State*, this Court found the newly enacted statute unconstitutional because it did not include jury unanimity as a requirement to impose death. *See Perry v. State*, 210 So. 3d 630 (Fla. 2016). The statute was amended in March 2017 to include jury unanimity. The fact-finding portion remained intact, as it was determined "constitutionally in conformance with *Hurst* to

Thereafter, as binding precedent, *Hurst v. Florida* would continue to shape the law prospectively, but the class of individuals sentenced under the statute that it invalidated was permanently closed. In light of the Legislature's intervening revisions to Florida's capital sentencing statute after *Hurst v. Florida*, *Poole* had the effect of precluding relief for six men. After Poole, the legislature again amended the statute and addressed this Court's concerns, i.e. legislative correction is possible. Poole's retroactive change cannot be reconciled with the bedrock objective of *stare decisis*—"that legal rules develop 'in a principled and intelligible fashion.'" *Michigan v. Bay Mills Indian Community*, 572 U.S. 798 (2014) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

4. Mr. Wilcox's Case is a Class of One—He is the *Only* Capital Defendant in Florida That can Make Such Argument.

The Court has further misapprehended Mr. Wilcox's equal protection argument as evidenced by the Court's considering it "obliterated" by *Jackson v. State*, 430 So. 3d 64 (Fla. 2025). Mr. Jackson challenged the applicability of the then-recently

---

require unanimous findings on all statutory elements required to impose death." *Id.* at 640.

promulgated 8-4 statute to his new sentencing proceeding, arguing that the Eighth Amendment required a unanimous jury vote for death. The Court rejected Mr. Jackson's claim "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.* at 80.

The Court has misapprehended Mr. Wilcox's claim and conflated the constitutional errors. The cases are inapposite, as are the legal arguments.

The class of one distinction is no comparison. As of the filing of this Motion for Rehearing, ***thirteen*** capital defendants resentenced to death following a *Hurst* remand, were resentenced under the 8-4 statute. Mr. Wilcox is the *only* client having been sentenced to death in Florida following a jury recommendation for death by a vote of 7-5, that was eligible for, sought *Hurst* relief, and was denied.[4] Because

[4] Of the *Hurst* eligible cases, 22 were sentenced to death following a jury vote of 7-5 for death. Of those, 18 were granted relief. Of the remaining 4: 1 waived postconviction proceedings entirely, 2 were granted relief on other grounds and exonerated, and Mr. Wilcox. Fifteen of the remanded 7-5 cases were resentenced to life, 1 defendant died pending resentencing, and 2 remain pending.

this Court refuses to correct the injustice, he will remain the only Florida capital defendant on death row with a death sentence that cannot meet constitutional scrutiny even under the current statute, which requires only 8 jurors to vote for death.

The underlying error is likewise incomparable. Mr. Jackson received *Hurst* relief. The Sixth Amendment error in his case was cured when he was granted a new penalty phase proceeding, wherein the jury was required to make specific findings of fact as required by the Sixth Amendment. The error in Mr. Wilcox's case stands irrespective of *Hurst v. State*—he remains sentenced to death pursuant to a sentencing scheme the United States Supreme Court struck down. There is no rational basis for the disparate treatment of Mr. Wilcox.

The Court's denial completely ignores the larger issue—that Mr. Wilcox was denied relief because an experienced circuit court judge failed to follow the law and grant Mr. Wilcox the relief he was entitled to. What's more, it appears the judge could not be bothered to read

---

As of the filing of this motion, more than 76% of the remanded *Hurst* cases have been resentenced to life. Of those, 81% had initial jury votes of 8-4 or higher.

the pleadings at all. The latter is evidenced by the fact that the lower court's order explicitly denied Mr. Wilcox's Rule 3.851 motion without an evidentiary hearing "pursuant to the State's Response" and without any further analysis or mention of any facts. (PCR-889). The State's response *explicitly* conceded, "If this Court does not grant relief based on the *Hurst* error, the State agrees that this claim needs an evidentiary hearing." (PCR-868). The lower court's actions 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). It cannot be that this Court will ignore constitutional error in a case simply because a member of the judiciary failed to uphold the Code of Judicial Conduct, including his duty to "be faithful to the law and maintain professional competence in it" and to "dispose of all judicial matters . . . fairly." Fla. Code of Jud. Conduct, Canon 3(B)(3); B(8).

Notably, on appeal of the lower court's summary denial, this Court also mishandled Wilcox's case, treating it differently than similarly situated capital defendants. Prior to *Poole*, this Court remanded *every* denial of *Hurst*-eligible claims on appeal. Among

those appeals included Eric Patrick, a capital defendant on appeal of the lower court's denial of his Rule 3.851 motion, also out of Broward county. The lower court denied all of Patrick's claims, including guilt and penalty phase issues. This Court reversed the summary denial of a juror issue and remanded Mr. Patrick's case for an evidentiary hearing. *Patrick v. State*, 246 So. 3d 253 (Fla. 2018). The Court simultaneously granted *Hurst* relief and vacated Patrick's death sentence. *Id.*

Mr. Wilcox was on appeal at the very same time. Mr. Wilcox appealed the summary denial of his motion, and requested this Court reverse and remand so that the lower court could hold a case management conference and hear all of his claims. Mr. Wilcox also requested this Court grant Mr. Wilcox *Hurst* relief. The Court declined to do so. *Wilcox v. State*, SC2018-146, 2026 WL 4391268 (Fla. 2019).

At every turn, Mr. Wilcox properly challenged and preserved the Sixth Amendment violations in his case. Pretrial, he requested the jury be instructed to make specific findings. (R. 283). On direct appeal, he challenged the constitutionality of his death sentence pursuant to *Ring*. *Wilcox v. State*, 143 So. 3d 359 (Fla. 2014). Following this Court's affirmance of his death sentence, he sought

certiorari review at the Supreme Court. *Wilcox v. Florida*, 574 U.S. 1161 (Feb. 23, 2015). Once the Supreme Court granted certiorari review in *Hurst v. Florida*, Wilcox sought rehearing. *Wilcox v. Florida*, 575 U.S. 980 (Apr. 20, 2015). And, in postconviction proceedings, Mr. Wilcox again challenged the constitutionality of his sentence pursuant to *Hurst,* twice. Despite his persistence to properly challenge the constitutionality of his sentence, Mr. Wilcox has been denied relief at every stage, all while additional aspects of his case erode, thereby decreasing the confidence and reliability of his death sentence.

This Court's circumvention of *Hurst v. Florida* with *State v. Poole* cannot stand. Mr. Wilcox is entitled to a new penalty phase proceeding wherein a jury will be required to make the requisite findings of fact necessary to impose a death sentence.

This Court should reverse.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Wilcox respectfully urges this Court to reverse the lower court, grant a new penalty phase proceeding, and grant such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ Brittney N. Lacy

BRITTNEY N. LACY
Assistant CCRC-South
Fla. Bar No. 116001
lacyb@ccsr.state.fl.us
ccrcpleadings@ccsr.state.fl.us

MICHAEL COOKSON
Staff Attorney
Florida Bar No. 1057838
cooksonm@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 26th day of June, 2026.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Motion for Rehearing is produced in Bookman Old Style 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.210.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

Filing # 199205058 E-Filed 05/24/2024 10:49:36 PM

IN THE SUPREME COURT OF FLORIDA

Case No. _____

DARIOUS WILCOX,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

LOWER CASE NO. 08-3736CF10A

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

COLIN WAGNER
Staff Attorney
Florida Bar No. 1054120

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 174114

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

COUNSEL FOR WILCOX

May 24, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES.....iii

PRELIMINARY STATEMENT AND CITATIONS TO RECORD 8

JURISDICTION 9

REQUEST FOR ORAL ARGUMENT 9

PROCEDURAL HISTORY 10

GROUNDS FOR HABEAS CORPUS RELIEF 15

GROUND 1 15

Wilcox invokes this Court's habeas jurisdiction to remedy an intolerable injustice resulting from the lower court's arbitrary denial of *Hurst* relief. 15

GROUND 2 21

Appellate counsel's failure to raise numerous meritorious issues on direct appeal implicating the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Articles I §§ 9, 16(a), and 17 of the Florida Constitution warrants reversal of Wilcox's convictions and/or sentence of death. 21

A. Appellate counsel was ineffective for failing to challenge Wilcox's competency to waive counsel at the guilt phase of his trial. 23

B. Wilcox was forced to surrender one constitutional right in order to assert another in violation of *U.S. v. Simmons*. 45

C. Appellate counsel was ineffective for failing to challenge the trial court's instructing the jury on and erroneous finding of the prior violent felony aggravator. 52

D. Appellate counsel was ineffective for failing to challenge the trial court's instructing the jury on and erroneous finding of the "in the course of a felony aggravator." 56

E. Appellate counsel was ineffective for failing to properly challenge prosecutorial misconduct as a Fourteenth Amendment violation, depriving Wilcox of his rights under the Sixth, Eighth, and Fourteenth Amendments.....62

F. Appellate counsel was ineffective for failing to raise the claim that Wilcox was denied his Sixth Amendment right to confront the witnesses against him and present a defense. 67

G. Appellate counsel was ineffective for failing to properly challenge the trial court's refusal to allow Wilcox to cross examine the State's key witness in violation of his Sixth Amendment right to confrontation and right to present a defense. 74

CONCLUSION AND RELIEF SOUGHT.....76

CERTIFICATE OF SERVICE 78

CERTIFICATE OF COMPLIANCE AND FONT.....78

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante, 499 U.S. 279 (1991) 52

Barker v. Wingo, 407 U.S. 514 (1972) 51

Behr v. Bell, 665 So. 2d 1055 (Fla. 1996) 43

Brady v. Maryland, 373 U.S. 83 (1963) 41

Campbell v. State, 227 So. 2d 873 (Fla. 1961) 59

Cash v. Maxwell, 565 U.S. 1138 (2012) 66

Chambers v. Mississippi, 410 U.S. 284 (1973) 63, 66, 75

Chapman v. California, 386 U.S. 18 (1967) 76

Darden v. Wainwright, 477 U.S. 168 (1986) 63, 64, 66

Davis v. Alaska, 415 U.S. 308 (1974) 68, 69, 72, 73, 75

Davis v. State, 207 So. 3d 142 (Fla. 2016) 16

Delaware v. Fensterer, 474 U.S. 15 (1985) 67, 68

Dixon v. State, .283 So. 2d 1 (Fla. 1973) 20

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 63

Douglas v. Alabama, 380 U.S. 415 (1965) 69

Evitts v. Lucey, 469 U.S. 387 (1985) 21

Faretta v. California, 422 U.S. 806 (1975) 23, 24, 25

Farina v. Sec'y, Fla. Dep't of Corr., 2013 WL 5432318 (11th Cir. Sept. 30, 2013).....22, 76

Figueroa-Sanabria v. State, 366 So. 3d 1035 (Fla. 2023) 51

Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986) 76

Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986) 26, 27, 28, 29, 33, 44

Furman v. Georgia, 408 U.S. 238 (1972) 19

Gonzalez v. State, 136 So. 3d 1125 (Fla. 2014) 54

Hamblen v. State, 527 So. 2d 800 (Fla. 1988) 51

Hayes v. State, 581 So. 2d 121 (Fla. 1991) 47

Holmes v. South Carolina, 547 U.S. 319 (2006) 72, 75

Hooks v. State, 286 So. 3d 163 (Fla. 2019) 27

Huff v. State, 622 So. 2d 982 (Fla. 1993) 8, 13

Hurst v. Florida, 577 U.S. 92 (2016) 15

Hurst v. State, 202 So. 3d 40 (Fla. 2016) 15

Indiana v. Edwards, 554 U.S. 164 (2008) 25

Iowa v. Tovar, 541 U.S. 77 (2004).....24, 25

Johnson v. State, 537 So. 2d 1116 (Fla. 4th DCA 1989) 47

Johnson v. State, 720 So. 2d 232 (Fla. 1998) 54

Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985).....22

Johnson v. Zerbst, 304 U.S. 458 (1938).....25

Jones v. Walker, 540 F.3d 1277 (11th Cir. 2008) 37

Kilgore v. State, 688 So. 2d 895 (Fla. 1997) 57

Kitchen v. K-Mart Corp., 697 So. 2d 1200 (Fla. 1997) 57

Lee v. State, 340 So. 2d 474 (Fla. 1976).....19, 20

Lewis v. State, 398 So. 2d 432 (Fla. 1981) 54, 55

Mahn v. State, 714 So. 2d 391 (Fla. 1998) 54

Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987).....21

McCoy v. Louisiana, 584 U.S. 414 (2018).....44, 50, 51

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) 16

Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).....32

Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989) 21

Parker v. State, 641 So. 2d 369 (Fla. 1994) 59

Porter v. State, 788 So. 2d 917 (Fla. 2001) 27

Potts v. State, 718 So. 2d 757 (Fla. 1998) 26, 27

Rogers v. Singletary, 698 So. 2d 1178 (Fla. 1996) 26, 27, 29

Rose v. State, 787 So. 2d 786 (Fla. 2001).....54

Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) 57

Simmons v. United States, 390 U.S. 377 (1968).....44, 46, 47, 73

Smith v. Illinois, 390 U.S. 129 (1968) 72

Smith v. State, 400 So. 2d 956 (Fla. 1981) 9

Smith v. State, 407 So. 2d 894 (Fla. 1981) 26

Smith v. State, 931 So. 2d 790 (Fla. 2006) 22, 45

Spann v. State, 857 So. 2d 845 (Fla. 2003) 54

Spencer v. State, 615 So. 2d 688 (Fla. 1993).....11

State v. Bowen, 698 So. 2d 248 (Fla. 1997).....26

State v. Hacker, 510 So. 2d 304 (Fla. 4th DCA 1986) 60, 61

State v. Naveira, 873 So. 2d 300 (Fla. 2004) 47

State v. Poole, 297 So. 3d 487 (Fla. 2020) 14, 17

State v. Williams, 776 So. 2d 1066 (Fla. 4th DCA 2001) 60, 61

Strickland v. Washington, 466 U.S. 668 (1984) 21, 52

Thornber v. City of Ft. Walton Beach, 568 So. 2d 914 (Fla. 1990) 58

United States v. Cash, 47 F.3d 1083 (11th Cir. 1995) 43

United States v. Cobble, No. 20-13166, WL 3448354 (11th Cir. Aug. 17, 2022) 27

United States v. Owen, 963 F.3d 1040 (11th Cir. 2020).....27, 30, 42

United States v. Stanley, 739 F.3d 633 (11th Cir. 2014) 27, 28, 29, 32, 36, 42, 43, 44

Weaver v. Massachusetts, 582 U.S. 286 (2017).....52

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

Wilcox v. State, 143 So. 3d 359 (Fla. 2014) 12

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

Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985) 9, 22, 76

Statutes

Fla. Stat. § 90.610 63

Fla. Stat. § 921.141(6)(d).....58

Other Authorities

2 Subst. Crim. L. § 14.5(f) (3d ed.).....58, 59, 61

Rules

Fla. R. App. P. 9.142(b)(4) 14

Fla. R. Crim. P. 3.191 47

Fla. R. Crim. P. 3.210(b).....23

Constitutional Provisions

Art. I, §13, Fla. Const. 8

Art. I, §16, Fla. Const. 47

PRELIMINARY STATEMENT AND CITATIONS TO RECORD

The present habeas corpus petition is the first filed by Wilcox in this case. The petition preserves claims arising under decisions of the U.S. Supreme Court and asserts substantial claims of error under the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Wilcox demonstrates that he was deprived of the effective assistance of counsel on direct appeal and that his convictions and death sentence were obtained and affirmed on appeal in violation of fundamental constitutional guarantees.

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 to this Court following the summary denial of Wilcox's initial Rule 3.851 motion without a *Huff*[1] hearing;

---

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

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

All other references will be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Rule 9.030(a)(3) and Article V, section 3(b)(9) of the Florida Constitution. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, §13, Fla. Const.

This Court has jurisdiction over the present action because the fundamental constitutional errors alleged herein arise in the context of a capital case in which this Court heard and denied a direct appeal. *See, e.g.*, *Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *see also Wilson*, 474 So. 2d at 1163. The Court's authority to exercise its habeas corpus jurisdiction and correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Wilcox requests oral argument on the claims asserted in this

Petition.

PROCEDURAL HISTORY

The Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, entered the judgments of conviction and sentences of death at issue.

On February 28, 2008, Wilcox was indicted for the first-degree murder of Nimoy A. Johnson; armed kidnappings of Mr. Johnson, Stephanie Hankerson, Tanesha Arnold, and Veronica Morris; and armed robbery with a firearm. R1-8; 11. Judge Paul Backman was thereafter assigned to the case.

Wilcox pled not guilty and invoked his right to counsel, and the Office of the Public Defender was appointed to represent him. R1-17. Over the course of the following nine months, Wilcox's legal counsel changed four times. R1-17, 27, 22, 26-27, 40, 46. The Public Defender's Office moved to withdraw due to conflicts of interest. R1-22. The court granted the motion and appointed the Office of Criminal Conflict and Civil Regional Counsel (CCCRC). R1-26, 27. Robert Gershman, under contract with CCCRC, entered his appearance on September 28th.

On November 14, 2008, Wilcox moved to proceed pro se and demanded speedy trial. The court held a status on his pro se motion on December 15, 2008, where Attorney Joseph Walsh made his first appearance as second chair counsel. 2PCR-1052-53.

After conducting a *Faretta* inquiry on January 9, 2008, the trial court determined that Wilcox was competent to proceed and waive counsel. T6-53-54. Accordingly, the court discharged counsel, but appointed CCCRC to remain as standby counsel.

After the jury returned a guilty verdict on March 4, 2009, Wilcox invoked his right to counsel for the penalty phase. R1-196.

The penalty phase lasted less than one day, during which counsel presented a single witness. The jury rendered its advisory recommendation of death by a vote of 7-to-5. T21-1274. The jury made no findings of fact.

After conducting a *Spencer*[2] hearing, T22-1285-1383, the trial court sentenced Wilcox to death for the murder count and life imprisonment on each remaining count. T23; R5-860-875. The court found four aggravating circumstances:

---

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

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. The court afforded "great weight" to each. *Wilcox v. State*, 143 So. 3d 359 (Fla. 2014).

In mitigation, the trial court found that Wilcox grew up in a difficult environment and lacked stability; his dysfunctional childhood led to the murder; circumstances beyond his control resulted in a dysfunctional childhood and adolescence; he had untreated symptoms of childhood depression; he will spend the rest of his life in prison; and he behaved well in court. R5-867-71. The court afforded "little weight" to each mitigating factor. R5-867-71.

Wilcox timely appealed his convictions and sentences, raising ten issues. This Court determined that the trial court erred by permitting the prosecution to cross-examine Wilcox on prior felony convictions, by not permitting Wilcox to refresh a witness's recollection using a police report, and in instructing the jury on, and finding, the avoid arrest aggravator, but found each error harmless. *Wilcox v. State*, 143 So. 3d 359 (Fla. 2014), *cert. denied*,

574 U.S. 1161 (2015).

Wilcox timely filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 on February 19, 2016, which he subsequently amended.

The postconviction court, presided over by Judge Backman, set a case management conference (*Huff*[3] hearing) for February 12, 2018; however, on January 18th, the court "inexplicably"[4] summarily denied all relief. PCR-889.[5]

Wilcox timely appealed to this Court, asserting that: 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 Brief, SC18-146 (Fla. Sept. 4, 2018).

---

[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).

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

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

Finding the lower court erred for failing to hold a *Huff* hearing, this Court reversed and remanded for further proceedings.[6] 2PCR-50.

Subsequently, this Court issued *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." Wilcox amended his postconviction motion in light of *Poole*.

The lower court ultimately granted an evidentiary hearing on one claim: whether trial counsel rendered ineffective assistance at the penalty phase. After the hearing, the court denied all of Wilcox's claims.

Wilcox timely appealed to this Court. Pursuant to Florida Rule of Appellate Procedure 9.142(b)(4), this Petition is being filed simultaneously with Wilcox's Initial Brief in Case Number SC23-1498.

[6] Given Judge Backman's retirement, Wilcox's case was assigned to Judge Martin S. Fein.

GROUNDS FOR HABEAS CORPUS RELIEF

GROUND 1

Wilcox invokes this Court's habeas jurisdiction to remedy an intolerable injustice resulting from the lower court's arbitrary denial of *Hurst* relief.

Wilcox suffered the exact constitutional error that 158 other death row inmates suffered: his death sentence was imposed after his jury returned a non-unanimous recommendation.[7] The error in Wilcox's case is perhaps more pronounced as he was sentenced following a mere 7–5 vote. *Hurst v. Florida*, 577 U.S. 92 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). But for the "inexplicabl[e]" summary denial of his claim without holding the requisite *Huff* hearing, Wilcox would have received *Hurst* relief. Wilcox is now the *only Hurst*-eligible defendant that has been denied relief with a bare majority vote for death—an unconstitutional sentence even under

[7] *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).

Florida's new death penalty statute that cries out for this Court's intervention.

One month after the Supreme Court issued *Hurst v. Florida* finding Florida's death penalty sentencing scheme unconstitutional, Wilcox timely filed his initial postconviction motion, wherein he raised several claims for relief including *Hurst* error. Wilcox moved to stay all proceedings until this Court considered *Hurst v. State*. PCR-659.

Once this Court determined the retroactive scope of *Hurst* in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), Wilcox promptly amended his postconviction motion.

This Court's ruling on the application of *Hurst* error was clear: it 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.

Despite this, the postconviction court summarily denied Wilcox's claim without holding a *Huff* hearing. On appeal, Wilcox asked that this Court remand to allow Wilcox to argue all of his

postconviction claims but also requested that this Court grant him the *Hurst* relief he was entitled. 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 "inexplicabl[e]" failure.

However, four months later, this Court issued *State v. Poole*, 297 So. 3d 487 (Fla. 2020), and receded 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." In light of this change in law, the postconviction court denied *Hurst* relief, creating a disparate and arbitrary result for Wilcox.[8]

Wilcox deserves *Hurst* relief. He has timely appealed at every stage, and 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, the jury returned a mere 7–5

[8] The lower court's denial of Wilcox's *Hurst* claim is the subject of Argument II of his contemporaneous appeal. In this habeas claim, Wilcox invokes this Court's original jurisdiction to avoid an unjust result.

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. Furthermore, Wilcox presented substantial, compelling mitigation at his evidentiary hearing that, at the very least, would have had an impact on just one juror.

Beyond the reduction in aggravation and increase in mitigation, this Court must consider the fair imposition of the most severe penalty. It is true that this Court has decided other issues resulting in the denial of relief to some litigants. However, unlike those decisions, this Court's decision in *Poole* uniquely affected Wilcox. As mentioned above, 158 death-sentenced litigants were eligible for *Hurst* relief. Of those: 150 were granted relief,[9] and two litigants waived postconviction proceedings, leaving six *Hurst*-eligible Defendants.[10] Of those six, Wilcox is the only defendant

---

[9] The *Hurst* Data indicates 145 defendants were granted *Hurst* relief, and five were granted relief on other grounds.

[10] At the time this Court decided Mr. Poole's case in January 2020, five *Hurst* challenges remained pending, including the cases of Duane Owen, Andrew Gosciminski, Carlton Francis, James

sentenced to death by a jury recommendation of 7–5. Indeed, he is the only remaining Defendant whose death sentence would be unconstitutional even under the new statute requiring a jury vote of 8–4 for death.

The timing of Wilcox's case is hardly a distinction that justifies a life-or-death decision. 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. Deciding Wilcox's case in the wake of these events is tantamount to drawing lots. 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 "inexplicabl[e]" error.

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

---

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.

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.*

This Court has the authority to consider the entirety of Wilcox's case—every error, the reduction in aggravation, and all of his mitigation. This Court has a compelling basis to do so and grant relief if the nuanced *Hurst* and *Poole* arguments on appeal are rejected because the injustice in this case far exceeds an ordinary denial of *Hurst* relief.

GROUND 2

Appellate counsel's failure to raise numerous meritorious issues on direct appeal implicating the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Articles I §§ 9, 16(a), and 17 of the Florida Constitution warrants reversal of Wilcox's convictions and/or sentence of death.

Wilcox had the constitutional right under the Sixth Amendment to the effective assistance of counsel for the purpose of presenting his direct appeal to this Court. *Strickland v. Washington*, 466 U.S. 668 (1984). "A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The *Strickland* test applies equally to ineffectiveness allegations of appellate counsel. *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989).

Because the constitutional violations that occurred during Wilcox's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," the "adversarial testing process" did not work in Wilcox's direct appeal. *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987). This Court has granted habeas relief in cases with a similar lack of appellate

advocacy. *Wilson*, 474 So. 2d 1162; *see also Farina v. Sec'y, Fla. Dep't of Corr.*, 2013 WL 5432318 (11th Cir. Sept. 30, 2013) (unpub.) (finding habeas relief warranted because of appellate counsel's unreasonable failure to raise fundamental error on direct appeal).

To establish ineffective assistance of appellate counsel, this Court looks to the "parallel the standards announced in *Strickland*:"

> 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Smith v. State, 931 So. 2d 790, 805 (Fla. 2006) (citations omitted). Wilcox alleges both that appellate counsel's performance was deficient under the Fifth Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and that appellate counsel's deficient performance "compromise[ed] the appellate process." *Johnson v. Wainwright*, 463 So. 2d 207, 209 (Fla. 1985).

Appellate counsel's failures to raise issues crucial to "the validity of the conviction" and sentence cannot be excused. *Wilson*, 474 So. 2d at 1163. Wilcox is entitled to relief on the following

grounds.

A. Appellate counsel was ineffective for failing to challenge Wilcox's competency to waive counsel at the guilt phase of his trial.

Wilcox was not competent to waive the assistance of counsel and proceed pro se.

The trial court appointed psychologist Michael Brannon, Psy.D., to determine whether, in the court's words, Brannon *felt* Wilcox was competent to waive counsel pursuant to *Faretta v. California*, 422 U.S. 806, 807 (1975). T5-18. The court's order, however, only instructed Brannon to determine whether Wilcox was competent to proceed. R1. 67. Brannon prepared a report and provided it to the court, T6-53-54, but it was not admitted on the record.

Although the court's order specifically stated that "there are reasonable grounds to believe that the Defendant is not mentally competent to proceed at this material stage of the criminal proceeding," the court did not conduct a competency hearing as required under Florida Rule of Criminal Procedure 3.210(b).[11]

[11] Rule 3.210(b) requires:

After conducting a *Faretta* inquiry, the trial court, relying only on Brannon's report and the court's own interactions with Wilcox, accepted Wilcox's waiver, determining it to be "knowing, voluntary [and] for purposes of the record, I have to use the word intelligent," T06-59, and discharged counsel. CCCRC remained appointed as stand-by counsel. S8-33.

Although the Sixth Amendment guarantees a criminal defendant the assistance of counsel, a criminal defendant can waive that right, discharge counsel, and represent himself. *Faretta v. California*, 422 U.S. 806, 834-35 (1975); *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). The right to self-representation, however, "is *not*

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and may order the defendant to be examined by no more than 3 experts, as needed, prior to the date of the hearing. Attorneys for the state and the defendant may be present at any examination ordered by the court.

absolute." *Indiana v. Edwards*, 554 U.S. 164, 171 (2008) (emphasis added).

A waiver must be knowing, voluntary, and intelligent. *Faretta*, 422 U.S. at 934-35. Whether a waiver meets this standard depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In *Faretta*, for instance, the Supreme Court noted that the record in question "affirmatively show[ed] that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." 422 U.S. at 835. Thus, the Court held it was constitutional error "*under these circumstances*" to force a lawyer upon the defendant. *Id.* at 836 (emphasis added).

A waiver's validity requires a "case-specific" determination. *Tovar*, 541 U.S. at 88 ("The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.").

This Court, too, has repeatedly recognized the necessity of

evaluating waivers circumstantially. *See*, *e.g.*, *Smith v. State*, 407 So. 2d 894 (Fla. 1981); *Rogers v. Singletary*, 698 So. 2d 1178 (Fla. 1996); *State v. Bowen*, 698 So. 2d 248 (Fla. 1997); *Potts v. State*, 718 So. 2d 757 (Fla. 1998). In *Smith*, much like in *Faretta*, this Court observed that the defendant was "literate, competent, and understanding." 407 So. 2d at 900.

Later, in *Rogers*, this Court expanded its analysis, upholding a waiver partly because "[the defendant] had represented himself on at least four occasions, once obtaining a mistrial, once obtaining an acquittal, and once obtaining a reversal on appeal from a denial of post-conviction relief." 698 So. 2d at 1181. Notably, as Justice Shaw remarked, the defendant understood that *Faretta* "guaranteed his right to represent himself." *Id.*

The Rogers court adopted the Eleventh Circuit's reasoning in *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986), holding that "[t]he ultimate test is not the trial court's express advice, but rather the defendant's understanding." *Id.* (internal quotations omitted). As the *Fitzpatrick* court explained, "[a] defendant's understanding" depends upon "the particular facts and circumstances of each case." 800 F.2d at 1065. These "particular

facts and circumstances," known as the *Fitzpatrick* factors, have been explicitly adopted by this Court. *United States v. Stanley*, 739 F.3d 633, 645-46 (11th Cir. 2014) (explaining the eight, distinct factors); *see*, *e.g.*, *Porter v. State*, 788 So. 2d 917, 927 (Fla. 2001); *Waterhouse v. State*, 596 So. 2d 1008, 1014-15 (Fla. 1992); *Potts v. State*, 718 So. 2d 757, 760 (Fla. 1998); *Hooks v. State*, 286 So. 3d 163, 170 (Fla. 2019) (Labarga, J. concurring).

In assessing the *Fitzpatrick* factors, reviewing courts are permitted to look to "subsequent events during a trial as evidence of what would have been true when a defendant first waived his rights." *Stanley*, 739 F.3d at 646; *see also United States v. Owen*, 963 F.3d 1040, 1049 (11th Cir. 2020); *United States v. Cobble*, No. 20-13166, WL 3448354 (11th Cir. Aug. 17, 2022) ("We may examine the entire record when determining if a defendant's waiver of counsel was knowing and voluntary.").

It bears emphasis that for the purposes of *Faretta*, "[t]he ultimate test is not the trial court's express advice, but rather the defendant's understanding." *Rogers*, 698 So. 2d at 1181 (quoting *Fitzpatrick*, 800 F.2d at 1064); *see also Potts*, 718 So. 2d at 760. An application of the *Fitzpatrick* factors shows Wilcox did not make a

knowing, voluntary, and intelligent waiver of his Sixth Amendment right to the assistance of counsel.

The Fitzpatrick Factors

1. Defendant's Age, Education, and Health

The first factor considers "the defendant's age, educational background, and physical and mental health." *Stanley*, 739 F.3d at 645. Although Wilcox was thirty-one years old at the time of the trial, he had completed just eight years of schooling, T6-45, across multiple schools. T22-1327. Some portion of those eight years were spent in special education classes. T22-1327. Wilcox's education abruptly ended at fourteen years old after his arrest and subsequent ten-year prison sentence. T22-1322.

Wilcox presents a stark contrast to the defendants in *Fitzpatrick*, *Stanley*, and *Rogers*—all of whom were found to have knowingly, voluntarily, and intelligently waived counsel. Fitzpatrick was a former lieutenant in the Marine Corps, "an experienced stockbroker," and a teacher of "Latin, English, and humanities in high school." *Fitzpatrick*, 800 F.2d at 1066. Harris was the Chief Executive Officer of Conversion Solutions Holdings Corporation. *Stanley*, 739 F.3d at 639. Rogers was a seasoned, and often

successful, pro se litigant. *Rogers*, 698 So. 2d at 1181.

Wilcox had no profession, minimal education, and no experience as a pro se litigant. Even the trial court appeared to doubt Wilcox's intellectual capacity at the closing of the *Faretta* hearing:

> THE COURT: This is a knowing, voluntary—*for the purposes of the record, I have to use the word intelligent*—decision to represent himself.

T6-59 (emphasis added). The first *Fitzpatrick* factor weighs heavily against finding a valid waiver.

2. Contact with Lawyers Prior to Trial

The second factor concerns "the extent of the defendant's contact with lawyers prior to trial." *Stanley*, 739 F.3d at 645. The more contact the defendant has, the more familiar he likely will be with "the complexity of the case and the legal process." *Fitzpatrick*, 739 F.3d at 647. Wilcox's contact with his lawyers prior to trial was sporadic, haphazard, and virtually non-existent.

Between Wilcox's arrest on February 28, 2008, and his first pro se motion on November 14, 2008—nearly nine months—Wilcox waited in jail for consistent and qualified representation. R1-56; T4-

4; 11;17; T11-108. Wilcox himself told the trial court:

> DEFENDANT: 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. The court even acknowledged the problem at trial. T13-363 ("Did you have some delay problems because of your lawyers? Yes.").

In contrast to Wilcox's situation, the Eleventh Circuit in *Owen* found support for a valid waiver where the defendant met his appointed lawyer "more than 15 times and spoke on the phone another 15 to 20 times." 963 F.3d at 1050. Wilcox's contact pales in comparison.

In fact, the impetus behind Wilcox's decision to proceed pro se stems from just how little contact he had with his various lawyers while waiting indefinitely in jail:

> DEFENDANT: I don't want to be represented by counsel.
>
> THE COURT: You want to do this on your own?

DEFENDANT: Give me the paperwork. Been since January [sic].

THE COURT: Back up a second. You want to represent yourself in a murder in the first degree, where the State is seeking the death penalty?

DEFENDANT: Has no baring [sic] on me.

THE COURT: It does.

DEFENDANT: To the prosecution. Not me. I am tired of sitting here. Been here since January. That's all I ask. Him, he can stand alongside me.

THE COURT: No, no, no. If you represent yourself, you represent yourself.

DEFENDANT: I will go by myself. Give me all the paperwork the prosecution has. Tired of sitting here. Can't sit here longer. Frustrated. Frustrated. Can't do if no more [sic].

T4-4.

DEFENDANT: I know. I'm ready. I'm ready to have the case tried before a jury. I am tired of sitting a county jail [sic] in Dade County, not Broward.

THE COURT: You have a right to tell your lawyers you want a speedy trial.

DEFENDANT: I have, since February 22nd.

T4-11.

THE COURT: I need to make sure you understand what you're doing.

DEFENDANT: Understand? Of course, I do. Tired of sitting here. Been here too long.

T4-17. Wilcox decided to represent himself because he was not receiving any representation. Thus, the second *Fitzpatrick* factor weighs heavily against the finding of a valid waiver.

3. Knowledge of the Nature of the Charges, Possible Defenses, and Penalties

The third factor evaluates "the defendant's knowledge of the nature of the charges, possible defenses, and penalties." *Stanley*, 739 F.3d at 645. Though the record shows that the trial court informed Wilcox of the charges and possible penalties, T6-26-43, clearly Wilcox had no genuine understanding of them. For instance, when asked whether he grasped the implications of proceeding pro se in a death penalty case, Wilcox replied that that "has no baring [sic] on me." T4-4. Later, after the trial court urged him to read *Faretta* and *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973), before deciding to proceed pro se, Wilcox was unable to say anything at all about either case:

THE COURT: Did you read the cases?

DEFENDANT: One of them.

THE COURT: Which one?

DEFENDANT: Faretta.

THE COURT: That's the important one. What did you get out of reading that case?

DEFENDANT: Really nothing.

THE COURT: No? You didn't get out of that case the fact that you don't have to know a thing about the law? That you don't have the competency of a lawyer? You just have to be able to make an intelligent decision whether or not you want to represent yourself?

DEFENDANT: Yes, sir.

T5-10. Indeed, much of the record reveals similarly lopsided exchanges, misunderstandings, and "pro forma answers to pro forma questions." *Fitzpatrick*, 800 F.2d at 1067:

THE COURT: If I allow you to represent yourself and if you requested, I could have conflict regional counsel act as stand-by counsel.

DEFENDANT: No.

THE COURT: What that means is that individual is available to you if you have any questions in the course of the proceedings.

DEFENDANT: Oh.

THE COURT: You want stand-by counsel?

DEFENDANT: If I ask any questions, it will be Joe? Yes.

THE COURT: Do you want me to appoint stand-by counsel? You're entitled to it.

DEFENDANT: Yes, sir.

* * *

THE COURT: Now, if I find you're capable of making the decision to represent yourself, I'll appoint stand-by counsel to assist you. However, you will still be responsible for the organization and content presenting your case.

DEFENDANT: Yes, sir.

THE COURT: You will still have the entire responsibility for your own defense. You understand that?

DEFENDANT: Yes, sir.

THE COURT: In other words, stand-by counsel is not an individual who you can call and say I want you to take this deposition, I need you to get me this information. They are there only to answer legal questions and procedural questions you may have. That's all they are there for. Basically, to guide you through the process if you have a question.

DEFENDANT: Understood.

THE COURT: I'll ask you again, do you want a lawyer to be your main lawyer?

DEFENDANT: If not Joe, no.

THE COURT: It is Joe.

DEFENDANT: No.

THE COURT: I am not talking about stand-by counsel. I'm talking about a lawyer to represent you.

DEFENDANT: No, sir.

THE COURT: You understand you're really making a big mistake. I can't emphasize that enough, Mr. Wilcox.

DEFENDANT: I understand that, Backman. You have to put yourself in my shoes. I'm the only one sitting here. You can only imagine not identify.

T6-48-49.

Wilcox's decision to proceed pro se indicates his inability to grasp the nature of the charges, possible defenses, and penalties. The record demonstrates that Wilcox's decision was based on little more than his wish to "go home" as soon as possible. T6-22:

THE COURT: What do you want to do, Mr. Wilcox?

DEFENDANT: Ready to go. Ready to go home. That's what I'm ready to do. Go home.

THE COURT: A jury will have to make that determination.

DEFENDANT: How soon?

T6-22. But, of course, Wilcox's ability to "go home" was entirely dependent on his defense. If he had understood that he and his lawyers needed as much time as possible to prepare for the trial, he would not have insisted on representing himself. The third *Fitzpatrick* factor, therefore, weights against finding a valid waiver.

4. Understanding of rules of procedure, evidence, and courtroom decorum

The fourth factor considers "the defendant's understanding of rules of procedure, evidence and courtroom decorum." *Stanley*, 739 F.3d at 645. In *Stanley* the Eleventh Circuit found the defendant's waiver valid partly because he "made evidentiary objections, examined witnesses, distinguished Government case law, invoked the rule of sequestration, and argued motions, including a motion *in limine* and a Rule 29 motion." *Id.* at 648. The court determined that the record indicated the defendant "performed adequately at trial." *Id.* At the very least, a defendant's performance at trial "provides some circumstantial evidence of what he knew at the time he waived his right to counsel." *Jones v. Walker*, 540 F.3d 1277,

1295 (11th Cir. 2008).

While representing himself at the guilt phase of his trial, Wilcox made just two objections. The first was an improper objection in response to the State's own hearsay objection it was attempting then to elaborate:

> ROSSMAN: My position, this is all hearsay from unidentified witnesses. It is the rankest form of hearsay. We don't know who is saying what. He's saying these civilian witnesses. He's trying to elicit statements of other people through this detectives [sic].
>
> DEFENDANT WILCOX: Object [*sic*].
>
> THE COURT: Wait. He's trying to explain his objection.

T14-497. Wilcox's second, and only other, objection was equally inappropriate:

> [ROSSMAN]: Did you ever give Darious Wilcox permission to take your Chevy Tahoe?
>
> [WITNESS]: No
>
> DEFENDANT WILCOX: Objection. Does not know a Darious Wilcox.
>
> THE COURT: The question is still appropriate. It is overruled.

T14-527.

Wilcox's cross examinations often fared no better than his objections. On cross of an arresting officer, for instance, Wilcox's questions probed nothing more than the officer's knowledge of headwear:

> Q. You gave testimony to the fact that you identified me as a suspect that came out of a particular house and surrendered, am I correct?
>
> A. Yes.
>
> Q. Would you say I was the suspect that exited the vehicle? Did you see me exit the vehicle?
>
> A. No, I did not.
>
> Q. You refer to this cap as being that of a skully, am I correct?
>
> A. I'm not sure of the cap. You had a white cap on your head.
>
> Q. This is a religious cap?
>
> A. Okay.
>
> Q. Do you have any idea what a skully is?
>
> A. Sure.
>
> Q. If you know what a skully, why would you refer to a religious cap as that of a skully?
>
> A. I was mistaken. You had a white cap on your head.
>
> Q. Kuffee is the name. Not skully.

A. Okay. Thanks for the lesson.

DEFENDANT WILCOX: Other than that, nothing further.

T14-415-16.

And when confronting the State's most prejudicial witness, Terrell Collier, Wilcox's questions tended to confirm the State's theory, rather than cast doubt on it:

Q. You do know that I stand accused of this offense, am I correct?

A. That you stand accused.

Q. Of this offense?

A. Yes. Because it was you.

Q. How would you know it was me?

A. Come on. You're my cousin. I know you. I seen you when you came out the man's house. Come on, man. This—

Q. What did you see me do?

A. I saw you. You came out the man's house. Took the bags off of our porch. You opened the truck. I don't know whose truck it was in, but you opened the truck. You put your bags in there. When you put your bags in there, you krunk [sic] the car up. Then when you krunk [sic] the car up, you went right back into that man's house. When you went back in there, you had a gun in your right hand.

T15-682-83.

Although Wilcox filed pre-trial motions, the majority of them were boilerplate forms he simply signed. R1-69, 72, 73, 75, 79, 81. Where Wilcox drafted his own motions, they demonstrated a fundamental lack of understanding of procedure. For example, when seeking "all forensic DNA and patent fingerprint test result findings," he filed a "Motion to Suppress Evidence." R1-104-05. The trial court later "convert[ed] it" to a motion to compel before denying it. T9-87-88.

Wilcox also filed a motion to subpoena adverse witnesses "for purpose of avoiding heresy [sic] and farmost [sic] securing their presence and testimonies of fact of case at trial." R1-93. The court later had to explain that his motion did not in fact act as a subpoena:

> DEFENDANT: That's what prompted me to submit this not to him but to Your Honor.
>
> THE COURT: I don't subpoena witnesses.
>
> DEFENDANT: Clerk of the Courts, I asked to subpoena.
>
> THE COURT: Again, that's what a lawyer would do.

T13-367.

The record indicates that Wilcox did not understand the rules of procedure or evidence. Wilcox filed a pretrial demand for *Brady*[12] material, asking for transcriptions of DVDs the State had provided to him:

> MS. VOGEL: Those statements were on DVD. There are not transcripts of them. I do not intend to provide transcripts.
>
> DEFENDANT: Why not.
>
> THE COURT: Nor does she have to.
>
> DEFENDANT: They are needed.
>
> THE COURT: You're only entitled to the DVD's. That's what she has.

T8-73. Wilcox failed to distinguish discovery from admissible evidence, T13-357, and struggled to understand the meaning of hearsay. T14-499. During his opening, T13-355, he attempted to read from his motion for judgment of acquittal, in which he claimed, clearly miming legal language:

> A vast majority of the states evidence <testimonial> [sic] to be presented at trial documented in the state discovery proves beyond a reasonable doubt that the defendants assertion of him being framed for the crime committed by another and/or others is

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

> deserving of meticulous judicial review and examination for judgment of acquittal.

R1-119. Even under the most charitable interpretation, Wilcox did not "perform[] adequately at trial." *Stanley*, 739 F.3d at 648. The fourth *Fitzpatrick* factor weighs heavily against finding a valid waiver.

5. Experience in Criminal Trials

The fifth factor considers "the defendant's experience in criminal trials." *Id.* at 645. Although Wilcox had a prior conviction, he had never had a jury trial. *Cf. Owen*, 963 F.3d at 1050 (observing that the defendant's prior experience at trial supported the validity of his waiver). For this reason, the fifth factor weighs against finding a valid waiver.

6. Appointment of and Assistance from Standby Counsel

The sixth factor asks "whether standby counsel was appointed, and the extent to which that counsel aided [the] defendant." *Id.* In *Stanley*, the Eleventh Circuit upheld a waiver where the defendant himself admitted that his standby counsel "had taken an active role . . . including making objections . . . submitting charges on his behalf, procuring and interviewing

witnesses, asking for bench warrants, and interceding with the court." *Id.* at 649 (internal quotations omitted). In *United States v. Cash*, 47 F.3d 1083 (11th Cir. 1995), by contrast, the court overturned the finding of a valid waiver where the defendant's standby counsel "rendered no consultation, advice or aid to [the defendant] during trial." *Id.* at 1089.

Wilcox's standby counsel mirrored that in *Cash*. At trial, standby counsel was not qualified to handle death penalty cases. S8-41. Although he was present for the trial, he did not participate. He made no objections, did not assist Wilcox in subpoenaing witnesses, despite Wilcox's ongoing difficulty, and did not once "interced[e] with the court." *Stanley*, 739 F.3d at 649. In fact, counsel made sure to note that his role was *not* "to provide the pro se defendant with any trial strategy, tactics or any legal advice," but only "to assist the Court in conducting orderly and timely proceedings." T11-105. Notwithstanding the fact that he was correct regarding the role of standby counsel, *Behr v. Bell*, 665 So. 2d 1055, 1056 (Fla. 1996), standby counsel's assistance nevertheless remains an important factor in assessing the validity of a waiver under *Fitzpatrick*. *Stanley*, 739 F.3d at 645-46. Because standby

counsel's assistance was, at best, minimal, the sixth *Fitzpatrick* factor weighs against a valid waiver.

7. Mistreatment or Coercion

The seventh factor examines the "mistreatment or coercion of the defendant." *Id.* at 646. As noted above, Wilcox received few legal visits during the nearly nine months he waited in jail. When Wilcox made the decision to proceed pro se, there was no trial date set, despite his many requests for a speedy trial. In effect, Wilcox's lawyers ignored his right to set the objectives of his defense. *See McCoy v. Louisiana*, 584 U.S. 414, 422 (2018). Wilcox was forced to abandon one constitutional right to assert another. *Simmons v. United States*, 390 U.S. 377, 391 (1968). The seventh factor, therefore, weighs against a valid waiver.

8. Efforts to Manipulate the Events of the Trial

The eighth, and final, *Fitzpatrick* factor inquires "whether the defendant was trying to manipulate the events of the trial." *Stanley*, 739 F.3d at 646. "Evidence of manipulation or intentional delay implies a greater understanding of the proceedings and an understanding of the risks and complexities of a criminal trial." *Fitzpatrick*, 800 F.2d at 1067. Here, of course, Wilcox had no

interest in manipulating or delaying the proceedings. Rather, it was his intention to accelerate them because of the amount of time he had been waiting in jail without consistent counsel. T6-22. Therefore, the eighth factor also weighs against finding a valid waiver.

Conclusion

The deficiency of Wilcox's waiver was apparent on the record. Because all of the *Fitzpatrick* factors weigh against finding Wilcox's waiver valid, this Court should find that his waiver was invalid and that appellate counsel's failure to raise the issue fell outside of professional norms, thereby undermining the confidence in the fairness and correctness of the appellate result. *See Smith*, 931 So. 2d 790.

B. Wilcox was forced to surrender one constitutional right in order to assert another in violation of *U.S. v. Simmons*.

As outlined above, Wilcox received minimal contact from his attorneys over nine months post-arrest. In response to his attorneys' inactivity, Wilcox filed a motion to discharge counsel and proceed pro se. Despite having demanded speedy trial, Wilcox's counsel was still months away from being prepared and seemingly

had no intention of honoring Wilcox's constitutional right. On appeal, appellate counsel failed to raise the claim that Wilcox was forced to abandon one constitutional right to assert another.

In *Simmons,* the Supreme Court held that it was "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 394. The defendant's dilemma in *Simmons* concerned whether to testify at his motion to suppress hearing or maintain his Fifth Amendment privilege against self-incrimination. In order to assert his Fourth Amendment claim, the defendant had to establish standing—i.e., he had to demonstrate a possessory interest in the seized property. However, admitting ownership of the item meant that the government could then use the defendant's admission to prove an element of the charged offense. *Id.* at 389-91.

The Supreme Court dismissed the suggestion that testifying at the hearing was simply the defendant's choice. *Id.* at 394. Instead, the Court described the situation as creating a "Hobson's choice," *id.* at 391, and remanded the case, prohibiting the government from using the defendant's testimony at his motion to suppress hearing at the subsequent trial. *Id.* at 394.

In *Hayes v. State*, 581 So. 2d 121 (Fla. 1991), this Court rejected the argument that *Simmons* is limited to its facts, holding that the "analysis applied to any situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights." *Id.* at 126 (quoting *Johnson v. State*, 537 So. 2d 1116, 1117-18 (Fla. 4th DCA 1989)).

Wilcox, too, faced a "Hobson's choice." *Simmons*, 390 U.S. at 391. The Sixth Amendment guaranteed Wilcox the effective assistance of counsel and the right to a speedy trial.[13] Wilcox was forced to choose between the two. The trial court acknowledged this dilemma in an exchange with Wilcox during voir dire:

> THE COURT: But, Wilcox, if I understand correctly, please, correct me if I'm wrong, one of the reasons Mr. Wilcox wanted to proceed on his own, is he really didn't want to waive speedy. He wanted to file a demand for speedy.

---

[13] The right to speedy trial is also guaranteed by Article 1, Section 16 of the Florida Constitution, as put into practice by Florida Rule of Criminal Procedure 3.191. Wilcox, however, is not asserting that the Hobson's choice here is between the right to counsel and the right to be tried within time allotted in the rule. Rather, because he was denied effective representation for nearly a year, he was forced to waive counsel or wait an indefinite and unreasonable amount of time. *See State v. Naveira*, 873 So. 2d 300 (Fla. 2004).

> Counsel, who met the criteria, both lead and second chair, indicated that they were not ready, did not feel comfortable proceeding without conducting full discovery, this being a capital homicide, and that Mr. Wilcox had no issue with his lawyers. He did not fire the lawyers because they weren't doing what needed to be done preparation wise. He decided to go on his own, predicated on his desire to proceed as quickly as possible. And I believe he even made a statement, at one point, on the record, you liked the attorney. You just wanted to go and he wasn't prepared to go? Am I correct?
>
> DEFENDANT WILCOX: No, you ain't correct. What you was correct on Joe Walsh [sic]. Joe Walsh was the last of the 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. It was ineffective assistance of counsel.

T11-107.

As the exchange above demonstrates, Wilcox wanted qualified counsel and wanted to proceed to trial within a reasonable time. Instead, he languished in jail while counsel did nothing to investigate or prepare. T11-108. After Wilcox filed his motion to

proceed pro se, Joseph Walsh entered an appearance as second chair counsel and appeared at the status on Wilcox's motion. Though Wilcox seemed appreciative of Walsh, if he wanted to proceed with counsel, he would have had to wait many more months for trial. When the court held the *Faretta* hearing in early January 2008, Wilcox had been in jail for nearly one year, and even then, counsel could not anticipate a trial date:

> THE COURT: What is the situation other than the fact you would tell your client you're not ready to go and it is a big mistake?
>
> MR. WALSH: I have been on the case a month. Obviously, we haven't had an opportunity to do all of the discovery I would like to do before I would say we're ready for trial. I know we have depositions set in the coming weeks, depositions in Miami and I believe Lauderdale as well. We're working toward getting ready for trial. However, obviously, I can't fix what happened in the past. But I can, I'm trying to get ready before all of this issue came up. That's something we have been doing Mr. Wilcox' lawyers [sic]. As far as speedy trial, it's not saying we can say we're ready to do at this point.
>
> THE COURT: What happens if Mr. Wilcox says I don't care about any of that, I want to go to trial? I know we have had this discussion in the past.

MR. WALSH: We have. I respect his wishes as an attorney and somebody trained, as the Supreme Court dictates, I can't say, in good faith, let's go to trial without all of the things we need to go to trial.

THE COURT: What time frame do you need?

MR. WALSH: We have set a number of depos. I obviously, as the second chair, would be responsible for the second phase. I haven't begun to do mitigation yet.

THE COURT: Where is counsel, first chair?

MR. WALSH: He's in a murder case that's in federal court at this point, the Turnpike murder case.

THE COURT: He won't be around for a while.

MR. WALSH: Some months now. That's right.

T6-31-33.

Nevertheless, Wilcox had the constitutional right to a speedy trial, and proceeding to trial was clearly a substantial part of Wilcox's objective. *McCoy*, 584 U.S. at 422. On that point, the record is replete with Wilcox's frustration over sitting in jail. *See*, *e.g.*, T4-4; T5-11, 17. Wilcox's lawyers should have honored his objective since, as the *McCoy* Court explained, "some decisions . . . are reserved for the client." 584 U.S. at 422. Decisions reserved for the client are *not* those "about how best to *achieve* a client's

objective . . . they are choices about what the client's objectives in fact *are*." *Id*. Indeed, as this Court held in *Figueroa-Sanabria v. State*, "all competent defendants have a right to control their own destinies." 366 So. 3d 1035 (Fla. 2023) (quoting *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988)).

That Wilcox's objective was to proceed to trial within a reasonable time frame is unsurprising. As the Supreme Court has explained, "[t]he disadvantages for the accused who cannot obtain his release are . . . serious." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). "The time spent in jail awaiting trial has a detrimental impact on the individual . . . it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time." *Id*. at 532-33.

The dilemma before Wilcox—whether to wait indefinitely for effective counsel and forgo his constitutional right to a speedy trial or proceed pro se and sacrifice his constitutional right to the assistance of counsel—resulted in structural error because it violated his "Sixth Amendment-secured autonomy." *McCoy*, 584 U.S. at 427. Wilcox had "the right . . . to make his own choices about the proper way to protect his own liberty." *Weaver v.*

Massachusetts, 582 U.S. 286, 295 (2017).

The Supreme Court's structural error doctrine protects just this sort of right since the right in question is "not designed to protect . . . from erroneous conviction but instead protects some other interest," such as autonomy; the error's effect is hard to measure; and the error itself made the trial fundamentally unfair. *Id.* at 295-96. Appellate counsel, therefore, was ineffective for failing to raise this claim.

Because the error is structural and "affect[s] the framework within which the trial proceeds," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), Wilcox need not show prejudice, although prejudice is evident. Because counsel was unwilling to honor Wilcox's objectives, he was forced to forgo "the vital importance of counsel's assistance," *Strickland*, 466 U.S. at 685, in order to receive a speedy trial.

C. Appellate counsel was ineffective for failing to challenge the trial court's instructing the jury on and erroneous finding of the prior violent felony aggravator.

On March 8, 1992, fourteen-year-old Wilcox was arrested on charges of second-degree murder, armed robbery, and grand theft

related to the death of Robert Lovett. The State direct-filed to adult court. Wilcox accepted a guilty plea and was sentenced to ten years in prison.

Wilcox's capital jury was presented with the probable cause affidavit and 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.

Counsel argued to the jury that it was up to the State to prove that Wilcox had direct contact with the victim: "Whether or not that was there, I leave it up to you." T20-1249. The jury returned a bare-majority verdict for death by a vote of 7–5 and made no findings of fact.

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, thus preserving these issues for review. Nevertheless, appellate counsel failed to raise these meritorious issues on appeal.

This Court has held that the prior violent felony aggravator "only attaches 'to life threatening crimes in which the perpetrator comes *in direct contact* with a human victim.'" *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998) (emphasis added) (citing *Lewis v. State*, 398 So. 2d 432, 438 (Fla. 1981)); *see also Johnson v. State*, 720 So. 2d 232, 237 (Fla. 1998); *Rose v. State*, 787 So. 2d 786, 800 (Fla. 2001); *Spann v. State*, 857 So. 2d 845, 855 (Fla. 2003); *Gonzalez v. State*, 136 So. 3d 1125, 1150 (Fla. 2014). Accordingly, this Court upheld such findings where, for instance, the defendant had a conviction for shooting his brother, *Johnson*, 720 So. 2d at 237, and the defendant "covered [the victim's] mouth with his hand" after breaking and entering. *Rose*, 787 So. 2d at 800-01. By contrast, this Court has disapproved of such a finding where the State could show at most that the defendant "acted with total disregard for the

safety of . . . two bystanders." *Lewis*, 398 So. 2d at 438.

Here, there is no evidence the Wilcox came into "direct contact" with the victim of the prior violent felony. The State admitted as much in its closing argument at the penalty phase:

> You will hear something in the jury instruction about it requires he have direct contact with a human being, *but you won't hear it mean he must physically touch the person*. Direct contact means he wasn't in some other room or county somewhere, as part of a plan to do something. He's there. You heard the stipulation about his prior. He's part of a group looking for someone to rob. They finds [sic] 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 (emphasis). Contrary to the State's argument, it *did* have to prove "direct contact." In its instructions, the trial court specified that for the jury to find the aggravator, "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. "To c[o]me into contact with" means "to touch."[14].

[14] *Come in/into contact with*, MERRIAM-WEBSTER, *merriam-webster.com*

Neither the jury nor the court found that Wilcox came into contact with the victim. R-861-62 ("The basic facts of the prior homicide indicated that the Defendant was part of a group who were looking for someone to rob. They approached people playing dice. The Defendant got out of the vehicle to collect money and one of his codefendants shot and killed one of the victims."). Because this finding was necessary to establish the aggravator, appellate counsel was deficient for failing to challenge is application on direct appeal. The failure to challenge the issue compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

D. Appellate counsel was ineffective for failing to challenge the trial court's instructing the jury on and erroneous finding of the "in the course of a felony aggravator."

At sentencing, the trial court found and gave great weight to the fact that "the capital felony was committed while the Defendant was engaged in the commission of armed robbery and armed kidnapping." R5-865. The armed kidnapping applied *only* to the

---

/dictionary/come%20in%Finto%20contact%20with (last visited May 10, 2024).

kidnappings of Veronica McMorris, Stephanie Hankerson, and Tanesha Arnold, and the armed robbery applied *only* to the theft of Hankerson's Chevy Tahoe. R-865. Even though penalty phase counsel objected to the constitutionality of this aggravator and its associated jury instruction, R3-415, appellate counsel failed to challenge the jury's improper consideration of the aggravator, R4-626, and the trial court's improper reliance on it when sentencing Wilcox to death.[15] R5-685.

In enacting Florida's capital sentencing scheme, the legislature did not define "in the course of a felony" for purposes of aggravation. In the absence of any definition, the principles of statutory interpretation therefore dictate "a general presumption that [the] statutory term has its common-law meaning." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003); *see also Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1207 (Fla. 1997) (citations omitted) ("Under our rules of statutory construction, a statute will not displace the common law unless the legislature expressly

[15] Should this Court find that Wilcox's argument herein does not fall within the ambit of counsel's objection, appellate counsel's failure to raise this claim constitutes fundamental error. *See Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1997).

indicates an intention to do so."); *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990) (citations omitted) ("Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.").

While this aggravator is legally distinct from felony murder, its language mirrors that of common-law felony murder. *Compare* § 921.141(6)(d) ("The capital felony was committed while the defendant was engaged . . . in the commission of . . . ") *with* 2 Subst. Crim. L. § 14.5(f) (3d ed.) ("The common-law felony-murder rule requires that the killing occur 'in the commission . . . of' the felony."). Thus, examining common-law felony murder is instructive when evaluating the applicability of this aggravator in capital cases.

In this vein, Professor Wayne R. LaFave has written that "it is not enough that a killing occur 'during' the felony or its attempt or 'while' it is committed or attempted." 2 Subst. Crim. L. § 14.5(f) (3d ed.). Rather, there must be some "causal relationship between the felony and the death." *Id*. Historically, this has meant that either "the defendant's conduct be the proximate or legal cause of the victim's death" or "that the felony attempted or committed be

dangerous to life." *Id.* at § 14.5(a) .

This Court has interpreted Florida's felony-murder statute as requiring the same kind of causal relationship. In *Campbell v. State*, 227 So. 2d 873 (Fla. 1961), for instance, the defendant robbed a bank, fled in a rented vehicle, and crashed in a ditch under pursuit. *Id.* at 875. When the deputy sheriff attempted to arrest the defendant, the defendant managed to seize the sheriff's revolver and shoot him. *Id.* On appeal, the defendant argued that felony murder did not apply because the time between the felony and the death had broken the causal relationship. *Id.* at 878. This Court disagreed, reasoning that "the death of [the sheriff deputy] was the inevitable result of and an integral part of the same transaction." *Id.*

This Court rejected a similar argument in *Parker v. State*, 641 So. 2d 369 (Fla. 1994), where the defendant, after robbing a Pizza Hut, shot a customer who pursued him into the street. *Id.* at 372. Echoing Professor LaFave, this Court explained that the purpose of the felony-murder statute "is to protect the public from inherently dangerous situations *caused by the commission of the felony*," and in this case, there was "no break in circumstances . . . between the robberies and the killing." *Id.* at 376 (emphasis added); *see also*

State v. Hacker, 510 So. 2d 304, 306 (Fla. 4th DCA 1986).

The district courts of appeal have applied similar reasoning. For instance, in *State v. Williams*, 776 So. 2d 1066 (Fla. 4th DCA 2001), the Fourth District Court of Appeal affirmed an order granting the defendant's motion for judgment of acquittal where the State based the third-degree felony-murder charge on grand theft auto. The State had also charged the defendant with carjacking but did not use that as the basis for the felony-murder charge because the carjacking occurred more than twenty-four hours earlier. *Id.* at 1068-69. This break in the chain of circumstances meant "[the defendant] was not 'engaged in the perpetration' of the carjacking at the time of the fatal accident." *Id.* at 1071. Because "the grand theft . . . cannot be separated from the carjacking for the purposes of applying the felony murder statute," the judgment of acquittal was proper. *Id.* at 1072. In reaching this conclusion, the court adopted the reasoning of the Supreme Court of Tennessee from a similar case, stressing that "if the [felony murder] rule is to have any deterrent effect, it must not be extended to killings which are collateral to and separate from the underlying felony." *Id.* (quotation omitted) .

Here, the State used Wilcox's convictions for armed kidnapping and armed robbery as the bases for the statutory aggravator that the capital felony was committed during the course of a felony. Importantly, the State relied on *only* the armed kidnappings of McMorris, Hankerson, and Arnold, as well as the armed robbery of Hankerson. R5-865 ("The State is not relying on the armed kidnapping of Nimoy Johnson . . . as a basis for this aggravator."). Those convictions, however, are inappropriate bases for 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, *Hacker*, 510 So. 2d at 306, but rather was "collateral to and separate from" them. *Williams*, 776 So. 2d at 1072 (quotation omitted). The State itself admitted as much at trial. T20-1098 ("I believe the reason going over there was to take Nemoy [sic] Johnson out."); T20-1177 ("The three ladies coming over wasn't part of the plan . . . They were not a threat to him. Wasn't part of his plan.").

Under the State's theory, the causal relationship is precisely

the opposite—the armed kidnappings and armed robbery resulted from the death. This, however, misconstrues the meaning of the aggravator as informed by the common-law felony-murder definition. Because the causal relationship the common law requires does not exist here, "in the course of a felony" cannot apply. Appellate counsel therefore rendered ineffective assistance in failing to challenge the jury's consideration and the trial court's use of this aggravator on direct appeal.

E. Appellate counsel was ineffective for failing to properly challenge prosecutorial misconduct as a Fourteenth Amendment violation, depriving Wilcox of his rights under the Sixth, Eighth, and Fourteenth Amendments.

At trial, Wilcox chose to testify in his own defense. The State cross examined Wilcox, asking whether he had "previously been convicted of a felony or crime involving dishonesty." T16-866. Although Wilcox believed the question was referring to a felony involving dishonesty or a crime involving dishonesty, the prosecutor refused to rephrase the question. T16-867. Wilcox admitted to his prior conviction but failed to specify that it was a felony. T16-867. In response, the trial court allowed the State to enter his prior convictions into evidence. T17-86.

On direct appeal, appellate counsel raised this claim solely as a misapplication of section 90.610, Florida Statutes, which permits impeachment of a witness with a conviction involving dishonesty. Appellate counsel's claim, however, failed to address the Fourteenth Amendment violation.

A prosecutor violates the Fourteenth Amendment when his misconduct "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). A denial of due process is a denial of "the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). In *Darden*, the prosecutors made a number of improper comments during their closing argument, including that the death penalty was necessary to prevent the defendant from similar acts in the future. *Darden*, 477 U.S. at 180. Despite disapproving of the prosecutors' comments, the Supreme Court held that their comments "did not deprive [the defendant] of a fair trial." *Id.* at 181. For support, the Court noted that: the prosecutors' argument "did not manipulate . . . the evidence"; defendant's counsel had "invited" the prosecutors'

comments; the trial court had instructed the jury that the prosecutors' closing argument was not evidence; and, notwithstanding the comments, there was considerable evidence against the defendant. *Id.* at 181-82.

Here, on cross examination, the prosecutor asked Wilcox whether he had been "previously convicted of a felony or crime involving dishonesty." T16-866. Wilcox, thinking that the prosecutor was asking whether he had been convicted of a felony involving dishonesty or crime involving dishonesty, denied that he had:

A: I wouldn't say dishonesty.

Q: The answer is yes or no?

A: No.

T-866.

Rather than asking the prosecutor to clarify the question for Wilcox, the court told the prosecutor to ask the question again, to which Wilcox responded:

A: I been [sic] convicted of a crime; but, yes I have been convicted of a crime.

Q: Have you ever been convicted of a felony or a crime involving dishonesty?

A: Got to make me understand. As far as dishonesty is concerned, I don't see where I lied about anything.

Q: Not my job to make you understand but to ask you a question and ask you to answer it. Have you ever been convicted of a crime, a felony crime, or a crime involving dishonesty?

A: I got to say no.

T16-867.

At that point the State moved to admit into evidence Wilcox's prior convictions for second-degree murder, armed robbery, and grand theft motor vehicle. T16-868. Even after the trial court granted the State's motion, the State continued to badger Wilcox:

Q: Stealing a vehicle is not a crime of dishonest [sic], stealing? You don't consider that to be a crime of dishonesty?

A: I don't see why—

Q: If you were to steal from somebody, do you consider that not be [sic] a crime of dishonesty?

A: I was convicted. I ain't see where dishonesty, if I was convicted for that.

Q: Robbery, armed robbery, taking something by use of some weapon, you don't consider that to be dishonest?

A: Didn't have a weapon in the offense.

Q: Second degree murder, you don't consider to be a crime of dishonesty?

A: It is a crime, but like I wasn't dishonest in the case.

T16-868-69.

None of these were "crimes of dishonesty." *Cf. Cash v. Maxwell*, 565 U.S. 1138, 1138 (2012) (describing forgery, fraud, and false impersonation as crimes of dishonesty). The trial court, however, did nothing to correct the prosecutor's obvious manipulation of the evidence. *Cf. Darden*, 477 U.S. at 181-82. Moreover, unlike the defendant in *Darden*, *id.* at 182, Wilcox did not "invite" the prosecutor's misconduct. From the outset, he admitted to having been convicted of a crime—he simply did not understand the prosecutor's phrasing.

The prosecutor's actions, and the trial court's inaction, violated Wilcox's due process rights because they denied him "a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294.

On direct appeal this Court found error as a matter of state evidence law, but deemed it harmless. Appellate counsel's failure to raise the meritorious, concomitant constitutional challenge

undermined the confidence in the fairness and correctness of the appellate result.

F. Appellate counsel was ineffective for failing to raise the claim that Wilcox was denied his Sixth Amendment right to confront the witnesses against him and present a defense.

Prior to trial, Wilcox asked for a transcription of several key witnesses' initial statements to police. T8-69. Claiming that transcriptions would be too costly, the State offered to give Wilcox DVDs of them. T8-70. Wilcox, however, had no means to view the DVDs in jail. Consequently, Wilcox was unable effectively to prepare his cross-examination of those witnesses.

On direct appeal, appellate counsel raised the State's refusal to turn over critical discovery as a state evidentiary error but failed to address the accompanying due process violation under the Fifth and Fourteenth Amendments and violation of Wilcox's right to effective cross-examination pursuant to the Confrontation Clause of the Sixth Amendment.

The Supreme Court has separated its Confrontation Clause cases into two categories. *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985). The first category involves "the admission of out-of-court

statements." *Id.* at 18. The second category, applicable here, involves "restrictions imposed by law or by the trial court on the scope of cross-examination." *Id.* Regarding the second category, the Court has stated that "[c]onfrontation means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

In *Davis v. Alaska*, the defendant, charged with burglary and grand larceny, sought to introduce a key witness's juvenile adjudication for burglary to show bias and prejudice. *Id.* at 311. Because the witness was on probation for burglary, it was possible that the witness identified the defendant "to shift suspicion away from himself." *Id.* The defendant, however, was unable to probe this possibility after the trial court granted the prosecution's protective order preventing any reference to the witness's juvenile record. *Id.* The Supreme Court later reversed the defendant's conviction, holding in part that "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony which provided 'a crucial link in the proof . . . of [the defendant's] act.'" *Id.* at 317 (quoting *Douglas v. Alabama*, 380 U.S.

415, 419 (1965)). Because the defendant was not able fully to present his theory of the crime, he "was thus denied the right of effective cross-examination." *Davis*, 415 U.S. at 318.

In *Douglas v. Alabama*, the Supreme Court reversed a conviction where the trial court admitted the alleged confession of the codefendant, but the defendant was unable to cross-examine him because of the codefendant's invocation of the Fifth Amendment. The Court concluded that "effective confrontation . . . was possible only if [the codefendant] affirmed the statement as his." *Douglas*, 380 U.S. at 420.

Here, the trial court denied Wilcox his right to effective cross examination. Wilcox's theory of the crime was that his cousin, Terrell Collier, shot Nimoy Johnson. Terrell's associate, Willie Ward, and his sisters, Richaunda and Shaquira Curry, then helped frame Wilcox. To support his theory, Wilcox needed to review the statements they had given to the police. The State, however, was only willing to offer Wilcox DVDs of their recorded statements, which he had no means of viewing in jail. T-70 ("I do not intend on transcribing them because of the extensive costs and the Court is aware of our budget situation."). Rather than ordering transcripts,

the trial court chided Wilcox for representing himself:

> THE COURT: I told you there are a lot of pitfalls to representing yourself in a capital homicide. You're starting to find out how limited you are. Remember, you wanted to act as your own lawyer. I told you I didn't think it was in your best interests. I still don't. Mr. Walsh doesn't think it is in your best interests. No one thinks it is in your best interests but you. You're subject to the fact that your ability to do the types of things that a lawyer can do is extremely limited because, as you said, you're incarcerated. You don't have access to these matters. The State does not have to provide you with a transcript. You're only entitled to what they have. You will get the DVD's [sic].

T8-73-74.

Though the State claimed the cost to transcribe the statements would be too "extensive," it later transcribed the statement of another witness listed in the same demand. T8-70; S9-45. The court, rather than indulging the State's gamesmanship, should have ordered the State to transcribe every statement.

Without the transcripts, Wilcox was effectively without the statements, and his cross examinations proved disastrous. On direct, Richaunda testified that Johnson had threatened her and

everyone in her apartment because he believed they had been involved in burglarizing his apartment. S10-254-57. In response, Wilcox sought to impeach Richaunda with Detective Brian Hardy's affidavit to arrest, S10-282-83, wherein Hardy wrote after speaking with Terrell, Ward, Shaquira, and Richaunda that "[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 strengthened 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 Curry 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:

> THE COURT: This is one of the reasons I told you on the perils of self representation on a case of this nature, the access that you

> have to various things and your ability to do things. This is one of those things. There is no transcript; therefore, you are not entitled to a transcript. If you didn't get the DVD, you had recourse to get it, with a motion to compel, you could have done it by means of an attorney.

S-285. Wilcox's inability to review the witnesses' recorded statements "effectively . . . emasculate[d] the right of cross-examination itself," *Smith v. Illinois*, 390 U.S. 129, 131 (1968), as well as his constitutional right "to have 'a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (citation omitted).

Davis and *Douglas* make clear that effective confrontation entails more than the physical confrontation of a witness. In *Davis*, it meant that the defendant had the right to probe a key witness's potential bias with information relevant to that bias. *Id.* at 317-18. In *Douglas*, it meant that the defendant had the right to cross examine a key witness about the confession he allegedly gave. 380 U.S. at 419. Here, effective confrontation demanded that Wilcox have witnesses' statements to police in a medium suitable to his defense so that he could cross examine the State's witnesses

concerning what they claimed to know about the burglary and when they claimed to know it.

Again, Wilcox was forced into a "Hobson's choice" between his right to self-representation and the right to confront witnesses against him and the right to prepare a defense. *See Simmons*, 390 U.S. 377.

Although appellate counsel raised the State's refusal to produce transcripts as a violation of state discovery rules,[16] counsel failed to raise the constitutional claim under the Sixth and Fourteenth Amendments. Initial Brief at 48, SC11-1017 (Fla. Dec. 28, 2012). It is evident that the trial court denied Wilcox "the right to effective cross examination" and committed "constitutional error of the first magnitude" [that] no amount of showing of want of prejudice [can] cure." *Davis*, 415 U.S. at 318 (quotation omitted). Appellate counsel's failure to raise this meritorious constitutional challenge undermined confidence in the fairness and correctness of the appellate result.

[16] While this Court found error as a matter of state discovery rules, it deemed the error harmless.

G. Appellate counsel was ineffective for failing to properly challenge the trial court's refusal to allow Wilcox to cross examine the State's key witness in violation of his Sixth Amendment right to confrontation and right to present a defense.

At trial, Wilcox attempted to discredit the testimony of one of the State's key witnesses by refreshing her recollection through another witness's statement. Following objection from the State, the trial court prohibited him from doing so because the statement was not the witness's own. While appellate counsel challenged the court's ruling in this regard as a state evidentiary error, counsel failed to raise the court's blatant violation of Wilcox's Sixth and Fourteenth Amendments rights.

Richaunda Curry, testified that Wilcox fit the description of someone seen in the area around the time of the crime because he had gold teeth. T15-585-86. Specifically, Richaunda testified that Wilcox was "the only one with gold teeth." T15-586. On recross examination, Wilcox asked Richaunda whether "someone else . . . had gold teeth," T15-588, and attempted to refresh Richaunda's recollection with the statement of Louvens Jean, which described "another black male with gold teeth" who spoke with Nimoy

Johnson. T15-592. The State objected based on improper foundation, and the trial court, on its own, held that Wilcox could not refresh her recollection "by using somebody else's statement." T15-593.

As appellate counsel correctly noted, and this Court agreed, "anything can be used to refresh a witness's recollection." Initial Brief at 62, SC11-1017 (Fla. Dec. 28, 2012); *Wilcox*, 143 So. 3d at 377-79. However, the court's ruling here constituted more than an evidentiary error, as the refusal to allow Wilcox to refresh Richaunda's recollection denied him "the right to a fair opportunity to defend against the State's accusations," *Chambers*, 410 U.S. at 294, and "to present a complete defense." *Holmes*, 547 U.S. at 331. Wilcox was possibly not "the only one with gold teeth." This, combined with Richaunda's inconsistences regarding her knowledge of the burglary, would have cast doubt on one of the State's best witnesses. Because the trial court denied Wilcox this opportunity, it in turn denied him his right to "effective cross-examination," *Davis*, 415 U.S. at 318, under the Sixth Amendment and due process under the Fourteenth Amendment.

On direct appeal, this Court found error as a matter of state

evidence law, but deemed it harmless. Appellate counsel's failure to raise the meritorious constitutional challenge undermined the confidence in the fairness and correctness of the appellate result.

CONCLUSION AND RELIEF SOUGHT

The errors described herein, and appellate counsel's failure to present them on direct review, entitle Wilcox to relief. Counsel's failure to present these meritorious issues "fell outside the range of professionally acceptable performance," and the deficiencies "undermine confidence in the fairness and correctness of the appellate result." *Wilson*, 474 So. 2d at 1163. Wilcox's representation was fraught with serious and substantial deficiencies. *See Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986); *Farina*, 2013 WL 5432318. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967).

This is particularly so here where Wilcox's jury returned a mere 7–5 recommendation for death, and this Court found several points of error on direct appeal, including the application of

aggravators. Had appellate counsel challenged the two additional aggravators—in the course of a felony and prior violent felony—there is a reasonable probability that Wilcox's sentence would have been overturned.

For the foregoing reasons and in the interest of justice, Mr. Wilcox respectfully urges this Court to grant habeas corpus relief.

Respectfully submitted,

/s/ Brittney N. Lacy
BRITTNEY NICOLE LACY
Assistant CCRC-South
Fla. Bar No. 116001
lacyb@ccsr.state.fl.us

COLIN WAGNER
Staff Attorney
Florida Bar No. 1054120
wagnerc@ccsr.state.fl.us

/s/ Paul Kalil
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.
ccrcpleadings@ccsr.state.fl.us

COUNSEL FOR WILCOX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been provided by United States Mail and/or electronic service to counsel for Appellee, Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, and/or *capapp@myfloridalegal.com*, this 24th day of May, 2024.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this brief contains 12,996 words and is produced in Bookman Old Style 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.210 and this Court's opinion in *In re: Amendment to Florida Rules of Appellate Procedure 9.120 and 9.210*, 308 So. 3d 53 (Fla. 2020) (Mem).

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

Filing # 208953158 E-Filed 10/16/2024 09:16:16 PM

IN THE SUPREME COURT OF FLORIDA

Case No. SC24-0785

DARIOUS WILCOX,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

LOWER CASE NO. 08-3736CF10A

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

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 174114

MICHAEL T. COOKSON
Staff Attorney
Florida Bar No. 1057838

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

October 16, 2024

COUNSEL FOR WILCOX

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENTS IN REPLY 1

GROUND 1 1

Wilcox invokes this Court's habeas jurisdiction to remedy an intolerable injustice resulting from the lower court's arbitrary denial of *Hurst* relief. 1

GROUND 2 11

Appellate counsel's failure to raise numerous meritorious issues on direct appeal implicating the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Articles I §§ 9, 16(a), and 17 of the Florida Constitution warrants reversal of Wilcox's convictions and/or sentence of death. 11

Standard of Review 11

A. Appellate counsel was ineffective for failing to challenge Wilcox's competency to waive counsel at the guilt phase of his trial. 13

B. Wilcox was forced to surrender one constitutional right in order to assert another, in violation of *United States v. Simmons.* 15

C. Appellate counsel was ineffective for failing to challenge the trial court's instructing the jury on an erroneous finding of the prior violent felony aggravator. 17

F. Appellate counsel was ineffective for failing to raise the claim that Wilcox was denied his Sixth Amendment right to confront the witnesses against him and present a defense. 18

G. Appellate counsel was ineffective for failing to properly challenge the trial court's refusal to allow Wilcox to cross examine the State's key witness in violation of his Sixth Amendment right to confrontation and right to present a defense..... 18

CONCLUSION AND RELIEF SOUGHT..... 20

CERTIFICATE OF SERVICE..... 22

CERTIFICATE OF COMPLIANCE AND FONT 22

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)..... 4

Bevel v. State, 983 So. 2d 505 (Fla. 2008)..... 17

Engquist v. Oregon Dept. of Agr., 553 U.S. 591 (2008)..... 4, 5, 7

Evitts v. Lucey, 469 U.S. 387 (1985) 19

Faretta v. California, 422 U.S. 806 (1975). 13, 19

Gideon v. Wainwright, 372 U.S. 335 (1963)..... 19

Gonzalez v. State, 136 So. 3d 1125 (Fla. 2014) 18

Gulf, C & S.F. Ry. Co. v. Ellis, 165 U.S. 150 (1897)..... 4

Hayes v. State, 581 So. 2d 121 (Fla. 1991) 16

Hayward v. State, 24 So. 3d 17 (Fla. 2009) 17

Hooks v. State, 286 So. 3d 163 (Fla. 2019) 13, 14, 15

Hurst v. State, 202 So. 3d 40 (2016) 1

Indiana v. Edwards, 554 U.S. 164 (2008) 14, 19

Johnson v. State, 720 So. 2d 232 (Fla. 1998) 17

Lee v. State, 340 So. 2d 474 (Fla. 1976)..... 1, 3

Mahn v. State, 714 So. 2d 391 (Fla. 1998) 18

Matire v. Wainwright, 811 F. 2d 1430 (11 Cir. 1987)..... 15

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) 1

Patrick v. State, 246 So. 3d 253 (Fla. 2018) 8, 9

Potts v. State, 718 So. 2d 757 (Fla. 1998) 13

Reaves v. State, 639 So. 2d 1 (Fla. 1994) 17

Rose v. State, 787 So. 2d 786 (Fla. 2001) 17

Simmons v. United States, 390 U.S. 377 (1968) 16

Spencer v. State, 842 So. 2d 52 (2003) 13

State v. Poole, 297 So. 3d 487 (Fla. 2020) 1

State v. Robinson, 873 So. 2d 1205 (Fla. 2004) 4

Strickland v. Washington, 466 U.S. 668 (1984) 12

Valle v. Moore, 837 So. 2d 905 (2002) 12

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 4, 5

Wilcox v. State, SC18-146 (Sept. 13, 2019) 2, 7

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 4

ARGUMENTS IN REPLY

GROUND 1

Wilcox invokes this Court's habeas jurisdiction to remedy an intolerable injustice resulting from the lower court's arbitrary denial of *Hurst* relief.

The State contends that this Court's opinion in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), overturned the retroactive application of *Hurst* error to cases in Wilcox's posture. The State has wholly misstated this Court's ruling in *Poole*. This Court receded from *Hurst v. State*, 202 So. 3d 40 (2016), insofar as it concerned the jury's required findings. However, *Poole* does not address retroactivity or overturn *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), which applied *Hurst* error retroactively to cases final after the U.S. Supreme Court's opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). *Hurst* applies to Wilcox, and but for the postconviction court's improper summary denial of his initial postconviction motion, he would have been granted relief.

As to Wilcox's equal protection claim, the State challenges Wilcox's reliance on *Lee v. State*, 340 So. 2d 474 (Fla. 1976) and asserts that Wilcox was not similarly situated to other recipients of

Hurst relief. However, both arguments stem from a fundamental misunderstanding of Wilcox's equal protection claim.

Wilcox is not asserting that the application of *Poole* itself constituted the Equal Protection violation. Rather, the postconviction court violated the Equal Protection Clause when, per this Court's description, it "inexplicably, . . . canceled the *Huff* hearing required by Florida Rule of Criminal Procedure 3.851(f)(5)(A), and entered an order summarily denying postconviction relief on all claims." *Wilcox v. State*, SC18-146 (Sept. 13, 2019). This summary denial rendered Wilcox a class-of-one, arbitrarily subject to disparate treatment.

Notwithstanding this Court's vacatur of the postconviction court's summary denial, the State took the denial of Wilcox's equal protection rights as a windfall—Wilcox's class-of-one status allowed the State to rescind its repeated admissions that *Hurst* error entitled Wilcox to penalty-phase relief. This result informs the remedy sought, but the equal protection violation stands independent of *Poole* and must be analyzed at the time of the summary denial.

The State exaggerates Wilcox's reliance on *Lee* and, resultantly, distinguishes it on irrelevant grounds. The State argues that desuetude has nullified *Lee*'s precedential value. It then distinguishes *Lee* because *Lee* involved a capital sentencing law held wholly unconstitutional, whereas, here, Florida's capital sentencing law was held unconstitutional on more limited grounds. The former argument lacks any citation to authority. The latter argument retroactively grafts *Poole* onto a pre-*Poole* violation. But more importantly, both arguments are irrelevant, because the actual substance of Wilcox's claim rests firmly on principles of equal protection, not *Lee* itself.

Lee supports the proposition that equal protection is violated when temporal distinctions alone guide the State's imposition of death. 340 So. 2d 474. In *Lee*, this Court invoked equal protection as the constitutional basis for relief where it "[did] not think the question of whether a person should live or be put to death by the State should be determined by the legal procedures of when his request for reduction of sentence was made." *Id.* at 475. *Lee*'s holding on that point fits squarely within axiomatic equal protection

principles. *See Gulf, C & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897) (noting that distinctions "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis").

In line with these principles, Wilcox sets out a class-of-one equal protection violation.[1] *See Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 602 (2008). The Equal Protection Clause's prohibition on arbitrary state action is axiomatic. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Further, "it is well settled that the Equal Protection Clause 'protect[s] persons, not groups.'" *Engquist*, 553 U.S. at 597 (alteration in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). State action violates these fundamental equal protection principles when an individual has "been intentionally treated differently from others similarly situated

[1] This Court has previously acknowledged such claims. *State v. Robinson*, 873 So. 2d 1205, 1209 n.2 (Fla. 2004) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)) (distinguishing substantive due process violation from class-of-one equal protection violation because the former pertains to unconstitutional inclusion in a class and the latter to unconstitutional creation of a class).

and . . . there is no rational basis for the difference in treatment." 553 U.S. at 601 (quoting *Olech*, 528 U.S. at 564). "Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a 'rational basis for the difference in treatment.'" 553 U.S. at 602 (quoting *Olech*, 528 U.S. at 564).

To identify an arbitrary classification, the critical inquiry is whether there exists "a clear standard against which departures, even for a single plaintiff, could be readily assessed." 553 U.S. at 602. If the relevant state action ordinarily involves the mechanistic application of pre-established standards and state action deviates from that mechanistic application to the detriment of an otherwise similarly situated individual, then the "differential treatment raise[s] a concern of arbitrary classification, and [the Supreme Court] therefore require[s] that *the State* provide a rational basis for it." *Id.* at 603 (emphasis added). In other words, once the claimant shows an arbitrary classification, the burden shifts to the State, thereby alleviating the claimant's usual burdens of proving intentionality and lack of rational basis. *See Id.*

In summarily denying Wilcox's *Hurst* claim, the postconviction court departed from a clear standard that entitled Wilcox to penalty-phase relief. At that time, the courts were mechanistically applying a clear standard to determine defendants' entitlement to *Hurst* relief. The State's Answer to Wilcox's initial 3.851 motion laid out this standard:

> In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), the Florida Supreme Court found that *Hurst* decisions were retroactive to cases which were not final before April 24, 2002. Wilcox's case falls within that period and, thus, is eligible for relief under the *Hurst* decisions if the State cannot prove the error harmless. To date, the Florida Supreme Court has only found harmless error where the jury recommended death unanimously. Wilcox's jury returned a recommendation by a seven to five vote.

PCR-851. The standard for obtaining *Hurst* relief was clear: If the defendant's death sentence became final after *Ring v. Arizona*, and the jury had non-unanimously recommended death, then the defendant was entitled to *Hurst* relief.

This Court's disposition of every other *Hurst* claim by a defendant with a 7-5 jury recommendation reinforces this clear standard. When the *Hurst* decisions issued, 22 individuals sat on

death row pursuant to sentences final after *Ring* and predicated on bare 7-5 jury recommendations.[2] Of these individuals, two were granted relief on other grounds and exonerated and one was denied *Hurst* relief because he waived postconviction proceedings.[3] Of the remaining 19 individuals, Wilcox was the only one denied *Hurst* relief. Against this backdrop, the summary denial of Wilcox's *Hurst* claim was anomalous.

The postconviction court's differential treatment of Wilcox in "inexplicably" denying him *Hurst* relief raised "the specter of arbitrary classification . . . and the Equal Protection Clause requires 'a rational basis for the difference in treatment.'" *See Engquist*, 553 U.S. at 602. The State offers none and this Court has already determined that the postconviction court's summary denial was "inexplicabl[e]." *Wilcox v. State*, SC18-146 (Sept. 13, 2019).

Instead, the State argues that Wilcox was not similarly

---

[2] *See Death Penalty Appeals Decided in Light of Hurst*, DEATH PENALTY INFO. CTR. https://https://deathpenaltyinfo.org/stories/florida-death-penalty-appeals-decided-in-light-of-hurst (last visited Oct. 14, 2024).

[3] *Id.*

situated to those who received *Hurst* relief. The State attempts to differentiate Wilcox's *Hurst* claim because it was still pending when *Poole* issued. Again, the State fundamentally misconstrues Wilcox's equal protection claim—the critical moment was the inexplicable summary denial. At that moment, the only preconditions to *Hurst* relief were post-*Ring* finality and a non-unanimous jury recommendation. Wilcox's sentence became final after *Ring* and his jury recommended death by only a bare 7-5 majority. Thus, he was similarly situated in every relevant way to every other defendant whose 7-5 sentence was vacated after *Hurst*.

Although this Court's vacatur of the summary denial allowed Wilcox the opportunity for a *Huff* hearing, the equal protection violation went unremedied.[4] Wilcox remained a class-of-one, which

[4] The arbitrariness of Wilcox's treatment is further illustrated by this Court's treatment of Eric Patrick. *See Patrick v. State*, 246 So. 3d 253 (Fla. 2018). Patrick's jury returned a 7-5 recommendation for death and his case became final on October 7, 2013. When *Hurst v. Florida* issued, the postconviction court had already held an evidentiary hearing on Patrick's initial postconviction motion. Patrick sought and was granted leave to amend his motion and add a challenge based on *Hurst*. However, because this Court had yet to rule on the retroactive application of *Hurst v. Florida*, the lower court summarily denied his claim. *Id.*

On appeal, this Court affirmed the denial of postconviction

allowed the State to intentionally subject him to disparate treatment that culminated in the denial of *Hurst* relief. For instance, at the first status conference following this Court's vacatur of the summary denial, the State openly speculated that delay might allow the avoidance of *Hurst*.[5] Despite the court's assurances that it

---

relief except as to the lower court's summary denial of Patrick's claim alleging ineffective assistance concerning juror bias. The Court remanded the ineffective assistance claim for an evidentiary hearing. The Court affirmed the denial of *Hurst* relief finding nor error in the lower court because retroactivity had not yet been decided. However, the Court granted habeas relief pursuant to *Hurst* and vacated Patrick's death sentence. *Id.*

Wilcox was in a similar position—he was entitled to a new penalty phase pursuant to *Hurst* while his other claims still required due process in the lower court. On appeal, Wilcox requested that this Court grant *Hurst* relief and remand his remaining claims for the requisite *Huff* hearing.

[5] The State argued:

> I would just like to advise the Court that there is a pending case in front of the Florida Supreme Court . . . where the Supreme Court asked for briefing on the retroactivity of Hurst. As this case stands at the moment, Mr. Wilcox, under the current law, would be entitled to a new penalty phase most likely because it was not a unanimous verdict. However, the Florida Supreme Court has decided to revisit the issue of Hurst's retroactivity to Apprendi, that case is pending, and the decision in that case could well affect what happens in this Court.

would not delay the proceedings (2PCR-2972-73), the State requested a continuance on the eve of the *Huff* hearing which ultimately doomed Wilcox's *Hurst* claim by delaying the proceedings until the State's speculation became reality.

Distracting from its own culpability in abusing Wilcox's class-of-one status, the State argues that "such differences happen all the time." State's Response-22 ("Resp-"). Principles of equal protection cannot tolerate such an arbitrary result in a capital case. This Court so held in *Lee* and should do so again here to remedy this intolerable injustice.

The State further submits that any *Hurst* error is harmless in light of *Poole* because the same jury found Wilcox guilty of armed kidnapping. Resp-23-4. The State argues these convictions support a "finding that the murder was committed in the course of a felony and rendered Wilcox death eligible." Resp-23. However, at trial, the

---

2PCR-2969-70.

Mr. Klinger: *If you go with the current law*, if you ruled that way, then there would be no need for any hearing regarding the penalty phase portion.

2PRC-2970-71 (emphasis added).

State relied on the concurrent felonies to support the "in the course of a felony aggravator," but the jury was not instructed to apply these felonies to the existence of a contemporaneous felony. The former requires additional fact finding that the jury did not make.

The State further submits that Wilcox's "prior convictions for second degree murder were uncontested at trial and any reasonable jury would have unanimously found the prior violent felony aggravator proven." Resp-24. This argument is belied by the record. Whether Wilcox's prior felony met the requirements of the aggravator was a contested issue at trial, as it is in these postconviction proceedings.

GROUND 2[6]

Appellate counsel's failure to raise numerous meritorious issues on direct appeal implicating the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Articles I §§ 9, 16(a), and 17 of the Florida Constitution warrants reversal of Wilcox's convictions and/or sentence of death.

Standard of Review

As an initial matter, the State misrepresents the standard of

[6] For Grounds 2D and 2E, Wilcox relies on the arguments asserted in his Habeas Petition.

review applicable to ineffective assistance of appellate counsel claims. The State correctly notes that such claims are properly raised in habeas petitions and that the standard of review mirrors *Strickland v. Washington*, 466 U.S. 668 (1984). *Valle v. Moore*, 837 So. 2d 905 (2002). However, it misquotes *Valle*, asserting "appellate counsel cannot be deemed ineffective for failing to raise issues 'that were not properly raised during the trial court proceedings,' *or* that 'do not present a question of fundamental error.'" Resp-27 (emphasis added). *Valle* actually reads, "appellate counsel cannot be considered ineffective under this standard for failing to raise issues that were not properly raised during the trial court proceedings *and* do not present a question of fundamental error." 837 So. 2d at 908-909 (emphasis added). By the State's understanding of the rule, even appellate counsel's failure to raise fundamental error could not support an ineffective assistance claim if the error was not preserved at trial. Thus, although seemingly innocuous, the State's misquote of *Valle* nullifies the preservation exception whereby appellate counsel may be deemed ineffective for "fail[ing] to raise a claim which, although not preserved at trial,

presents a fundamental error." *Spencer v. State*, 842 So. 2d 52, 73 (2003). Such a rule could not be applied consistent with the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment, or this Court's ineffective assistance of appellate counsel jurisprudence.

A. Appellate counsel was ineffective for failing to challenge Wilcox's competency to waive counsel at the guilt phase of his trial.

The State argues that the "record clearly supports the finding that Wilcox's *Faretta*[7] waiver was knowing, intelligent, and voluntary." Resp-37. To support this assertion, the State lists several advantages of counsel and disadvantages of waiver that the trial court recited at the *Faretta* inquiry. However, "a reviewing court will not 'focus' on the particular 'advice rendered by the trial court,' but instead will evaluate 'the defendant's general understanding of his or her rights.'" *Hooks v. State*, 286 So. 3d 163, 168 (Fla. 2019) (quoting *Potts v. State*, 718 So. 2d 757, 760 (Fla. 1998)). Thus, the State improperly stresses the various advantages and disadvantages discussed by the trial court.

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

This "advice" is, in and of itself, irrelevant, because Wilcox displayed no actual comprehension his rights or the advice being given. *See Hooks*, 286 U.S. at 168. The *Faretta* inquiry was dominated by the trial court cursorily listing advantages and disadvantages and then asking, "do you understand all that?" Most of Wilcox's responses were limited to "yes, sir" but, when he offered more, he revealed only misunderstandings.

Perhaps recognizing the irrelevance of the trial court's advice, the State suggests that Wilcox was competent to represent himself because he was an adult, literate, an English speaker, not intoxicated, not sensorily impaired, and minimally educated. Resp-35-6. While the nonexistence of these facts might preclude a finding of competence, none affirmatively indicates competence in the relevant sense. *See Indiana v. Edwards*, 554 U.S. 164, 175-76 (2008) ("In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.") Thus, even alongside the trial court's advice,

the fact that the State relies upon do not support its assertion that Wilcox validly waived counsel.

Additionally, the State asserts that "Wilcox's reliance on [*Fitzpatrick*] and its seven-factor test is misplaced in light of the more recent precedent from this Court and the United States Supreme Court." Resp-40. Wilcox does not *rely* on *Fitzpatrick*; he uses it to structure his presentation of facts.[8] Specifically, because every *Fitzpatrick* factor weighs against finding a valid waiver, the waiver's defect "was obvious on the record," which bears on appellate counsel's reasonableness. *Matire v. Wainwright*, 811 F. 2d 1430 (11 Cir. 1987).

B. Wilcox was forced to surrender one constitutional right in order to assert another, in violation of *United States v. Simmons.*

The State argues that Wilcox's *Simmons*[9] claim would have failed if appellate counsel had raised it because, according to the

---

[8] This Court's recent precedent does not impugn the usefulness of *Fitzpatrick* in this regard. *See Hooks*, 286 So. 3d 163 (Labarga, J., concurring) (referring to the *Fitzpatrick* factors as "relevant considerations").

[9] *Simmons v. United States*, 390 U.S. 377 (1968).

State, trial counsel was not deficient and Wilcox's Sixth Amendment right to a speedy trial was not violated. Thus, the State's argument rests on the faulty premise that a *Simmons* claim depends on the merits of the underlying constitutional claims.

Simmons prohibits the government from requiring defendants to waive one constitutional right to assert another, regardless of the merits of the underlying constitutional claims. 390 U.S. at 394; *see Hayes v. State*, 581 So. 2d 121, 126 (Fla. 1991) (rejecting argument that *Simmons* is limited to its facts).

In fact, the Fourth Amendment claim underlying *Simmons* had failed on the merits and the challenged evidence was admitted. 390 U.S. at 381. Nevertheless, the Supreme Court "[found] it intolerable that one constitutional right should have to be *surrendered* in order to assert another." 390 U.S. at 394 (emphasis added). The constitutional violation lies in the requirement that the defendant choose between raising a bona fide constitutional claim and thereby waiving another constitutional right or surrendering that constitutional claim and thereby protecting the other constitutional right. The State's focus on the merits of the underlying

constitutional claims is, thus, wholly misplaced.

C. Appellate counsel was ineffective for failing to challenge the trial court's instructing the jury on an erroneous finding of the prior violent felony aggravator.

The State argues that "this Court has not required physical touching" to sustain the prior violent felony aggravator ("PVF"). Resp-51. To support this contention, the State misleadingly cites five cases in which PVF was based on defendants' personal use of force against the victim either with a firearm or direct physical contact. *Hayward v. State*, 24 So. 3d 17, 26-27 (Fla. 2009) (sustaining PVF where "Hayward shot the victim from behind"); *Bevel v. State*, 983 So. 2d 505, 518 (Fla. 2008) (defendant "pointed the gun to the side of [victim's] head" during robbery); *Rose v. State*, 787 So. 2d 786, 800-01 (Fla. 2001) (defendant "covered her mouth with his hand as he threatened to kill her"); *Johnson v. State*, 720 So. 2d 232, 237 (Fla. 1998) (defendant previously "convicted of aggravated assault for shooting a firearm at his brother . . . convicted of aggravated battery for shooting one David Greenwall"); *Reaves v. State*, 639 So. 2d 1, 6 n.11 (Fla. 1994) (defendant "[held] a gun to the head of a hotel clerk during two separate robberies and

punch[ed] a correctional officer in the face").

The State offers no authority that undermines the longstanding rule "that [PVF] only attaches 'to life-threatening crimes in which *the perpetrator* comes in *direct contact* with a human victim." *Gonzalez v. State*, 136 So. 3d 1125, 1150 (Fla. 2014) (emphasis added) (quoting *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998). In light of this Court's consistent application of *Mahn* and trial counsel's preservation of this issue, appellate counsel rendered ineffective assistance by failing to raise the properly preserved issue of the applicability of the prior violent felony aggravator.

F. Appellate counsel was ineffective for failing to raise the claim that Wilcox was denied his Sixth Amendment right to confront the witnesses against him and present a defense.

AND

G. Appellate counsel was ineffective for failing to properly challenge the trial court's refusal to allow Wilcox to cross examine the State's key witness in violation of his Sixth Amendment right to confrontation and right to present a defense.

In response Grounds 2F and 2G, the State argues that "appellate counsel cannot be found ineffective for not raising federal

constitutional claims which were the direct result of the defendant's knowing, voluntary, and intelligent decision to waive counsel." Resp-60. In effect, the State proposes to bifurcate the adversarial process, creating a subclass of constitutional trial rights unprotected by appellate review solely because they are held by persons exercising their right of self-representation.

Such a rule would undermine the core dignity interest protected by the right of self-representation, *see Edwards*, 554 U.S. at 176-77, and the Due Process Clause's guarantee of adversarial process, *see Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). "When an accused manages his own defense, he relinquishes, *as a purely factual matter*, many of the traditional benefits associated with the right to counsel." *Faretta*, 422 U.S. at 835 (emphasis added). He retains the right to mount a substantive defense with the benefit of all non-waived trial rights and the right to effective assistance of appellate counsel. *See Id.*; *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." 469 U.S. at 394.

Instead, the State suggests that appellate counsel may, with impunity, blame their previously *pro se* client for any constitutional violations wrought upon them and decline to raise even potentially meritorious claims merely because they arise from their client's vulnerable position. This suggestion is flatly antithetical to the right to effective assistance of appellate counsel and cannot form the basis for denying relief.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons and those stated in Wilcox's Petition for Writ of Habeas Corpus, and in the interest of justice, Mr. Wilcox respectfully urges this Court to grant habeas corpus relief.

Respectfully submitted,

/s/ Brittney N. Lacy
BRITTNEY NICOLE LACY
Assistant CCRC-South
Fla. Bar No. 116001
lacyb@ccsr.state.fl.us
pleadings@ccsr.state.fl.us

PAUL KALIL
Assistant CCRC-South
Fla. Bar. No. 174114
kalilp@ccsr.state.fl.us

MICHAEL T. COOKSON
Staff Attorney
Florida Bar No. 1057838
cooksonm@ccsr.state.fl.us

Capital Collateral Regional
Counsel-South
110 S.E. Sixth Street, Suite 701
Fort Lauderdale, Florida 33301
(954) 713-1284 Tel.
ccrcpleadings@ccsr.state.fl.us

COUNSEL FOR WILCOX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing reply has been provided by United States Mail and/or electronic service to counsel for Respondent, Lisa-Marie Lerner, Assistant Attorney General, this 16th day of October, 2024.

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South

CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this brief contains 3,736 words and is produced in Bookman Old Style 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.210 and this Court's opinion in *In re: Amendment to Florida Rules of Appellate Procedure 9.120 and 9.210*, 308 So. 3d 53 (Fla. 2020) (Mem).

/s/ Brittney N. Lacy
BRITTNEY N. LACY
Assistant CCRC-South