

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC23-1498
Lower Court Case No. 08-3736 CF10A

DARIOUS WILCOX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Darius Wilcox, was the defendant at trial and will be referred to as the "Defendant" or "Wilcox". Appellee, the State of Florida, the prosecution below, will be referred to as the "State." References to the record on appeal at trial will be by the symbol "ROA", to the transcripts will be by the symbol "T", to any supplemental record or transcripts will be by the symbols "SR" preceding the type of record supplemented, post-conviction record "PCR", and to Wilcox's initial brief will be by the symbol "IB", followed by the appropriate page number(s).

PROCEDURAL HISTORY

This Court set out the procedural history and facts of this case in its opinion on direct appeal. *Wilcox v. State*, 143 So.3d 359, 366-371 (Fla. 2014). This Court found that about a week before the murder of Nimoy Johnson, Wilcox called his cousin, Richaunda Curry ("Richaunda") and requested that she allow him to stay with her in her Lauderhill, Florida townhome. Curry reluctantly agreed. *Wilcox*, 143 So. 3d at 366. At the time, Richaunda along with her brother, Terrell Collier ("Collier"), their sister Shaquira Curry, and

Richaunda's ex-boyfriend, Willie Ward, were living together in a townhome next door to the victim, Nimoy Johnson ("Johnson"). *Id.* As neighbors, Richaunda and Johnson had an amicable relationship. *Id.*

On January 27, 2008, Wilcox arrived at Richaunda's townhome. The next morning, Richaunda witnessed a verbal confrontation between Wilcox and Johnson during which Johnson threatened to kill Wilcox for burglarizing his townhome and taking his property. Later that day, Richaunda confronted Johnson about the incident and assured him that nobody living with her committed those crimes. *Wilcox*, 143 So. 3d at 366. Johnson apologized for the incident and said he no longer suspected her family members of the crime. *Id.*

A few days later, at approximately 8:30 p.m. on February 2, 2008, while at Richuanda's townhome with others, Wilcox told Jaquinda Wright that he was considering committing a robbery in an area known for drug and criminal activity. Wilcox left Richuanda's town house about 10:00 p.m. *Wilcox*, 143 So. 3d at 366.

At 8:30 p.m. that evening, and again at 2:00 a.m. the following morning, Johnson invited Stephanie Hankerson ("Hankerson") to

visit his townhome. After the second call, Hankerson agreed and said she would bring her friends, Veronica McMorris ("McMorris"), and Taneshia Arnold. The women arrived at Johnson's home around 4:00 a.m. driving a white Tahoe. *Wilcox*, 143 So. 3d at 366. Upon their arrival at the darkened townhome, they called Johnson from the car, and he invited them to enter. *Id.* As they approached the door, it opened, but the women could not see inside. As they started across the threshold, they were frightened by a shadowy figure just inside the home. *Id.* at 366-67. Retreating to their car, the women drove away only to receive another call from Johnson before they left the townhouse complex, asking them to return and stating the person they saw was a friend. *Id.* at 367. As Hankerson approached the front door, it again opened and she walked inside where she encountered a man holding a gun with his face covered by a bandana and dressed in all black, including a leather jacket, shirt, pants, and a baseball cap. *Id.* at 367.

From the car, Hankerson's two friends saw her facial expression change and, fearing for her safety, McMorris called Johnson using Hankerson's cell phone. Hankerson told McMorris that the man was

Johnson's friend and that they should enter the townhome. *Id.* When the two women entered the home, they saw Johnson and Hankerson and then were surprised by the gunman who stepped out from behind the front door and closed it. The gunman ordered his captives upstairs and demanded money. *Id.*

Once upstairs in Johnson's bedroom, the gunman smoked marijuana, went in and out of the bedroom several times while talking on a telephone, and demanded the keys to the Tahoe because he needed the car to escape. *Wilcox*, 143 So. 3d at 367. After receiving the keys, the gunman ordered Johnson to tether the women's hands and feet. Once that was completed, the gunman checked Johnson's work and instructed the women not to try to escape. *Id.* Next, he used his shirt to wipe down the areas he had touched, noting he did not want to leave fingerprints. *Id.* He turned the volume of the television up so loud that the women could only faintly hear what happened outside the room. The gunman then ordered Johnson downstairs. *Id.*

Sometime between 4:30 and 5:00 a.m., Richaunda received a telephone call from Wilcox who directed her to give the phone to her

brother, Collier, who had not been answering his cell phone. *Wilcox*, 143 So. 3d at 367. Collier then noted that he had missed several calls from Wilcox which had been placed at approximately 4:45 a.m. *Id.* Wilcox ordered Collier to bring Wilcox's belongings outside and to call him when that task was done. *Id.* While outside with Wilcox's bag, Collier heard Johnson's door unlock and saw Wilcox exit the townhome holding a gun and dressed all in black, including a leather jacket and with something covering his mouth. *Wilcox*, 143 So. 3d at 367-68. Using a keyless remote, Wilcox placed his bag in the white Tahoe¹, and turned on the engine before returning inside Johnson's townhouse. *Id.* at 368. As Collier returned to his upstairs room, he heard a single gunshot. *Id.* The women, still bound upstairs, also heard the front door of Johnson's home open, a single gunshot fired, and the door closed, followed by a car leaving. *Id.*

Thereafter, Hankerson was able to free herself and call the police, notifying them that she suspected a murder had been

¹At trial: "Collier testified during trial that he had never seen Wilcox with a white Tahoe before and that Wilcox was not driving a vehicle when he arrived at Richaunda and Collier's townhome." *Wilcox*, 143 So. 3d at 368, n3.

committed. Hankerson also untied her friends before she when halfway down the stairs to find "Johnson lying face down on the ground, bound at the wrists and ankles, with a gunshot wound to the back of the head." *Id.*

Collier next heard from Wilcox at 8:00 a.m. later that morning. During the call, Wilcox admitted he had killed Johnson to protect Collier and his family. Wilcox confessed that he killed Johnson because he did not know how Johnson would react after the burglary and finding that Wilcox had been living with Richaunda and Collier. *Wilcox*, 143 So. 3d at 368.

A week later, February 9, 2008, Cleveland Aguilar ("Aguilar") and James Duran ("Duran") were with Wilcox at a nightclub. When receiving a ride home from Wilcox, Aguilar asked about the white Tahoe Wilcox was driving with temporary tags. *Wilcox*, 143 So. 3d at 368. Wilcox stated a girl had purchased the vehicle for him. When the men stopped for gasoline, Aguilar noticed several police cars in the lot. The police had tracked Wilcox using his cell phone. Aguilar refused to return to the car having seen several guns in the car,

including a .9 millimeter, and suggested they leave on foot. *Id.* Wilcox and Duran ignored the suggestion and drove off in the Tahoe. *Id.*

Shortly thereafter, the police located the white Tahoe abandoned in an apartment complex. *Wilcox*, 143 So. 3d at 368. Having received information Wilcox was hiding in one of the apartments, they approached and saw Wilcox appear, and he was arrested. *Id.* A search of the Tahoe revealed a .9 millimeter weapon and another firearm. Near the Tahoe, the police located a black leather jacket, black bandana, and 49 rounds of .9 millimeter ammunition. *Id.*

At trial, the medical examiner testified that Johnson died from a single gunshot wound to the back of the head. *Wilcox*, 143 So. 3d at 368-69. The bullet recovered during the autopsy was determined to be a .9 millimeter fired from the .9 millimeter gun recovered from the white Tahoe. *Id.* at 369. A latent fingerprint expert testified that prints recovered from paperwork found in the Tahoe matched Wilcox's prints. *Id.* The DNA experts testified that the DNA recovered from a cigarette butt found on Johnson's living room table matched Johnson's DNA and alleles containing a genetic structure like the

DNA of Wilcox. The minor DNA profile, which Wilcox possesses, was noted as rare and present in about two percent of the population. *Id.*

Wilcox represented himself during the guilt phase and called three witnesses. Wilcox's girlfriend testified that it was her cell phone that Wilcox used to call Collier on the night of the murder. She stated that she did not give Wilcox her phone and that Wilcox did not own a cell phone of his own. *Wilcox*, 143 So. 3d at 369. She identified Wilcox as a drug dealer who rode a bike around town selling drugs. *Id.* Wilcox's cousin testified that she saw Wilcox in the white Tahoe three or four days after Johnson's murder. However, she did not see Wilcox with drugs or a cell phone at that time. The mother of Wilcox's son testified that she last saw Wilcox on the Wednesday following Johnson's murder. *Id.*

Testifying on his own behalf, Wilcox denied ever being in Broward County where the murder took place. He claimed to have been in Miami on the weekend of the murder. *Wilcox*, 143 So. 3d at 369. With respect to the Tahoe, he claimed Collier gave it to him on February 6, three days after the murder. *Id.* Wilcox also denied ownership of the bullets and bandana found near the Tahoe on the

day of his arrest. Like with the Tahoe, Wilcox claimed he received the cell phone he used to call Collier, two days after the murder. He explained that he fled the gas station on the day he was arrested because he was a drug dealer and knew the Tahoe was stolen. *Id.*

Based on the above evidence, Wilcox was convicted by the jury of first-degree murder. He was also convicted of four counts of kidnapping, and one count of armed robbery. *Wilcox*, 143 So. 3d at 369.

During the penalty phase, Wilcox chose to be represented by counsel. Following the State's case, Lawanda Wilcox ("Lawanda"), Wilcox's mother, testified for the defense. Wilcox was the eldest of her four children. *Wilcox*, 143 So. 3d at 369. Lawanda began using drugs when she was ten-years old. Wilcox was born when she was 15-years old, and Wilcox's father was not part of his son's life. While she stopped using drugs while pregnant with Wilcox, she used drugs thereafter and during other pregnancies. *Id.* The defense presented evidence of Lawanda's childhood, dating men to obtain money for food/drugs/diapers and growing up in poverty in a violent/drug-infested area. She admitted using the government assistance she

received to support her drug habit. While growing up, Wilcox witnesses his mother's drug use and how he was forced to find makeshift drug paraphernalia. Also, Lawanda was incarcerated for periods of time when Wilcox was a child and that he witnessed her being arrested. *Id.*

Lawanda testified that she was not a good mother and that she suffered depression and addiction. Her addiction/depression caused him to fail to provide Wilcox with needed mental and emotional support. *Wilcox*, 143 So. 3d at 370. Wilcox was a slow learner who earned mediocre grades and acted out. She punished him with spankings and locking him in a bathroom. Wilcox was removed from school and placed in a reform school. *Id.*

While Wilcox's mother was unsupportive, his grandmother offered a stable positive influence in his life. Before he was eleven-years old, he would split his time between his mother and grandmother. *Wilcox*, 143 So. 3d at 370. After he turned eleven, he lived permanently with his grandmother until he was arrested at fourteen-years old and convicted of second-degree murder, robbery,

and grand theft. *Id.* While incarcerated, his grandmother died, and he was unable to grieve with his family. *Id.*

At the close of the defense penalty phase mitigation case, the trial court inquired about a possible mental health presentation. "Wilcox's counsel indicated that both he and Wilcox made a strategic decision not to present mental health mitigation."² *Wilcox*, 143 So. 3d at 370. The jury recommended death by a seven to five vote. *Id.* This Court noted that during the hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993):

... the defense presented Dr. Christopher Fichera, who determined that Wilcox was exposed to several risk factors that resulted in a predisposition for violent criminal behavior. Dr. Fichera concluded that this predisposition was developed when Wilcox was a child and formed from circumstances that were beyond his control. Further, he opined that Wilcox was psychologically damaged as a child, and that psychological damage was the reason Wilcox murdered Johnson. During cross-examination, Dr. Fichera testified that Wilcox exhibited symptoms of antisocial personality disorder; however, he concluded that some of the behavior considered to be antisocial was

²"The prosecutor stated for the record that Wilcox had been evaluated and diagnosed with antisocial personality disorder." *Wilcox v. State*, 143 So. 3d 359, 370, n. 7 (Fla. 2014).

actually a coping mechanism that Wilcox developed to survive in his home environment. On May 16, 2011, the trial court sentenced Wilcox to death for the murder of Nimoy Johnson. In pronouncing Wilcox's sentence, the trial court found that the State had proven beyond a reasonable doubt the existence of four statutory aggravating circumstances and afforded each great weight: (1) Wilcox had been previously convicted of the prior violent felonies of second-degree murder and armed robbery; (2) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification (CCP); (3) the murder was committed for the purpose of avoiding lawful arrest; and (4) the murder was committed while Wilcox was engaged in the commission of an armed robbery and an armed kidnapping. See " 921.141(5)(b), (d), (e), (I), Fla. Stat. (2008).

The trial court concluded that no statutory mitigating circumstances had been established, as Wilcox did not present, nor was the jury instructed regarding, evidence of statutory mitigation. The trial court found seven nonstatutory mitigating circumstances and afforded each little weight: (1) Wilcox grew up in a difficult home environment and was not properly nurtured by his crack and heroin addicted mother; (2) Wilcox lacked stability in his home environment while growing up; (3) the conduct that resulted in these convictions was a direct product of Wilcox's abusive and dysfunctional childhood and adolescent period; (4) circumstances beyond Wilcox's control affected his development and led him to have a psychologically damaged childhood and adolescence; (5) Wilcox exhibited signs of

childhood depression around the age of twelve or thirteen which were untreated; (6) Wilcox will spend the rest of his life in prison; and (7) Wilcox exhibited good behavior during court proceedings. FN9

FN9. Wilcox also asserted as mitigation that the seven-to-five jury recommendation was reached too quickly by a group of jurors who were inadequately qualified. The court determined that Wilcox exercised his right of self-representation when he selected the jury, and that any conclusion with regard to the advisory sentence based on the speed of the penalty phase deliberation was speculative. Accordingly, the court found that this asserted mitigating circumstance had not been established.

The trial court concluded that the aggravating circumstances substantially outweighed the mitigating circumstances and noted that its finding "would not change even if the Court were to exclude the aggravating factors of avoiding or preventing lawful arrest and that the capital felony was committed in a cold, calculated and premeditated manner." In addition to the death sentence, the trial court imposed sentences of life in prison for each of the four counts of armed kidnapping and the single count of armed robbery. This appeal followed.

Wilcox filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on April 20, 2015. *Wilcox v. Florida*, 574 U.S. 1161 (2015).

Wilcox filed his initial post-conviction motion to vacate the judgement on February 19, 2016, and the State responded. Wilcox amended that motion on September 22, 2017, to which the State responded. On January 18, 2018, the post-conviction court summarily denied all claims without holding a case management hearing where the parties could have argued the claims. Wilcox appealed.

On appeal, this Court declined to address the merits of Wilcox's claims but vacated the lower court's order and remanded the case for the post-conviction court to hold a case management hearing and further proceedings. *Wilcox v. State*, SC18-146 2019 WL 4391268 (Fla. Sept. 13, 2019).

After the case was remanded, Wilcox filed a second amended motion for post-conviction relief on August 9, 2021. The State filed its response on November 1, 2021. The court held a case management hearing on February 18, 2022, and granted a hearing

on Claim 3 regarding whether trial counsel was ineffective in investigating and presenting mitigation during the penalty phase. The evidentiary hearing on that claim took place on April 19 to April 21, 2023.

Wilcox called eight witnesses during the hearing. Kerry Sheehan (“Sheehan”) is a mitigation specialist who was hired by Robert Gersham, Wilcox’s trial counsel, in late November, early December 2008. Wilcox “fired” his attorneys and Sheehan shortly thereafter when he chose to represent himself. (PCR, 966-72) Joseph Walsh (“Walsh”) rehired her on April 13, 2009. (PCR, 2252-59) She met with Wilcox for four to five hours where he related his history and family situation to her. He did not inform her that he had spent time in solitary confinement as a juvenile while in prison. (PCR, 990-94) She obtained as many records on Wilcox as she could get although she was unable to get his early school records or any medical records outside the Department of Corrections. She had his later school records, his criminal history, Department of Children and Family, Department of Juvenile Justice, and Department of Corrections records. She routinely reviewed the records and prepared summaries

of them which she then forwarded to Walsh.³ (PCR, 977-89) She interviewed, along with Walsh, three members of Wilcox's family for about three and a half hours. She and Walsh also interviewed Wilcox and his mother, who were both in custody. (PCR, 996, 1026-27) Again, Sheehan prepared a report on the interviews and gave them to Walsh. Walsh never put any constraints on what she could do or investigate, but she only had three and a half months to prepare a mitigation case which she felt was not enough time. Both she and Walsh worked hard on the case. (PCR, 1013-20, 1029)

Walsh was originally brought onto the legal team in December 2008, just before Wilcox chose to represent himself. Walsh had tried two capital cases before this case as well as attending multiple training seminars in handling death penalty cases. (PCR, 1046-54, 1063-64) The court contacted him on March 9, 2009, after the guilt phase trial was complete and re-appointed him to represent Wilcox at the penalty phase. Walsh was contracted through the Regional

³Wilcox did not present any additional records at the evidentiary hearing other than those gathered by Sheehan and Walsh in their 2009 representation of him.

Counsel which was headed by Phil Massa. Attorneys at that agency recommended Dr. Rapa to him as an expert; since he respected that attorney, he followed that advice. (PCR, 1055-56) Sheehan routinely sent Walsh reports on her investigations and interviews. Walsh of course met with and interviewed Wilcox and they discussed his prior convictions and history. Walsh could not recall if they discussed the neighborhoods where Wilcox had lived, nor could he remember if Wilcox told him that he had been kept in solitary confinement as a teen.

Walsh also met with and interviewed possible mitigation witnesses. Walsh met Wilcox's mother in jail for three hours to find out about his childhood and her drug and criminal history. (PCR, 1056-57) He vaguely remembered meeting with members of Wilcox's family. (PCR, 1060-61) He did recall meeting with Cory Waters, Wilcox's co-defendant on his prior murder case. He had him sign an affidavit establishing that Wilcox was not the shooter in that case. He got the State Attorney to enter into a stipulation on the affidavit saying that Wilcox was 14 at the time of that crime and that he was not the shooter. Walsh chose that course of action because he had to

address the existence of the prior murder conviction but did not want to draw more attention to it, especially since Waters said that Wilcox had gotten out of the car and took items off the dead body. For that reason, Walsh had not considered calling Waters as a mitigation witness. (PCR 1064, 1067-68, 1088-91) Waters told him that Wilcox was teased a lot by the neighborhood kids because of his mother's behavior.

Throughout the trial, Walsh was concerned about the jury finding out about Dr. Rapa's diagnosis that Wilcox had Anti-Social Personality Disorder ("ASPD") since that might get them thinking about his possible future dangerousness. Walsh reviewed Wilcox's DOC records as well as Sheehan's summary of them. Those records were replete with official notations of Wilcox's bad and violent behavior⁴ while he was incarcerated, which resulted in him spending a considerable amount of time in solitary confinement. Walsh did not want the jury to learn about that behavior since it would undercut

⁴The DOC records indicate that Wilcox was disciplined for offenses like fighting, possessing a weapon, and inciting a riot. (ROA, 1367)

his mitigation case. (PCR, 1113) It was for those reasons that Walsh decided not to call Dr. Rapa in front of the jury. (PCR, 1111-12)

Walsh had received no files from Wilcox's prior attorney and had to start everything from the beginning. The trial was set at the start of August 2009, so he only had a few months to complete a mitigation workup, a process that normally takes one to two years. More time would have allowed him to build more rapport with the family. (PCR, 1080, 1117) During that period, Walsh was also handling another capital case, took the Board certification exam, and had several medical appointments. (PCR, 1081-83) Walsh believed the materials covered in the certification case were relevant to Wilcox's case and helped Walsh. (PCR, 1109) Those other commitments did not affect his work on this case, which he took very seriously and worked very hard on. (PCR, 1092-94, 1109, 1116)

Walsh did hire another expert, Dr. Fichera, despite some resistance from Massa, the head of Regional Counsel, which he found extremely frustrating. Dr. Fichera did a detailed presentation at the *Spencer* hearing where he explained how Wilcox's family, childhood experiences, and violent, criminal neighborhood set him up to

become violent himself and to develop ASPD. (PCR, 1071-79, 1100, 1102-03)

Dr. Sarah Vinson is a forensic psychologist who, when working on criminal cases, works for the defense. For post-conviction litigation, CCRC asked her to evaluate Wilcox for the biopsychosocial and structural factors which may have affected him leading up to this crime. (PCR, 1120-26) She reviewed records documenting aspects of his life (the same documents Walsh and Sheehan had obtained prior to trial) and interviewed him where she learned about his childhood, family structure, the death of his grandmother's partner with the ensuing poverty and relocation to a particularly bad neighborhood. She conducted no testing on Wilcox. (PCR, 1127-31) Dr. Vinson also interview Linda Kelly, Wilcox's aunt, who verified the verbal and physical abuse his mother inflicted on him as well as the mother's drug abuse, prostitution, and stealing. That behavior led to the neighborhood children teasing and talking bad about Wilcox. (PCR, 1132)

Dr. Vinson explained that a lack of security and safety in childhood, as well as trauma, bad schools, a dangerous

neighborhood all adversely affects a child's mental health even if it does not rise to actual mental illness. She explained how psychologists and sociologists have identified factors which critically influence the trajectory of a child's life, labeling them Adverse Childhood Experiences ("ACE"). (PCR, 1134-39)

Wilcox had ACE in a continuing pattern in both his family and community. His mother gave birth to him when she was 15 years old and already addicted to drugs and engaging in prostitution to buy drugs. All of Wilcox's aunts and uncles abused drugs, sometimes in front of him. His grandmother Nancy raised him along with his cousin Nicki. Her own children, including Wilcox's mother, and some of their children would sporadically stay at the house as well. Nancy's partner was Mr. Davis who was a good man and a father figure to Wilcox. He died when Wilcox was 11 years old, which was a huge loss for him and it was this event that caused the family to move to Circle Plaza, a dangerous and crime-ridden neighborhood, where Wilcox saw gangs, drug abuse, violence, and death by the time he was 14. (PCR, 1142-49, 1155)

When Wilcox was 12 years old, his mother stole his PlayStation gaming system, sold it to his friends, and then lied about it to Wilcox. That too was a huge loss and a turning point in his life since it had been what occupied most of his time outside of school and was his coping method to handle the stresses in his life. (PCR, 1146-47, 1151) He was furious at his mother and no longer trusted her. Wilcox had already begun to use marijuana and alcohol by that point, but his use increased after the loss of his games. He also began to be arrested. He had already had problems in school with learning as well as getting into fights, issues which increased at this point. (PCR, 1150-52)

By the age of 14, Wilcox had been arrested numerous times and was arrested for murder. When he went to prison at 15, he weighed under a 100 pounds. He was initially put into solitary confinement for his protection, isolating him from educational opportunities and disrupting normal teen development. (PCR, 1153-55) Dr. Vinson acknowledged that Wilcox's aggression and misbehavior in prison may have led to both solitary confinement and the lack of training and educational opportunities. (PCR, 1176) Wilcox's family was not

able to visit with him often and failed to inform him when his grandmother died. *Id.*

Wilcox had difficulties once he was released from prison when he was 24. While he initially worked at a car wash, he quickly began selling drugs again. He had two children and was involved with caring for his first, a daughter. While Dr. Vinson never diagnosed Wilcox, she questioned Dr. Rapa's diagnosis of him as having ASPD, saying that symptoms of other mental health issues like depression and PTSD overlap with the ASPD factors. Dr. Vinson also cited to social racism in the over-diagnosing of ASPD in minorities. (PCR, 1159-70) Dr. Vinson also acknowledged that the issues and factors she testified to were largely covered in Dr. Fichera's presentation at the *Spencer* hearing. (PCR, 1177-80)

Linda Kelly, Wilcox's aunt, testified that she lived with her mother and seven siblings in a one-bedroom apartment in East Perrine, a working class neighborhood. Her mother Nancy was a housekeeper and a great person who cared for her children well. Her mother got a serious boyfriend when Linda was 13, Louis Davis. (PCR, 1227-30) Nancy was from Georgia but was brought to Miami

when her uncle found out that she was being molested. The family eventually moved to West Perrine which changed into a poor drug and crime infested area a few years after they settled there. (PCR, 1227-34) They lived in a two-bedroom apartment in West Perrine. Nancy spent a good amount of time with Wilcox while he was young since she was no longer working. She had a positive effect on him and gave him good direction. Wilcox lived with her until he went to prison at 14. (PCR, 1257-58) No adult pushed Wilcox to go to school but rather left it up to him. (PCR, 1253)

All of Linda's siblings used drugs. Her older brother Larry would inject heroin in the home, asking her to help hold his arm so he could get the drugs in. Larry also used in front of Wilcox. Lawanda, Wilcox's mother, and her sister Mary also used heroin, crack cocaine, and marijuana and did so before Wilcox was born. Lawanda was "in the streets," coming in and out of the home, using drugs and supporting her habit with prostitution and theft. (PCR, 1231-36, 1239-44) She had Wilcox when she was 15 and abandoned him when he was four months old to return to the streets. *Id.* She did not take Wilcox with her but left him with Nancy to care for. (PCR, 1263) The two-bedroom

apartment had six people living there, including Wilcox and his cousin, as well as Linda's siblings who, along with their children, would come and go. (PCR, 1237)

A couple of the sisters would hold big birthday parties for their children after which the siblings would sit around and get high together in the children's presence. On one occasion, Linda's sister Gloria stabbed her boyfriend out on the street after an argument; Wilcox and his cousins were present. (PCR, 1238)

Lawanda was not close to Wilcox and did not show him any love. She doted on her younger son Nate, who had sickle cell anemia. Wilcox loved Nate and tried to protect him. Wilcox himself was a quiet child and was neither smart nor talkative. Lawanda abandoned two other children at the hospital after they were born with crack in their systems. Lawanda would tell her family about her life on the streets when she came to visit, including her pimp Clive who had eight other girls working for him. Lawanda was crazy when she was on drugs, acting paranoid and erratic. She would steal anything she could get for money from everywhere she could: stores, her family, and her children. Once, when Wilcox was 12, she stole his PlayStation, sold

it to his friends, and then lied to him saying that someone had burgled the home. His friends told Wilcox the truth. Those games were Wilcox's world; it was all he had. He changed after he lost them and turned to the streets. (PCR, 1239-45, 1259-62, 1296)

Nancy moved Wilcox and the other children living with her to Circle Plaza in West Perrine after Louis Davis died. The whole family stayed with Linda and her two sons in Liberty City while they waited for a three-bedroom public housing apartment to become available. Wilcox was happy when he was at her house, playing with her sons and their toys. He would often visit on the weekends. (PCR, 1244-47) Wilcox told Linda that he wished she were his mother. (PCR, 1248-62)

Circle Plaza was a terrible neighborhood, full of drugs, guns, and fights daily. People would sell and use drugs openly. Linda recalled hearing gunshots routinely, once her mother's house was shot up. (PCR, 1247)

Linda spoke with Wilcox occasionally while he was in prison during his teens. He came to her house when he was released. The only thing from the past that Wilcox would ever talk about was that

game station. (PCR, 1249-50) Wilcox was more introverted after he was released from prison. He had two children after he was released whom he loved and helped care for. (PCR, 1252) Linda's son Darrell was still close with Wilcox after his release but was a bad influence on him and got him back on the streets. (PCR, 1254)

Linda did not recall any attorneys or investigators talking to her before the 2009 trial. She may have met them but did not recall it. (PCR, 1250, 1259-62)

Darrell Howard is Wilcox's older cousin, the son of Linda Kelly. He has seven felony convictions, the last of which happened before 2009. Darrell and his two cousins, Wilcox and Nicki, were all close and played with each other as children. Wilcox and Nicki lived with their grandmother Nancy and Louis Davis. Others would sometimes stay there as well. (PCR, 1266-69) Darrell looked at Wilcox as his brother and Wilcox looked up to him since he was a little older and had more possessions. Darrell would have Wilcox do stupid things to amuse himself, like sticking his hand in an ant pile. Darrell regrets teasing Wilcox and not having Wilcox do the right things. (PCR, 1287-88, 1298-99)

His grandmother Nancy was really upset when Louis died. Darrell and Wilcox were returning from the corner store when they heard her cry out. Wilcox looked hurt when he heard Louis had died. Nancy and the house were fun but changed after his death. After that, other children moved in, and Nancy had no help in raising them. The family had to move to Circle Plaza then as well. (PCR, 1270-71) His aunts and uncles would sometimes stay at Nancy's home since they often had no other place to go. Darrell said he and Wilcox saw Larry using heroin in front of them; no adult ever told Larry not to do it in front of the children. Larry once over-dosed at an aunt's house and Darrell had to perform CPR on him. Larry has since died of an over-dose. His aunt Cynthia was also a drug addict who left her two daughters with her mother to care for. (PCR, 1272-75) Lawanda, Wilcox's mother, also used drugs and would stop by her mother's house for food and something to steal. Lawanda was not loving to Wilcox but would only fuss at and argue with him. Wilcox would tell Darrell that he wished his mother was like Linda. Wilcox did not get the outfits and presents for holidays that the other cousins did. (PCR,

1276-77) Lawanda would buy drugs from Wilcox's friends, using sex as payment. (PCR, 1292-93)

Circle Plaza was a terrible area with lots of drug use and sales, killings, police chases. They heard gunshots almost every other night. He and Wilcox knew several people who were killed, including boys near their own age. (PCR, 1278-81) There were also "family fights" in the neighborhood where members of two or more family would battle each other. Both he and Wilcox had been involved in such fights including the time when someone hit Wilcox on the head with a sizable stone. His grandmother's house was once shot up as a result of one of those fights. (PCR, 1281-83, 1285-86, 1303-04) After Wilcox went to prison, Darrell moved to Circle Plaza and stayed with Nancy. He got involved with selling drugs and stealing cars. (PCR, 1283-84)

While Wilcox was in prison, Darrell did not have much direct communication with him. Nancy would speak or write with Wilcox and then pass on what was said. When she died, Darrell did not think it wise to tell Wilcox about it. Wilcox only found out about it when he appeared at the family home and his cousin told him that she had died. Wilcox was really upset and disappointed when he found out

and Darrell regrets his decision. Wilcox moved into that apartment after his release. (PCR, 1289-90)

Initially after prison, Wilcox worked at a car wash but quit after Darrell and others urged him to sell drugs and make more money. (PCR, 1291-92) Wilcox also had two children after his release. He loved his daughter and helped care for her. (PCR, 1293)

Darrell attended Wilcox's guilt phase trial but did not attend the penalty phase trial because Wilcox did not tell him when it was scheduled. None of the attorneys or investigators spoke to Darrell before that trial although he would have been willing to testify. (PCR, 1294-95)

Cory Waters ("Waters") was a friend of Wilcox's and his co-defendant in the robbery homicide case. He grew up in the Circle Plaza housing projects. He met Wilcox when he was about 9 - Wilcox is a year or so older than he. Waters knew Wilcox's family from the area as well and remembered them as a pretty good or nice family. Only saw Lawanda in the streets; she was an addict. Wilcox loved Nate, his little brother, and brought him along to play. (PCR, 1304-11)

Circle Plaza is a very dangerous neighborhood where one is blessed to make it out. There were lots of drugs, shootings, and killings where numerous people were killed. Residents would hear gunshots every other day there. After the gunshots, the neighbors would go out to see what happened and would go to look at whomever had been shot. The police were slow to come to the area because it was so dangerous. Waters recalls seeing five bodies in the streets there, including people he knew. Experiences there made him feel traumatized and very scared. (PCR, 1311-15)

In 1992, on the night of the other homicide, Waters was with 14-year-old Wilcox and three others driving around going to parties. Duane was the oldest one in the group. Waters had a gun and was playing with it in the car when it went off. Duane took the gun from him. Duane then directed the driver to drive down south to Homestead. They turned down a street and saw a group of people outside. Duane ordered the car to stop and jumped out. Duane went up to a dice game with seven or eight people in a circle and shot one of the men. Duane then picked up the money; Wilcox got out of the car and picked up money from the ground of the dice game. They

returned to Perrine and separated. Wilcox did not plan or direct what happened that night. (PCR, 1315-19) Waters received eighteen months with a plea and Wilcox got ten years. (PCR, 1319-20)

Wilcox got a job at a car wash when he was released from prison and seemed happy. (PCR, 1320) Later, Waters heard Wilcox was arrested for another murder. Someone representing Wilcox contacted him and met him briefly at a Dunkin' Donuts for a total of about 15 to 20 minutes. The person questioned him about the earlier case but did not ask anything about Circle Plaza. Waters signed some paperwork for them. Waters was asked if he would testify. At that time Waters had been convicted of eight felonies or misdemeanors involving dishonesty. He has been convicted of three additional felonies since then. (PCR, 1320-23, 1327)

Dr. Micah Johnson is a sociologist working at the University of South Florida as a professor and researcher, focusing on the impact of social disadvantage and childhood trauma on adolescent health and behavior. The fields of sociology and psychology have developed a list of risk factors labeled ACE which link trauma with the future health, cause of death, relationships, and the interpretation of the

self and the world. The ACE are risk factors for delinquency and negative life outcomes; there are protective factors as well.⁵ (PCR, 1353-78) These traumas and risk factors are linked to poor decision making and may affect the brain development. (PCR, 1448-49) He spoke with Wilcox for three hours and used the ACE questionnaire as the basis of the discussion but used culturally appropriate language. (PCR, 1418-24) Dr. Johnson conducted no testing or scans on Wilcox to determine what, if anything, this trauma actually did to his brain. (PCR, 1450-55)

Wilcox had a number of the ACE risk factors. His mother began using drugs at 10, gave birth when she was 15, was depressed, and used drugs in front of him. Dr. Johnson opined that Lawanda was sex trafficked in addition to her having sex in exchange for drugs. She also stole to support her drug habit. She was arrested numerous times while Wilcox was a child. Wilcox lived the vast majority of his life with his grandmother but did spend some time with his mother who had irrational bouts of violence against him and emotionally

⁵ Might Wilcox's loving grandmother and role-model Louis Davis be protective factors to some degree?

abused him. (PCR, 1379-84, 1390-91, 1393) Other ACE factors included an absent father, physical abuse, lack of supervision, family member's being arrested, family drug use, failing school, special education, poverty, dropping out of school, criminality among his peers, and family dysfunction. (PCR, 1425-27)

Various aunts and uncles stayed in the home at times, using drugs in front of Wilcox. They also engaged in domestic violence in front of him. Wilcox also experienced physical neglect with little medical or dental care and used or dirty clothes. Wilcox also experienced other risk factors not included in the ACE score including community violence and the murder of friends. (PCR, 1396) Furthermore, the community was poor and had a high crime rate during the time Wilcox lived there. His siblings were taken by DCF due to Lawanda's drug use. Wilcox was incarcerated at 14 where he "acted out" when isolated. That he spent about sixty percent of his prison in solitary confinement, in non-consecutive periods, led to recidivism. The loss of his grandmother was another risk factor.⁶ All

⁶Wilcox was about 23-24 when his grandmother died.

of these risk factors, coupled with the dearth of protective factors, put Wilcox at an extreme level of risk of criminality and negative outcomes. (PCR, 1397-1412)

In Dr. Johnson's opinion, Dr. Fichera did not address the trauma and ACE in sufficient depth and completely neglected mentioning Dr. Johnson's supposition that Lawanda was sex trafficked.⁷ (PCR, 1413-15, 1428-32) While acknowledging that the literature on ACE was not as developed in 2009, Dr. Johnson believed that Dr. Fichera failed to "communicate the weight of the trauma" in Wilcox's life. (PCR, 1428-32) Yet the record shows that Dr. Fichera brought up most of the risk factors and other traumas Wilcox experienced, as well as at least one protective factor. (PCR, 1436-47; T, 22)

Dr. Stuart Grassian is a psychiatrist who has extensively studied the effects of solitary confinement and isolation on the individual. The studies include medical isolation as well as

⁷Dr. Johnson believed that Lawanda being trafficked as a minor was traumatic to her. However, Wilcox was a baby and young child then, living with his grandmother and Mr. Davis.

penitentiary solitary confinement; the reason for the isolation does not matter since the syndrome exhibited is the same in all situations. (PCR, 1496, 1504-06, 1524) Solitary confinement is likely an important factor in the understanding of the psychological and social functioning of an individual. (PCR, 1537) The restrictions of such a setting impair a person's ability to be alert, often putting him in a fog only to be jarred when exposed to any stimulation. Alternatively, such a person may become hyper alert and obsessive or paranoid. (PCR, 1507-09)

Juveniles do terribly in solitary confinement, even if in there for their own protection. Teens also have difficulty regulating their emotional responses, so they get disciplined for their behavior, sometimes landing them in isolation. Wilcox was imprisoned for ten years, serving roughly 6 years of that in solitary confinement. That length of confinement can have an impact on recidivism. (PCR, 1514-18, 1527, 1529-32) Dr. Grassian did not do a particularized evaluation of Wilcox and the effects of solitary confinement; he merely presented the general effects of that type of confinement. (PCR, 1517-18, 1535) Dr. Grassian believes that the issue of solitary confinement

of Wilcox should have been explored in depth due to his young age and his history of trauma.⁸ (PCR, 1534)

The final witness was Dr. Robert Ouaou who is a licensed psychologist with a specialization in neuropsychology. He usually testifies for the defense in criminal cases. (PCR, 1543-47) A number of risk factors may impair brain development: brain injury, the environment, trauma, neglect, abuse, and genetic factors. (PCR, 1552) He was asked in 2015 to conduct a neuropsychological evaluation on Wilcox. In preparation for that he reviewed all the background information supplied him by post-conviction counsel.⁹

Dr. Ouaou interviewed Lawanda in October 2015 who told him that Wilcox was a loner as a child, was not happy around her, had

⁸The DOC records put into evidence show that the time in confinement was not consecutive and that Wilcox interacted with others and had jobs in prison. (ROA, 1367)

⁹These materials included: the direct appeal opinion; the sentencing order; the reports from Dr. Brannon, Dr. Rapa, Dr. Fichera, Johnson, Grassian, and Vinson; Lawanda Wilcox's testimony; Waters's affidavit; Walsh's interview notes for Lawanda; Sheehan's correspondence; Lawanda's arrest records; CCRC's prepared "time line" and "family information"; all provided DOC records; and the CCRC mitigation letter. (ROA, 1556-58)

difficulty learning basic tasks, and was slow. Wilcox ran away when his gaming system “went missing.” She admitted that she neglected and abused him. (PCR, 1558-59)

Dr. Ouaou interviewed Wilcox in the fall of 2015 as well for about five to six hours. During the visit Dr. Ouaou tested Wilcox, discussed his family, his schooling, and what his childhood was like. Wilcox told him that he had been hit in the head with a brick during a fight and felt woozy as a result. (PCR, 1560-61) That injury was not documented in the records he reviewed, nor did Lawanda corroborate it. (PCR, 1590) The wound bled a lot, but he did not get medical treatment for it.

Dr. Ouaou administered a battery of tests, none of which were normed for death row inmates. (PCR, 1562, 1607) Dr. Ouaou acknowledged that there is some subjectivity in the scoring of the tests depending on who is doing the scoring. (PCR, 1608) Further, the tests were based on individuals with high school diplomas, which Wilcox did not have. (PCR, 1610) The tests he administered were to assess Wilcox’s intelligence and cognitive functioning. (PCR, 1560-62) Wilcox performed within normal limits on the malingering test.

(PCR, 1562-64, 1571) On the Premorbid Functioning test he scored in the low normal (84). On the WAIS-IV intelligence test Wilcox scored a 78, which places him in the borderline range. (PCR, 1566-69) His non-verbal intelligence measured at 86 while his verbal memory was 78. His scores on the various memory assessment tests also were in a consistent range of scores, from the 13th percentile down to the 1st. Wilcox's scores on the California Verbal Learning Test were within the normal range. (PCR, 1569-81) Wilcox was high average on the motor skill test but below average on the complex figure test. He essentially failed the Wisconsin Card Sorting Test. His achievement tests showed him beyond the grade he had completed. (PCR, 1571-75) The Trail Making Test showed that had no problems with mental flexibility or executive functioning. (PCR, 1614) From these tests Dr. Ouaou concluded that Wilcox was not malingering, his IQ was 78 in the borderline range and exhibited abnormalities in the areas of memory and executive functioning. (PCR, 1575) Absent some injury, the IQ score remains steady over time. (PCR, 1621) Dr. Ouaou wrote his report years after he did the interview and testing. (PCR, 1589)

Dr. Ouaou criticized both of the experts Walsh used. He did not believe that Dr. Fichera's opinion was complete since he had not conducted any mental status testing. He also disapproved of Dr. Rapa's use of the Kaufman Intelligence Test since it is not as comprehensive as the Weschler nor can it be used to determine intellectual disability in Florida. Wilcox's score on the Kaufman was 87. Dr. Rapa did find that Wilcox had neuropsychological deficits and neurologic impairments and early delays but she did not refer him for further neuropsychological testing or a neurologic workup. (PCR, 1578-80) To Dr. Ouaou's knowledge, Wilcox has not had a MRI or other brain scan. (PCR, 1623) Dr. Rapa tested Wilcox for psychopathy and he tested negative. She also described his personality and emotional characteristic based on personality tests. In diagnosing him with ASPD, Dr. Rapa discussed his possible neuropsychological defects as well as the biological and biosocial impacts on his behavior. (PCR, 1580-82) Dr. Ouaou believes that the trauma Wilcox experienced, as detailed earlier, had an impact on his adolescent brain development. He also believed that Wilcox has significant impairments in some aspects of his executive functioning. Dr. Ouaou

speculated that Wilcox may have performed worse in 2009 than he did in 2015, saying that his brain would have continued to grow.¹⁰ (PCR, 1582-84) He did not see any evidence that Wilcox ever suffered from any delusions, hallucinations, or perceptual or thought disturbances. (PCR, 1626)

The lower court denied relief in a written order on September 26, 2023. Wilcox timely appealed.

SUMMARY OF THE ARGUMENT

1. Counsel was not ineffective in the investigation and presentation of the mitigation evidence. Counsel obtained all the available records on Wilcox's life and had two qualified mental health experts review them. Wilcox presented no additional information at the evidentiary hearing but only more details on the same information. Competent, substantial evidence supported the lower court's factual findings and credibility determination. Wilcox failed to meet either prong of the test needed for relief under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

¹⁰ Wilcox was 32 years old in 2009, past his development stage.

2. Since Wilcox's case was in litigation when the state law on *Hurst v. State* changed, he is not entitled to a new penalty phase trial, nor does that result create a violation of either due process or equal protection.

3. The lower court did not err when it summarily denied three of Wilcox's claims. His claim of ineffective assistance of counsel pre-trial is procedurally barred and without merit. Similarly, his claim of *Brady/Giglio* erred is also procedurally barred and without merit. Finally, Wilcox's claim the newly discovered evidence required an evidentiary hearing was denied because the information did not meet the tests for such evidence and would not have resulted in an acquittal.

ARGUMENT

I

THE COURT'S FINDING THAT COUNSEL WAS NOT INEFFECTIVE IN THE PENALTY PHASE IS IN ACCORD WITH *STRICKLAND* AND IS SUPPORTED BY THE RECORD. (Restated)

Wilcox contends that the court's findings are not supported by competent, substantial evidence and the court did not understand the *Strickland* standards which apply to this type of claim. Wilcox

argues that: the court used a subjective standard, rather than an objective one, when analyzing whether trial counsel's performance was deficient; the court failed to consider the "wealth of uncontroverted mitigation" (IB 27) when conducting the prejudice analysis under *Strickland*; and the court "failed to engage" (*Id.*) with the mitigation when assessing its weight when determining whether Wilcox had shown the necessary prejudice under *Strickland*. None of these assertions are accurate because the record fully supports the lower court's factual findings and its analysis of the evidence accurately and properly applied the *Strickland* standards and law in determining whether Wilcox had proven deficient performance and prejudice. This Court should affirm the denial of relief.

Standard of Review

The standard of review for an appellate court reviewing a claim of ineffective assistance of counsel after an evidentiary hearing is mixed. See *Martin v. State*, 311 So. 3d 778, 792 (Fla. 2020). Clear error review applies to give great deference to the trial court's findings of fact, whereby if competent, substantial evidence supports the finding then it will not be disturbed, while the trial court's findings of

law are subject to *de novo* review. *Bruno v. State*, 807 So. 2d 55, 62 (Fla. 2001); *State v. Mullens*, 352 So. 3d 1229, 1238 (Fla. 2022).

Ineffectiveness claims are governed by the standard set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See *Nelson v. State*, 73 So. 3d 77, 84 (Fla. 2011). To establish ineffective assistance of counsel, a defendant must establish deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must satisfy both the performance and prejudice prongs to show ineffectiveness. “Both prongs of the *Strickland* test present mixed questions of law and fact.” *Johnson v. State*, 135 So. 3d 1002, 1013 (Fla. 2014).

Regarding the performance prong, there is a “strong presumption” that trial counsel’s performance was effective. *Hilton v. State*, 326 So.3d 640, 648 (Fla. 2021) (citing *Strickland*, 466 U.S. at 689). And that strong presumption is even stronger when trial counsel is experienced. *Cummings v. Sec’y, Fla. Dep’t of Corr.*, 588 F.3d 1331, 1356 (11th Cir. 2009) (citing *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc)). In the Eleventh

Circuit's words, "experience is due some respect." *Chandler*, 218 F.3d at 1316 n.18. Because the burden is on the defense in post-conviction to overcome that strong presumption, all defense counsel must testify at an evidentiary hearing. *Dunn v. Reeves*, 141 S.Ct. 2405, 2409 (2021) (explaining that if trial counsel are alive and available, the petitioner must call them to testify to meet their burden under *Strickland*). Every defense counsel involved in the discussion regarding the issue being raised must testify during the evidentiary hearing. The failure to account for all counsel involved in the decision is fatal to any ineffectiveness claim.

Furthermore, a fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Brown v. State*, 304 So.3d 243, 257 (Fla.2020), *cert. denied*, *Brown v. Florida*, 141 S.Ct. 2828 (2021); *Strickland*, 466 U.S. at 689. Judicial scrutiny of counsel's performance must be highly deferential. *Morris v. State*, 317 So.3d 1054, 1065 (Fla. 2021); *Strickland*, 466 U.S. at 688-89. "Strategic

decisions do not constitute ineffective assistance of counsel” if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Hilton*, 326 So.3d at 648 (citing *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000)). Trial counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel’s strategy. *Id.* An attorney can almost always be second-guessed for not doing more but that is not the standard. *Pagan v. State*, 29 So.3d 938, 949 (Fla.2009).

Regarding the prejudice prong, prejudice means there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Smith v. State*, 330 So. 3d 867, 875 (Fla. 2021) (citing *Strickland*, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* “[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052; *Jackson v. State*, 347 So. 3d 292, 299 (Fla. 2022).

A. The Mitigation Case

i. Trial Counsel Did Not Render Deficient Performance in Investigating and Presenting Mitigation.

Wilcox argues that his counsel was ineffective in the penalty phase by failing to adequately investigate and prepare the evidence for the mitigation presentation. Specifically, he contends that counsel did no investigation into mitigation in the period from May 8, 2008, through November 2008 when Wilcox announced that he wished to represent himself. Wilcox further contends that counsel's work on another capital case, his taking the board certification examination, and his medical conditions had a negative impact on his ability to prepare this case. Moreover, Wilcox argues that counsel delayed hiring his mitigation expert and mental health expert, further compounding the problems those individuals had in adequately preparing the case. He also alleges that counsel hired the wrong expert who had limited experience in capital cases. He also faults counsel for not interviewing any other potential witnesses other than Wilcox's mother and former co-defendant and for only interviewing them once. Finally, Wilcox argues that counsel failed to obtain all the records for his life, especially mental health and medical records, and

thus did an inadequate job of establishing an accurate medical and social history. The post-conviction court found that Wilcox failed to prove that trial counsel was ineffective as well as failing to show the necessary prejudice. (PCR, 1909-1917)

The lower court found that trial counsel Walsh and his mitigation specialist Sheehan both did excellent work in the preparation and presentation of the mitigation evidence, even given the time constraints they faced due to Wilcox's decision to have counsel for the penalty phase after he was found guilty when he represented himself during the guilt phase. (PCR 1921) The court further found that Walsh had presented evidence to the jury regarding the cumulative trauma and social disadvantages present in Wilcox's life, family, community, and mental health through Dr. Fichera, much as Dr. Johnson testified to at the evidentiary hearing. (PCR 1913) The court also found that Walsh had indeed presented experts, Dr. Fichera and Dr. Rapa, during his mitigation presentation to the court or jury. From them, evidence of Wilcox's life, family history, community, and mental health were presented to the jury and trial judge. The court specifically disagreed with Wilcox's

contention that Walsh should have found different or better experts: “this Court finds trial counsel Walsh did an excellent job as to the preparation and presentation of mitigation evidence under difficult circumstances caused by the Defendant’s choice to proceed to trial pro se.” (PCR 9015-16)

There is a special consideration regarding the performance of trial counsel in this case. Trial counsel’s performance must be judged in light of “all the circumstances” which, in this case, includes the fact that Wilcox fired his attorneys and represented himself for the guilt phase. Counsel was appointed after that trial was complete and the penalty phase trial had already been set. That penalty phase had to use the same jury as sat in the guilt phase so counsel could not have a year or two to prepare a mitigation case. Those facts, brought about by Wilcox’s choices, severely limited the time counsel and his team had to prepare the mitigation. *Strickland*, 466 U.S. at 688 (noting “the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances”); *Roe v. Flores-Ortega*, 528 U.S. 470,478 (2000) (reversing because the lower court did not “engage in the circumstance-specific

reasonableness inquiry” required by *Strickland*’s directions that the court consider all the circumstances when addressing a claim of ineffectiveness); *Khan v. United States*, 928 F.3d 1264, 1273 (11th Cir. 2019)(explaining *Strickland*’s totality-of-the-circumstances standard reflects the reality that the performance inquiry must “take account of the variety of circumstances faced by defense counsel”). A defendant cannot choose to represent himself and then change his mind, thereby throwing counsel into the role of defense counsel without the time to prepare in the manner most attorneys trying a penalty phase of capital case would want to have to prepare, and then scream ineffectiveness of counsel when it was the defendant’s own conduct that put defense counsel in that difficult position. *Cf. Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004) (noting that defendant may not obstruct attorney’s efforts, then claim ineffective assistance of counsel). The lower court recognized this law when it evaluated counsel’s performance in light of the time constraints of the case. (PCR 1912) Further, it is inappropriate to transform a possible direct appeal issue of trial court error (scheduling the penalty phase trial) into an ineffective assistance of counsel claim.

Additionally, this Court and other courts have made it clear that counsel is entitled to rely on a qualified expert's opinion, and that such reliance is not rendered unreasonable just because a new expert in post-conviction proceedings disagrees with trial counsel's expert. See *State v. Mullens*, 352 So. 3d 1229, 1237 (Fla. 2022) (“[W]e have repeatedly held that counsel is not deficient simply because postconviction counsel secures a more favorable expert.”); *Brant v. State*, 197 So. 3d 1051, 1069 (Fla. 2016) (“[W]e have repeatedly stated that trial counsel is not deficient because the defendant is able to find postconviction experts that reach different and more favorable conclusions than the experts consulted by trial counsel.”); *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) (“Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so.” (quoting *Smith v. Cockrell*, 311 F.3d 661, 675-76 (5th Cir. 2002)). Further, as stated earlier, under *Strickland* “there is a ‘strong presumption’ that trial counsel's performance ‘falls

within the wide range of reasonable professional assistance.” *Brown v. State*, 304 So. 3d 243, 257 (Fla. 2020) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

Wilcox attacks Dr. Rapa and her work extensively. Walsh testified that his director, the first chair who had intended to try the case, recommended her and that other attorneys respected her. She was a qualified mental health expert. As noted above, the fact that Wilcox found other experts with opinions he liked better does not render Walsh’s performance deficient. Walsh did make a strategic decision to not present Dr. Rapa to the jury because of her finding that Wilcox had anti-social personality disorder, which was consistent with his history and behavior. The State’s cross-examination of Wilcox’s mother in referencing Dr. Rapa’s psychological evaluation was an effort to impeach Wilcox’s mother’s implication that Wilcox had something wrong mentally. The State brought out nothing prejudicial about Wilcox to the jury. The court itself already knew of that diagnosis from the in camera hearing on the waiver of mental health mitigation. (T 20:1197-1203)

Contrary to Wilcox's allegation, the post-conviction court did not use a subjective standard in evaluating the performance of Walsh and Sheehan. The court merely noted that both did their best and worked as hard as they could to do an excellent job of representing Wilcox. The Court analyzed what was presented (Wilcox's personal and family history of dysfunction, violence, and drug abuse) and then found that counsel's performance was not deficient. *Id.* The court found that Walsh did in fact present mitigation evidence on "the cumulative trauma and social disadvantage present in the Defendant's life, family background and mental health history," like that which was presented in the hearing. (PCR 1913, 1915) The court specifically disagreed with the defense experts' opinions that additional, cumulative evidence of Wilcox's history and resulting mental health consequences was required to present an adequate mitigation case to the jury or the sentencing judge. (PCR 1912-17)

The record fully supports the court's findings that Walsh was not deficient in investigating Wilcox's family and social history as well as into any available mental health mitigation. He argues that counsel was ineffective for not initiating and conducting the

mitigation investigation before November 2008. However, Walsh was only appointed to the case weeks before the hearing where Wilcox went pro se, well after he had announced his intention to do so and the court had appointed a mental health expert to evaluate him. Another attorney was Wilcox's counsel before December 2009. Wilcox included that attorney who represented him during that period on his evidentiary hearing witness list but did not call him. Wilcox presented no evidence whatsoever at the evidentiary hearing of what investigation or preparation was conducted from February 2009 to December 2009, which was his burden to do under *Strickland*. In fact, this aspect of the issue was not raised at all during that hearing; Wilcox, consequently, waived it. His failure to present all the attorneys who represented him during this period to ascertain what actions they did and what transpired, decimates his attempt to meet his burden under *Strickland*. Because the burden is on the defense in post-conviction to overcome that strong presumption of effectiveness, all defense counsel must testify at an evidentiary hearing. *Dunn*, 141 S.Ct. at 2409 (explaining that if trial counsel are alive and available, the petitioner must call them to testify to meet

their burden under *Strickland*). Every defense counsel involved in the discussion regarding the issue being raised must testify during the evidentiary hearing. The failure to account for all counsel involved in the decision is fatal to any ineffectiveness claim. Wilcox failed to do this and, thus, failed to meet his burden to show deficient performance.

Walsh testified that he was brought on very shortly before Wilcox decided to represent himself; in fact, his first court appearance on the case was when Wilcox fired his attorneys; consequently, he had no opportunity to investigate any mitigation prior to when Wilcox went pro se. (PCR, 1046-54) Given that Wilcox did not call the actual attorney during that time, he failed to meet his burden under *Strickland* for this aspect of the claim. *Dunn*, 141 S.Ct. at 2409.

In the five and a half months between Walsh's appointment on the case on March 9, 2009, and the start of the trial in the first of August 2009, Walsh and Sheehan requested and obtained all the records that existed documenting Wilcox's social, educational, medical, court, police, and incarceration history. Sheehan testified

that she tried to find medical records for Wilcox but could not. She also testified that she requested and actually spoke with multiple people in the relevant school districts trying to get all the school records, including mental health and learning disability assessments done on Wilcox as a child, but the records could not be found. (PCR, 979-89, 1021, 1029, 1113; Def. Exs. 1-4) It is particularly telling on this aspect of Wilcox's claim that he did not present any additional records at the hearing; the only records submitted to the court were the ones Sheehan and Walsh obtained prior to the trial. (See Def. Exs. 22-26) This alone proves Wilcox failed to carry his *Strickland* burden to show a deficient investigation.

Additionally, Walsh and Sheehan interviewed mitigation witnesses, including multiple family members and Wilcox's prior co-defendant. They spent hours speaking with both Wilcox and his mother Lawanda, getting the backbone of the mitigation case. (PCR, 990-94, 1102-03; Def. Ex. 5) Sheehan interviewed Sandra Waterman, another of Wilcox's aunts. (PCR, 992-95; Def. Ex. 6) She and Walsh also spoke with three of Wilcox's family members for three and a half hours: Linda Kelly, her son Richard, and Wilcox's cousin Nicki. The

information those individuals gave corroborated what they had learned from Lawanda and Wilcox but did not significantly add to what they already knew. (PCR, 996, 1026-27; Def. Ex. 8) Wilcox presented little or no evidence of Eula's (great-grandmother) or Nancy's (grandmother) history or substance abuse. The evidence that was presented showed that Wilcox lived with Nancy and Davis who provided care and love for him despite his mother and other family members. The evidence also shows that while Wilcox lived in Perrine generally (not a good neighborhood) as a child, he did not move to Circle Plaza (a terrible, dangerous neighborhood) until he was 11.

Wilcox further argues that because Walsh waited several weeks after his appointment, after the guilty verdict and with a jury already chosen by Wilcox during his self-representation, his performance was deficient. As the lower court noted in its order, Walsh had an abbreviated time to conduct a full mitigation investigation in a death penalty case, approximately five months to go from zero to one hundred. The fact that he, and his experts, presented the essential picture of Wilcox's life, history, and social milieu is a testament to the work and dedication of Walsh and his team. Walsh showed the jury

the total dysfunction of Wilcox's mother and the other significant adults in his life. He demonstrated the importance and stability that Wilcox's grandmother represented to him. With what he presented, he managed to achieve a 7 to 5 jury recommendation for a defendant who was a professional drug dealer who had participated in multiple armed robberies, kidnappings, drug deals, and murders in his thirty-one years of life. To the court, the actual sentencer, he also presented Dr. Fichera, who instructed the court on the ACE risk factors, the nature of the community and its effects on Wilcox, as well as the family history of abuse, neglect, and trauma, much as the experts at the evidentiary hearing did.

That there were a few weeks delay in Walsh re-hiring Sheehan on the case had no impact on either the quality of her work, her document collection, or the finding and interviewing of witnesses. Walsh fully explored Wilcox's family and social history and gathered all the existing documentation to corroborate what he learned from the witnesses. Both Sheehan and Walsh took the case very seriously and worked hard. Walsh was an experienced capital attorney who gave this case his best. (PCR, 1029, 1092-94, 1105, 1117) Again,

Wilcox has not produced any documents not produced prior to trial by Walsh.

Additionally, Walsh's other time commitments did not adversely affect his performance on Wilcox's case. Studying for and taking the board certification exam only took a few days, and the subject matter was relevant to this criminal trial. (PCR, 1081-83, 1109) It is normal for a criminal attorney, either the defense or prosecution, to prepare multiple cases at the same time. That Walsh worked on the Young case during the time preceding Wilcox's trial did not have an impact on the work he actually accomplished. As he said, "certainly you're going to have to walk and chew gum at the same time doing work like this, no doubt." (PCR, 1081) While Walsh's medical condition occupied his mind occasionally, it never reached a point where he even had to bring it to the court's attention. He made his court appearances and did the necessary work. (PCR, 1092-94) Wilcox has failed to show deficient performance.

Wilcox criticizes the comprehensiveness and conclusions reached by both Dr. Rapa and Dr. Fichera as well as when Walsh hired them. He presented no evidence that the time of the hiring had

any effect on the expert's evaluations and analysis of Wilcox. As such, he failed to meet his burden of proving deficient performance under *Strickland*. Each of the experts testifying at the evidentiary hearing criticizes either one or both of Walsh's experts. Dr. Vinson criticized Dr. Rapa's diagnosis that Wilcox has ASPD. Of note is that Dr. Vinson did no testing on Wilcox at all. She implied that Dr. Rapa, due to "social racism," began with the conclusion of ASPD and then looked to support that diagnosis, overlooking other conditions that might have overlapping symptoms like PTSD or depression. (PCR, 1159-70) Her testimony regarding Dr. Rapa's ASPD was rank speculation. Unlike Dr. Rapa, she did not address ASPD symptoms like fighting, multiple felony convictions, early involvement in violent felonies like murder and robbery before the age of 15, and so forth that Wilcox exhibited which clearly supported the ASPD diagnosis. (T 22:1351-54)

Dr. Johnson testified that Dr. Fichera, while discussing ACE, community violence and dysfunction, and protective factors, should have been more comprehensive. He particularly criticized Dr. Fichera for not including and focusing on Dr. Johnson's own speculation that

Lawanda was sex-trafficked.¹¹ His testimony did not explain how labeling Lawanda's sex work as trafficking would have altered in any way the experience of a young Wilcox, who was still under the age of 5 by the time Lawanda turned 20. Dr. Johnson, a sociologist with no degrees in psychology or psychiatry, opined that Wilcox, his mother, and grandmother all suffered from depression and other possible mental illnesses. Such testimony, outside his field of specialty, undercuts his credibility.

Finally, Dr. Ouaou found problems in the work of both Dr. Fichera and Dr. Rapa. He faulted the completeness of Dr. Fichera's evaluation because he did no mental status testing. With Dr. Rapa, he faulted her for using an IQ screening test rather than a test designed to diagnose intellectual disability. The implication was that Wilcox's score of 87 with Dr. Rapa's test was not as valid as the 78 he achieved with Dr. Ouaou's test, despite the fact that other test scores supported the initial 87 score. He acknowledged that IQ

¹¹Dr. Johnson did not discuss 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 her own drug use and the exploitation of the men using her, rather than being trafficked against her will.

remains fairly steady over time. (PCR, 1608-21) Dr. Ouaou failed to account for Wilcox's score of 94 in intellectual functioning on the BETA III in 2003. (Def. Ex. 25 p. 85) Dr. Ouaou did agree that "you can't fake good," (PCR, 1591) although he had previously speculated that Wilcox's executive functioning would grow worse between 2009 and 2015, when Wilcox was 32 and 38 years old respectively. (PCR, 1583-84)¹²; given that the experts testified that the brain reaches full development around 24 to 25 years old and Wilcox was in his thirties in both 2009 and 2015, this statement shows the doctor's bias. Dr.

¹² Q. And the executive functioning, can that change or does that change over time?

A. Oh, certainly, with learning and the growth of 21 the brain, yes. I mean, it depends on... You know, there's something called plasticity that, although slows down as we get older compared to youth and adolescents, certainly continues, obviously without the impact of continued, you know, blows to the head or, you know, significant abuse.

Q. Is it fair to say, then, that there is a potential that his results in 2009 could have even been more impaired?

A. You know, obviously that's hypothetical, there was no testing then, but, I mean, I'd bet the farm that they were worse, not only because, you know, his brain was continuing to mature and grow, but that the impact of the severe abuse and any other head traumas were there.

Ouaou also believed that Dr. Rapa should have suggested neuropsychological or neurological testing based on her findings.

Here, trial counsel retained Dr. Rapa, an experienced and well-trained psychologist, to assist in developing mitigating evidence. Dr. Rapa has a doctorate in psychology and is licensed in Florida. Additionally, Dr. Rapa was highly recommended to Walsh by a trusted colleague. Dr. Fichera had similar qualifications and had qualified and testified as an expert witness numerous times. Wilcox did not undermine either Dr. Rapa's or Dr. Fichera's credentials or qualifications. Accordingly, the record demonstrates that both doctors were qualified experts upon whom counsel was entitled to rely upon in investigating and presenting mitigating evidence as part of a tailored penalty-phase strategy.

Counsel was entitled to rely on their assessments in developing the mitigation strategy and cannot be deemed deficient for not requesting additional testing. Further, Walsh was entitled to rely on his expert's opinions, notwithstanding the fact that later experts reached better or more detailed conclusions. *See Brant*, 197 So. 3d at 1069; *Valentine v. State*, 98 So. 3d 44, 53 (Fla. 2012); *Hoskins v.*

State, 75 So. 3d 250, 255 (Fla. 2011); *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007); *Peede v. State*, 955 So. 2d 480, 494 (Fla. 2007) ("The fact that Peede produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective.").

The Florida Supreme Court has addressed Wilcox's argument that he should have supervised Dr. Rapa. In determining that counsel does not have that duty, the Court stated:

[W]e find the following rationale, as articulated by a federal appeals court, persuasive:

If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous.

....

... By forcing lawyers to second-guess their experts, the position Hendricks argues would effectively eliminate the legitimate role experts play in guiding and narrowing an attorney's investigation.

Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995); *State v. Mullens*, 352 So. 3d 1229, 1241 (Fla. 2022).

This is hardly a case where counsel did little or nothing and left mitigation undiscovered. The United States Supreme Court in *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) stated: As the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2463 (2005); *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S.Ct. 2527 (2003) (counsel not required to investigate every conceivable line of mitigation).

Now, years later, Wilcox comes forward with new doctors and lay witnesses to suggest that other investigation should have been conducted and mitigation presented. However, as provided in *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir. 1987): “[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort.”

modified on other grounds, 833 F.2d 250 (11th Cir. 1987). *See Asay v. State*, 769 So.2d 974, 986 (Fla. 2000) (reasoning that first expert's evaluation is not less competent merely upon the production of conflicting evaluation by another expert); *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999) (reasoning mental health expert's evaluation is not rendered inadequate or incompetent merely because the defendant had found an expert who would provide testimony conflicting with the original expert). Likewise, *Butler v. State*, 100 So.3d 638, 666-67 (Fla. 2012) providing:

While trial counsel's failure to present mitigating evidence may under some circumstances entitle a defendant to a new penalty phase, the evidence must be of such significance that its absence has resulted in the deprivation of a reliable sentencing proceeding. *See, e.g., Hildwin v. Dugger*, 654 So.2d 107, 109-10 (Fla. 1995) (finding both deficiency and prejudice under Strickland where trial counsel failed to unearth a large amount of mitigating evidence, including two weighty statutory mitigating circumstances). By contrast, where the additional mitigation is minor or cumulative and the aggravating circumstances substantial, we have held that confidence in the outcome of the penalty phase is not undermined. *See, e.g., Breedlove v. State*, 692 So.2d 874, 877-78 (Fla.1997) (finding no prejudice under Strickland where mitigating evidence presented in postconviction, particularly testimony concerning the defendant's drug addiction and beatings by his father, would not have changed the outcome in light of substantial aggravation in the record); *see also Asay*, 769 So.2d at 988 (“[T]his Court

has reasoned that where the trial court found substantial and compelling aggravation, ... there was no reasonable probability that the outcome would have been different had counsel presented mitigation evidence of the defendant's abused childhood, history of substance abuse, and brain damage.”).

Butler, 100 So.3d at 666-67.

Wilcox also contends that his counsel should have brought out that he had been in solitary confinement for almost six years, although not in a consecutive period; his longest time in confinement was 140 days.¹³ (PCR, 1529-32) Wilcox failed to show that he had told counsel that fact prior to the start of the penalty phase trial. Additionally, the DOC records indicated that while some of the initial stays in solitary confinement, the majority of them happened after Wilcox was 18 due to violent or disruptive behavior. 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. That disciplinary record would also weaken the mitigation case before the court as well. As explained earlier, that counsel strategy was well considered and based on the records. Further, Dr. Grassian did not

¹³ No evidence was presented on the exact nature of Wilcox's confinement and DOC records do not specify the conditions.

do a particularized, as applied study on what effects the confinement did to Wilcox, and he agreed that not everyone suffers from adverse effects when placed into solitary confinement. While Drs. Vinson and Ouaou speculated on possible effects solitary confinement may have had on Wilcox, they did no tests or studies to see if there was any adverse effect on his brain development. Wilcox failed to carry his burden under *Strickland*.

B. Counsel was not ineffective in the handling of the prior violent felony aggravating factor.

Wilcox contends that his trial counsel should have challenged the application of the prior violent felony aggravator, arguing that if he had presented the facts of the earlier murder and robbery case to the jury, they would not have found this aggravator. Wilcox argues that the only way this aggravator could apply would be if Wilcox had actual contact with the victim. That is an incorrect understanding of the law.

Wilcox was an active participant in the prior murder and robbery. He was not a passive passenger who stayed in the car like Cory Waters did; Wilcox got out of the car with the shooter and was the one who collected the money from the ground. He did not have to

have contact with or go right next to the victim to both be guilty of the crimes and for this aggravator to apply. *See Hayward v. State*, 24 So.3d 17, 27, 46–47 (Fla. 2009) (affirming PVF in part on prior armed robberies); *Bevel v. State*, 983 So. 2d 505, 518 (Fla. 2008) (affirming PVF where defendant pointed a gun at victim’s head in attempted robbery); *Reaves v. State*, 639 So.2d 1, 6 & n. 11 (Fla. 1994) (finding PVF based on armed robberies).

Sheehan and Walsh interviewed Waters, Wilcox’s prior co-defendant, and learned the details of what had happened in that crime. Walsh then had an affidavit prepared and signed so he could ask the State to enter into a stipulation. Walsh did not want a discussion of the murder before the jury, nor did he want to chance having a witness on the stand subject to cross-examination. Wilcox had a murder conviction and Walsh had to deal with it. He chose to do so by having a stipulation which acknowledged the conviction but highlighted that Wilcox was not the shooter and was only 14 years old at the time. Walsh also put into evidence the probable cause affidavit to show that Wilcox was not the shooter. This showed that during the course of the murder, Wilcox got out of the car along with

his co-defendant who brandished a gun, ordering the victims to get down on the ground. After one victim was shot and killed, Wilcox gathered the money. (ROA-R6 908; ROA-T20 1207-08; T21 1249). Clearly, Wilcox was an actively involved principal of the prior felonies. Wilcox used the gun violence/murder to complete the joint robbery. Walsh also had some concern that information that Wilcox may have gotten out of the car to collect money off the body of the murdered man may have come out, either through testimony or questions. (PCR, 2326-27, 1064-68, 1088-91) Walsh was not deficient for failing to call Waters to testify. *Hilton*, 326 So.3d at 648. Such was a clear and reasonable strategy, falling squarely within the constitutional representation noted in *Strickland* and *Chandler*. Further the felony convictions that Waters had may have concerned most counsel about presenting him to a jury. Walsh had a difficult factual situation he had to confront and chose to do it in a concise and quick manner so as to not make it more prominent to the jury. Wilcox has failed to meet his burden under *Strickland*.

- C. The lower court's credibility findings regarding the expert witnesses are supported by the record.

Wilcox asserts that this Court should not defer to the post-conviction court's finding that certain of the defense experts were only credible in part. Parsing the court's order, he contends that the court only referenced single, minor answers which it took out of context. The does in fact support the court's findings and this Court should give deference to those findings and affirm the denial of relief. "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'"" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997) (quoting *Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984)); *Cruz v. State*, 320 So. 3d 695, 714 (Fla. 2021) ("The credibility of the witnesses and the weight of the evidence presented are matters within the province of the trial judge, whose determinations of factual questions must be accepted by the appellate court if the record supports that finding." citing *State v. Polak*, 598 So. 2d 150, 152 (Fla. 1st DCA 1992)).

The court was able to observe the manner in which each witness testified during the evidentiary hearing, including their expressions, body language, tone, and the quality of their answers. The court also observed the differences each witness had in their responses to the defense on direct as compared to their responses to the State on cross. For example, Dr. Vinson was open and responded directly to the defense questions but was more clipped and less willing to give straight forward answers to some of the State's questions. Dr. Vinson stated that she only works with the defense on criminal cases, which might affect her neutrality. (PCR 1120-82)

Dr. Grassian openly admitted that he did not professionally interview Wilcox but rather just chatted with him twice on the telephone. His testimony was about the general effects solitary confinement tends to have on individuals; he did not and could not say that Wilcox actually experienced any particular effect. The court took that fact into account in weighing Dr. Grassian's testimony. The doctor did state that a neuropsychological workup would give evidence if the confinement affected Wilcox. While Dr. Ouaou may have performed such an assessment, Wilcox did not present any of

those results during the hearing to the court. Dr. Grassian did not review the test results and could not say that they confirmed or refuted any adverse effect from solitary confinement. This affected the pertinence of this testimony, and the court took that into account. (PCR 1913-1914, 1496-1542)

The court noted that Dr. Ouaou has only worked with the defense and forensic work is his total practice. Dr. Ouaou stated at least twice: “I don’t diagnose people. ... I can make opinions.” (PCR 1449) He also stated that he is a researcher, not a clinician and does not make clinical diagnoses. (PCR 1451) The most this expert could say is that trauma *may have* negatively impacted Wilcox’s brain. (PCR 1454) The court correctly noted these answers in assessing Dr. Ouaou’s credibility and the weight of his testimony.

The record fully supports the court’s findings, and its credibility and factual findings should be given deference by this Court.

D. Wilcox failed to demonstrate the necessary prejudice required by *Strickland*.

In addition to failing to prove deficient performance, Wilcox cannot demonstrate the requisite prejudice required under *Strickland*. “[P]enalty-phase prejudice under the *Strickland* standard

is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court.” *Wheeler v. State*, 124 So. 3d 865, 873 (Fla. 2013) (quoting *Hurst v. State*, 18 So.3d 975, 1013 (2009)).

The post-conviction court analyzed the prejudice requirement and determined:

[T]he Defendant also fails to satisfy the second prong of Strickland. This Court finds no evidence that undermines the Death sentence imposed by the trial Judge after the majority recommendation by the jury. The Defendant stood before the jury and trial Judge previously convicted of murder and presently convicted of a separate first degree murder. The jury and trial Judge were presented with abundant evidence to support the finding beyond a reasonable doubt of a prior violent felony aggravator and the cold, calculated and premediated aggravator. Based on the Defendant's prior criminal conduct and the extreme violence and needless killing of the victim this Court finds overwhelming evidence of aggravation and minimal evidence of mitigation. This Court finds even if all the mitigation evidence presented in this evidentiary hearing including the testimony of Dr. Vinson, Dr. Johnson, Dr. Grassian and Dr. Ouaou was presented to the jury or the trial Judge the outcome would remain the same and the Defendant would still have received a Death sentence.

The record fully supports the court's analysis and conclusion. Lawanda Wilcox testified in the penalty phase trial. She testified that she had five children. Wilcox is the eldest and was born when she was 15. His father was absent and not involved in Wilcox's life. Lawanda "dated," i.e. engaged in prostitution, for money, drugs, and supplies. Her mother, Nancy, raised Wilcox in a neighborhood and family full of drugs and violence. No one was there for him. Wilcox saw Lawanda using drugs in front of him and getting arrested multiple times. Wilcox wanted attention which led him to act up in school. Wilcox was slow and had problems in school eventually leading to him being thrown out of regular school. (T2:77-100)

The testimonies of Linda Kelly, Darrell Howard, and Cory Waters contained substantially the same information as Lawanda's. Howard's and Waters's testimonies added incidents of neighborhood fights, a head injury, and teasing of Wilcox by the neighborhood children over his mother's behavior. However, Dr. Fichera's testimony included facts about the neighborhood, the drugs, the violence, and the killing that these witnesses provided. The small amount of additional information these witnesses provided was paled

in light of the substantial aggravation present in this case and would not have altered the outcome. Further, it is well-established that trial counsel cannot be ineffective for failing to present cumulative evidence. See *Duckett v. State*, 918 So. 2d 224, 236 (Fla. 2005); *Marquard v. State*, 850 So. 2d 417, 429-30 (Fla. 2002); *Patton v. State*, 784 So. 2d 380, 393 (Fla. 2000). This rule is consistent with the Florida Evidence Code, which allows for the exclusion of cumulative evidence. See 90.403, Fla. Stat. (2013). Cumulative evidence calls for a mere “repetition of testimony.” See *Gracy v. Atl. Coast Line R.R. Co.*, 42 So. 903, 906 (Fla. 1907).

Dr. Fichera testified at the *Spencer* hearing that he was a psychologist hired to conduct an evaluation for mitigation. He did a psychological/social evaluation which focused on Wilcox’s life history, significant and traumatic events in his life, and factors which contributed to the person Wilcox grew into. Dr. Fichera then empirically linked those experiences to known risk factors established in the scientific literature. (T 22:199-1301)

Dr. Fichera went through Wilcox’s life history, including: born to a 15 year old drug addict; his father, who abandoned him, was

also an addict who was arrested multiple times; Wilcox grew up in poor, crime ridden areas in Miami, including Circle Plaza; his mother was a severe crack addict who was often arrested; and Wilcox was raised by his grandmother. (T 22:1301-2) Wilcox had little residence stability, his grandmother was overwhelmed caring for five grandchildren, and his uncle used heroin in front of him. His mother was verbally and physically abusive to him and sold his belongings, including his beloved video game system. After that, Wilcox became angry and depressed, so he began spending a lot of time on the streets. Wilcox abused drugs and alcohol at an early age. Wilcox started selling drugs at 13, repeatedly got arrested, and was incarcerated by 15. Wilcox had been exposed to crime and violence when young, seeing people he knew shot and killed. By his 14th year, most of his peers were in jail. (T 22:1303-6, 1328)

Dr. Fichera testified that all these experiences damaged him and made him predisposed to violence. “His neighborhood was a violent, corruptive environment that exposed him to various pernicious and damaging influences, resulting in catastrophic developmental consequences.” He spoke about the structure and

functioning of the neighborhood on its residents. (T 22:1306-7) Dr. Fichera explained the ACE risk factors to the court and linked them to Wilcox's history, saying that Wilcox had all of them. (T 22:1312-15) He then went through child developmental stages and what Wilcox experienced in each. (T 22:1314-20) Dr. Fichera also highlighted the turning point in Wilcox's life as when his mother sold his PlayStation. Dr Fichera described that toy as Wilcox's main defense mechanism. Its absence left him angry and displaying aggressive behavior because of his depression. Wilcox also had inadequate supervision at that point since his grandmother was overwhelmed raising five small children on her own. Wilcox began staying out all night, engaging in delinquent behavior resulting in multiple arrests and the "establishment of anti-social norms." (T 22:1321) Wilcox had no psychological intervention and had impaired self-control. He dropped out of school. Dr. Fichera continued matching Wilcox's life history to the childhood brain development standards and risk factors. The doctor stated that without the proper guidance, order, and structure, a child will not develop self-control, with aggression then often unfolding. (T 22:1322) The violence and

dysfunction in Wilcox's parents, family, and community predisposed him to a toxic outcome. (T 22:1324)

Dr. Fichera covered every aspect of Wilcox's life and environment in addition to the existence in the scientific literature of the ACE risk factors in children and their role in creating criminal or toxic outcomes. The only area he failed to address was Wilcox's time in solitary confinement, much of which was a result of his bad behavior. In addition to being cumulative to the evidence presented in the trial court, this evidence would not overcome the four statutory aggravating circumstances the court found, giving each great weight. The evidence presented at the hearing does not support any statutory mitigation and was already encompassed in the non-statutory mitigation the trial court already found. Additionally, as detailed above, almost all of the post-conviction evidence was cumulative. At no point can Wilcox explain how, if his counsel had presented these new witnesses that the jury recommendation or the sentence would have changed, given the presence of the four weighty aggravators. *Sochor v. State*, 883 So.2d 766, 771 (Fla. 2014).

In sum, Wilcox failed to meet his burden under *Strickland* of proving either deficient performance or prejudice. This Court should affirm the denial of post-conviction relief.

II

WILCOX IS NOT ENTITLED TO RELIEF UNDER *HURST* AND THE COURT PROPERLY DENIED THIS CLAIM.

Wilcox argues that the post-conviction court should have granted him a new penalty phase trial based on *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). *Hurst v. Florida* invalidated the portion of the Florida death penalty sentencing scheme where the court, rather than the jury, found the aggravators necessary to impose a death sentence. In *Hurst v. State* the Florida Supreme Court applied and extended that decision, mandating that the jury must unanimously find the existence of the aggravators, that they are sufficient to impose the death penalty, and that they outweigh the mitigating circumstances. The court then held that a reviewing court must conduct a harmless error analysis with the burden on the State. Wilcox contends that he was entitled to a new penalty phase trial under this Court's *Hurst* decision because his jury recommended death by only a 7 to 5 vote, which he would

have received if the lower court had held the case management hearing in 2018. He argues that his death sentence is arbitrary since similarly situated defendants received *Hurst* relief. He contends that the lower court's error in summarily denying his post-conviction motion without a hearing amounts to a violation of due process and equal protection. The State maintains that the lower court's denial of relief was proper under the current law since Wilcox's case was still pending when this Court issued *State v. Poole*, 297 So. 3d 487 (Fla. 2020). This Court should affirm.

The standard of review for a summarily denied claim is as follows. A post-conviction motion may be summarily denied only “[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.” Fla. R. Crim. P. 3.851(f)(5)(B), (h)(6). In reviewing a trial court's summary denial, “this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record.” *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008). Conclusory allegations and speculations do not serve as a basis for an evidentiary hearing or relief. *Rogers v. State*, 327 So. 3d 784, 787 (Fla. 2021).

The lower court properly denied this claim since Wilcox's case was pending when *Poole* issued. *Hurst v. State* does not apply retroactively to Wilcox. Wilcox's case is not similarly situated with the cases of defendants who had new penalty phase trials or sentences ordered under *Hurst v. State*. The timing of the cases and where they are situated in the appellate process differentiates Wilcox's case from those of other defendants. His case was not final once this Court vacated the post-conviction court's summary denial; that decision, which both parties held was correct, put his case back into the post-conviction litigation. While that litigation was pending, there was an intervening change in the law; his motion to vacate was still pending when *Poole* was announced while other defendants already had final post-conviction orders mandating new penalty phase trials when *Poole* issued. Such differences are common occurrences. See e.g. *Hanks v. State*, 327 So. 3d 940 (Fla. Dist. Ct. App. 2021) (there was an intervening change in the controlling law after the trial court determined that Hanks was entitled to resentencing so it could revisit its earlier ruling and deny Hanks' request for resentencing on his first-degree murder conviction.). For example, two co-defendants may

end up with vastly different results if one had a case that had already been affirmed on appeal while the other one was still pending on appeal when a new rule of Constitutional law is announced; the timing of the trials and the appeals leads to different results. See *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716 (1987) (“We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past.) (emphasis added).

Hurst v. State did not create an independent crime of “capital first-degree murder” and the jury findings imposed by *Hurst* are not elements. *Foster v. State*, 258 So. 3d 1248, 1251–52 (Fla. 2018).

In sum, a conviction for first-degree murder, a capital felony, solely consists of the jury having unanimously found the elements set forth in the substantive first-degree murder statute and the relevant jury instruction. The conviction for first-degree murder must occur before and independently of the penalty-phase findings required by *Hurst* and its related legislative enactments. The Florida Statutes clearly establish the elements of first-degree murder required for a conviction, and upon conviction, the required findings in order to sentence a defendant to the death penalty.

Id. at 1252; *Wright v. State*, 312 So. 3d 59, 60 (Fla. 2021); *Randolf v. State*, 320 So. 3d 629, 631 (Fla. 2021). The jury’s findings under *Hurst* do not elevate a capital first degree murder into some “higher degree of murder.” A defendant whose jury convicts him of first-degree murder but recommends life is convicted of the same crime as a convicted murderer who receives death. Contrary to Wilcox’s position, the changes wrought by *Hurst* were procedural in nature, not substantive.

Finally, we note that *Hurst* is an extension of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Ring* was based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).⁴ *Apprendi* has been held to establish a rule of procedure. See *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir.2001); *United States v. Sanders*, 247 F.3d 139, 147 (4th Cir.2001). Likewise, *Ring* has been classified as a procedural rule rather than a substantive one. See *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Logically, it follows that *Hurst*’s holding is also procedural rather than substantive.

State v. Perry, 192 So. 3d 70, 75–76, certified question answered, 210 So. 3d 630 (Fla. 2016) (Footnotes omitted).

The Florida Supreme Court receded, in part, from its prior decision in *Hurst v. State* in *State v. Poole*, 297 So.3d 487 (Fla. 2020) (receding from *Hurst v. State* “except to the extent that it held that a

jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt”), cert. denied, *Poole v. Florida*, 141 S. Ct. 1051 (2021) (No. 20-250). Wilcox argues that the Poole decision violates the ex post facto clause in the Constitution because it changed the law to his detriment. The clause, however, is not called into question since the change in the law in this instance resulted from a judicial opinion rather than from a legislative action. *Bouie v. City of Columbia*, 378 U.S. 347 (1964), is the controlling case in analyzing judicially mandated changes in the law.

When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law ‘in its primary sense of an opportunity to be heard and to defend (his) substantive right.’ *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.

Bouie, 378 U.S. at 354–55; *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (the ex post facto clause does not apply to judicial decision making.). *Bouie* claims are limited to substantive changes in the law that result in a lack of fair warning that the conduct is criminal;

despite Wilcox's allegations to the contrary, *Hurst* involved procedural changes in determining the appropriate sentence. A state court receding from its prior procedural precedent does not violate *Bouie*.

Thus, a legislative act affecting changes in criminal procedure, including procedural changes that disadvantage a defendant, generally does not violate the ex post facto clause. *Carmell v. Texas*, 529 U.S. 513, 543–44, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) (recognizing no one has vested right in mode of procedure); *Collins*, 497 U.S. at 45, 110 S.Ct. 2715 (“[Procedural] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.”).

Perry, 192 at 74.

In *Poole*, the Florida Supreme Court receded from *Hurst v. State*, saying:

Having thoroughly considered the State's and Poole's arguments in light of the applicable law, we recede 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.

Poole, 297 So. 3d at 507 (Fla. 2020). That decision in *Poole* aligned Florida law with the United States Supreme Court's recent decision in *McKinney v. Arizona*, 140 S.Ct. 702 (2020). The Florida Supreme Court's reasoning in *State v. Poole* closely tracks the reasoning of the

United States Supreme Court's later decision in *McKinney*. Both courts held that a capital jury is only required to find one aggravating factor and is not required to perform the weighing of the aggravation against the mitigation. It cannot be said that a state court adopting federal law is "indefensible," as required to establish a *Bouie* violation. *Metrish v. Lancaster*, 569 U.S. 351, 368 (2013) (rejecting a *Bouie* claim, where a state supreme court addressing the issue for the first time, disagreed with a consistent line of lower court decisions, but whose decision was a reasonable interpretation of the language of the statute, because the decision was not unexpected and indefensible). Under opposing counsel's view, it is a violation of due process for the Florida Supreme Court to hold that a capital jury is only required to find one aggravating factor, as it did in *State v. Poole*, but it somehow is not a violation of due process for the United States Supreme Court to hold likewise, as it did in *McKinney*. Due process and *Bouie* do not operate in that manner.

It is the lack of notice of the crime or its penalty that is critical to any *Bouie* claim. *Rogers*, 532 U.S. at 459. Fair warning of the crime and the penalty is the core concern of due process in this area. But

Wilcox did not lack notice that murder was against the law in Florida or that he could face the death penalty for committing first degree murder in Florida when he executed the victim. He had statutory notice of both the crime and the penalty. *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982).

Furthermore, *Bouie* is limited to substantive changes in the law, such as changes in the definition of the crime or in the penalty and does not extend to procedural changes in the law, such as *Hurst. Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (characterizing *Ring v. Arizona*, 536 U.S. 584 (2002), as procedural rather than substantive because it did not alter the conduct that was subjected to the death penalty); cf. *Collins v. Youngblood*, 497 U.S. 37, 45 (1990) (limiting the prohibition on ex post facto laws to substantive changes in the law rather than procedural changes). *Gonzalez v. Wong*, 667 F.3d 965, 997 (9th Cir. 2011) (explaining that *Bouie* applies to the situation of a court's reinterpretation of a criminal statute such that conduct was not criminal before the opinion becomes criminal without prior warning). *Hurst* is a decision regarding the conduct of a trial, not the interpretation of a substantive criminal statute. *Bouie*

is inapplicable to *Hurst* claims because *Hurst* is not a substantive rule that raises the specter of turning innocent conduct into criminal conduct without warning. Wilcox's claim fundamentally misunderstands the reach of the United States Supreme Court's decisions in *Bouie*, *Rogers*, and *Metrish*. The Florida Supreme Court's decisions in this case and in *State v. Poole* do not violate *Bouie*. The Florida Supreme Court's receding from *Hurst v. State* does not violate due process.

Wilcox relies on *Lee v. State*, 340 So. 2d 474 (Fla. 1976) in his argument that he should get relief because other defendants with similar jury recommendation received new sentences under *Hurst v. State*. As argued earlier, Wilcox's litigation was in a vastly different procedural posture than the defendants to whom he refers. Further, in the 48-years since *Lee* was decided in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), it has been cited only three times. Those few opinions were issued between 1979 and 1988 by courts in other states. No Florida case has ever cited to or followed *Lee*. *Lee* appears to be fact specific given that the Florida capital sentencing statute was unconstitutional at the time relief was first provided.

Such is not the case here, since *Hurst* did not find the Florida capital sentencing statute unconstitutional, only that the manner of determining death eligibility had to rest with the jury, as discussed earlier.

Further, any error under *Hurst* was harmless because Wilcox's case meets the requirements of *Poole* (and *Hurst*). The sentencing court found four aggravating circumstances, including prior violent felonies based on his previous convictions for second degree murder and armed robbery and the contemporaneous convictions for armed kidnapping and armed robbery. The jury unanimously found the three aggravating factors that survived review. The prior convictions for second degree murder were uncontested at the trial and any reasonable jury would have unanimously found that aggravator proven. The sentencing jury found Wilcox guilty of the armed kidnappings and armed robberies unanimously and beyond a reasonable doubt, satisfying the requirements set out in *Hurst v. Florida* and interpreted in *Poole*.

[T]he jury's unanimous finding that Poole committed other violent felonies during the course of the first-degree murder "satisfied the requirement that a jury unanimously

find a statutory aggravating circumstance beyond a reasonable doubt.”

Poole, 297 So. 3d at 508; *State v. Jackson*, 306 So. 3d 936, 938 (Fla. 2020). The existence of these two aggravators alone were and would be sufficient to sentence Wilcox to death and his sentence did not violate due process or equal protection. The Court should affirm the denial of relief.

III

THE LOWER COURT DID NOT ERR IN SUMMARILY DENYING SEVERAL CLAIMS WHICH WERE EITHER PROCEDURALLY BARRED OR REFUTED BY THE RECORD. (Restated)

Wilcox claims that the lower court should have granted an evidentiary hearing on three of the issues which were summarily denied. The claims are that: his trial counsel was ineffective for not challenging Wilcox’s competency to waive his *Faretta* rights; the State violated *Brady* and/or *Giglio* by not providing Wilcox with transcripts of the witnesses’ recorded statements; and newly discovered evidence existed to challenge the forensic evidence admitted in the guilt trial. None of these claims were entitled to an evidentiary hearing. This Court should affirm the denial of relief.

The standard of review for a summarily denied claim is as follows. A post-conviction motion may be summarily denied only “[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.” Fla. R. Crim. P. 3.851(f)(5)(B), (h)(6). In reviewing a trial court's summary denial, “this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record.” *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008). Conclusory allegations and speculations do not serve as a basis for an evidentiary hearing or relief. *Rogers v. State*, 327 So. 3d 784, 787 (Fla. 2021).

A. The court’s summary denial of the claim that counsel was ineffective pre-trial was proper.

In his motion, Wilcox argued that he had not been competent to knowingly and intelligently waive his right to counsel given his intellect, educational and mental deficits, and experiences. The court found the claim both procedurally barred and refuted by the record.

The court stated:

Specifically, this Court finds that although the trial Judge appointed Dr. Brannon to evaluate the Defendant for competency in an abundance of caution prior to conducting a *Faretta* hearing there is no evidence that supports the conclusion that trial counsel should have

raised the issue of competency pursuant to Rule 3/210 and 3.211. This Court notes a review of the transcript demonstrates the trial Court conducted a thorough and detailed *Faretta* inquiry prior to granting the Defendant's request to proceed pro se. This Court further notes the trial Judge participated in lengthy discussions with the Defendant and specifically commented that the Defendant always gave intelligent and appropriate responses when questioned by the trial Judge. This Court concludes trial counsel was not ineffective in failing to challenge the Defendant's competency to waive his right to counsel and proceed pro se. In addition the Defendant also claims the trial Court erred when it found the Defendant competent to waive his right to counsel and proceed pro se pursuant to *Faretta*. As to this claim the State argues and this Court agrees trial Court error is procedurally barred as it could have and should have been raised on direct appeal. If this issue was not procedurally barred this Court would find the trial Court exceeded what is required to conduct a legally sufficient *Faretta* hearing and also had no grounds to question the Defendant's competency pursuant to rule 3.210 and 3.211.

(PCR 1908-1909)

The Supreme Court held in *Faretta v. California*, 95 S.Ct. 2525 (1975), that the Sixth Amendment guarantees a defendant the right of self-representation in a criminal trial. 422 U.S. at 821. Because of the dangers of proceeding pro se, however, the Court imposed a check: "the accused must 'knowingly and intelligently' forgo" the traditional benefits associated with the right to counsel. *Id.* at 835. "Although a defendant need not himself have the skill and experience

of a lawyer in order to competently and intelligently to choose self-representation,” the Court explained, “he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). The Supreme Court held that the defendant had knowingly and voluntarily waived his right to counsel when the record showed he “was literate, competent, and understanding, and that he was voluntarily exercising his informed free will.” *Id.* The defendant need not have “mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire” because “his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.” *Id.* at 836.

The Court later explained in *Godinez v. Moran*, 509 U.S. 389 (1993), that “[a] finding that a defendant is competent to stand trial . . . is not all that is necessary before he may be permitted to . . . waive his right to counsel” because “a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary.” *Id.* at

400. In other words, the Court emphasized, “when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.” *Id.* at 402. This conclusion is confirmed by the Supreme Court itself in *Indiana v. Edwards*, which held that a state may deny a defendant the right to represent himself when he is not mentally competent to conduct a trial himself, even if he is competent to stand trial. 554 U.S. at 178.

Wilcox had been appearing before the trial court for months before he actually waived counsel in January 2009. Wilcox had written the court letters and had drafted several pro se motions to dismiss counsel and for a speedy trial. (RA 1:41-42,56-57; 4:640-41) When Wilcox demanded to represent himself, the trial court took the cautionary step of having him examined by a mental health professional to make certain that he was competent to make that decision. The court appointed Dr. Brannon to conduct the evaluation for competency, using the standard order for attaining a competency examination; merely signing that order was not evidence that the trial court actively questioned Wilcox’s competency. That sort of

evaluation is not one which involves intelligence testing for one can be competent and 31 have low intelligence. At no point prior to the appointment of the expert had there been any issue of Wilcox's competency. Counsel was not ineffective for failing to call Wilcox's competency into question if it was not an issue. *Barwick v. State*, 88 So. 3d 85, 102 (Fla. 2011) (counsel will not be held to have rendered ineffective assistance in not bringing a nonmeritorious claim.); see *Lugo v. State*, 2 So.3d 1, 21 (Fla.2008).

After reviewing Dr. Brannon's report finding Wilcox competent, the trial court held an extensive *Faretta* inquiry, all the time trying to dissuade Wilcox from representing himself. (T 6:34-56) The record clearly supports the court's finding that Wilcox's *Faretta* waiver was knowing and voluntary. There is absolutely nothing in the record to support Wilcox's contention that his trial counsel had a duty to question his competency.

Wilcox argues that *Indiana v. Edwards*, 128 S.Ct. 2379 (2008), applied to him and his counsel should have called the court's attention to it. That case does not, however, apply to Wilcox and the trial court surely knew the current status of the law regarding *Faretta*

waivers. The Supreme Court in *Edwards* unambiguously held that courts may consider a defendant's mental condition in evaluating whether he should be permitted to proceed to trial without counsel. 554 U.S. at 167. The Supreme Court discussed at length the risk that allowing a mentally ill defendant to represent himself could lead to an unfair and humiliating spectacle of a trial and concluded that a state may insist that a defendant who "suffer[s] from severe mental illness" be represented by counsel. *Id.* at 176-78. *Indiana v. Edwards* also instructs that the trial judge "will often prove best able to make more fine-tuned mental capacity decisions." *Id.* at 177. *Edwards* itself observed that the question it was addressing involved a "mental-illness-related limitation on the scope of the self-representation right." *Edwards*, 554 U.S. at 171. Thus, by its own terms, *Edwards* announced a "limitation" on the *Faretta* rule.

Wilcox was far different from the defendant in *Edwards*. *Edwards* was a diagnosed schizophrenic possessed of "delusions and marked difficulties in thinking" which caused the trial court to find that he was not competent to defend himself; he had been twice declared incompetent to stand trial and committed to a state

psychiatric facility for over a year. *Edwards*, 554 U.S. at 167. *Edwards* exhibited bizarre tendencies in his court filings to the point where the Supreme Court added a short appendix to its opinion consisting of a written version of events handwritten by *Edwards*. *Id.* at 179. Wilcox had no history of mental illness, nor did he display paranoid or bizarre behavior preceding his *Faretta* waiver. Trial counsel was not ineffective for failing to challenge Wilcox's *Faretta* waiver based on *Indiana v. Edwards*. Furthermore, Wilcox cannot and has not shown the necessary prejudice in order to get relief. He cannot show that, but for trial counsel not hiring a separate mental health expert, the trial court would have denied his *Faretta* rights. Summary denial was appropriate, and this Court should affirm.

B. Since Wilcox's claim of *Brady/Giglio* error was procedurally barred and without merit, the court's summary denial was proper.

Wilcox claimed that the prosecution had a duty to prepare written transcripts of recorded witness statements since he was in custody and had no means to listen to the recordings. He argues that by failing to do so, the State committed *Brady* error. The State then committed *Giglio* error, he claims, when it presented a witness whose

testimony differed from that which a police officer noted in a report. Wilcox raised this issue under a claim of a discovery violation in his direct appeal, so it is procedurally barred and without merit, which is why the court summarily denied it.

The court stated:

This Court finds no evidence of any discovery violation, *Brady* violation or *Giglio* violation. ... The sole and complete cause of the Defendant's inability to view the contents of the DVD recordings was his decision to proceed pro se while incarcerated in the Broward County Jail.

(PCR 1917-1918) The court found the issue procedurally barred and without merit. (PCR 1917-1919)

Wilcox brought up this issue on direct appeal on the grounds that the State violated discovery for failing to prepare transcripts for his review. In denying relief on the merits in the direct appeal, this Court found:

We conclude that the State did not violate either the spirit or the technical requirements of the criminal discovery rules. The rules do not require the State to produce and disclose information which is not within the State's actual or constructive possession. *Sinclair v. State*, 657 So.2d 1138, 1141 (Fla.1995). Here, Wilcox knew that the prosecution was in possession of, and prepared to provide him with, a copy of Richaunda's recorded statement on DVD. He was also aware that the State did

not intend to transcribe Richaunda's statement (or the statements of Ward, Shaquira, or Collier) because of the "extensive cost" associated with transcribing those statements. Wilcox knew that, due to his incarceration, he would not be able to access the DVD copy of Richaunda's statement, which is why he repeatedly and unsuccessfully demanded that the trial court order the State to transcribe the statement for him. The trial court also, on several occasions, warned Wilcox of the perils of self-representation specifically in relation to discovery, and offered to appoint counsel and delay trial until Wilcox had an opportunity to examine the disclosed discovery materials. During the *Faretta* hearing, Wilcox indicated that he understood he would be limited to the legal resources available to him in custody, and that he would not receive special treatment from the prosecution. During another pretrial discovery hearing, the trial court informed Wilcox:

COURT: I told you there are a lot of pitfalls to representing yourself in a capital homicide. You are starting to find out how limited you are.... You want to act as your own lawyer. I told you I didn't think it was in your best interest.... 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 DVDs.... You still want to represent yourself?

WILCOX: Yes.

Despite the trial court's repeated warnings, Wilcox refused to delay trial or accept appointment of counsel.

These record facts demonstrate that Wilcox: (1) was aware of Richaunda's recorded statement, which the State was prepared to provide to him in DVD format; (2) believed

that Richaunda's recorded statement was important to his defense; and (3) knew that he was unable to view the statement in its only available format while incarcerated. As a result, any surprise, lack of preparation, or improper reliance by Wilcox on Detective Hardy's arrest affidavit is attributable only to Wilcox's conscious decision as an incarcerated capital defendant to represent himself, and not to a failure of the State to disclose available information. See *Behr v. Bell*, 665 So.2d 1055, 1056–57 (Fla.1996) (“a defendant who represents himself has the entire responsibility for his own defense”). Thus, we conclude that no discovery violation occurred, and the trial court did not abuse its discretion when it refused to order the State to transcribe the recorded statement.

Wilcox, 143 So. 3d at 375–77 (footnotes omitted). As can be seen from the opinion, the issue Wilcox is now making was fully before the Court on direct appeal, albeit in a different guise. The substance of the issue is that Wilcox did not have the transcripts he wanted, the same one he presents here. Since it was already addressed on direct appeal, Wilcox is prohibited from raising it in his post-conviction motion. Furthermore, Wilcox could have raised a *Brady* or *Giglio* claim on direct appeal as well. By not doing so he is now still procedurally barred from raising it in his post-conviction motion. *Riechmann*, 777 So.2d at 353 n.14 (finding claims procedurally barred because defendant was couching them in terms of ineffective assistance when they had been raised and rejected on direct appeal);

Muhammad, 603 So.2d at 489 (“Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.”); *Spencer*, 842 So. 2d at 60-61; *Vining*, 827 So. 2d at 218. This claim should be summarily denied. *Muhammad*, 603 So. 2d at 489.

The standards applicable to the *Brady* aspect of this claim are as follows. First, to establish a *Brady* claim, the defendant must show that the evidence was material and favorable or of impeachment value. Next, he must show that the State willfully or inadvertently withheld it. Finally, he must show that he was prejudiced by the State’s withholding of the favorable evidence. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999). To prove prejudice, the defendant must demonstrate “a reasonable probability that had the suppressed evidence been disclosed, the jury would have reached a different verdict. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Rhodes v. State*, 986 So.2d 501, 508 (Fla.2008) (quoting *Green v. State*, 975 So.2d 1090, 1102 (Fla.2008)); see *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936 (“[T]he question is whether ‘the favorable evidence could reasonably be

taken to put the whole case in such a different light as to undermine confidence in the verdict.” (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555 (1995))). The evidence is material “if there is any reasonable likelihood” that it “could have affected” the jury's verdict. *Id.* at 506 (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976)).

Wilcox cannot meet the tests outlined in *Brady*. The State did not suppress any evidence; it gave him the DVDs on which the witnesses’ statements were recorded.

Moreover, the State questions whether the transcripts are material under *Brady*. The recorded statements of Richaunda Curry were consistent with her trial testimony and they were neither exculpatory nor could they be used to impeach that testimony. The only document which was inconsistent with her testimony was the arrest affidavit authored by Detective Hardy, which Wilcox did use to impeach her. Similarly, Wilcox did impeach Terrell Collier with his first statement to Det. Hardy and got him to admit that he had lied to the police the first time he spoke with them. Collier’s recorded statement of the second interview was consistent with his trial

testimony and was neither exculpatory nor of impeachment value.

Wilcox cannot show that confidence in the verdict would have been undermined if he had transcripts of the recordings. As noted above, he was able to impeach the two witnesses with the information in the arrest affidavit and got Collier to testify that he lied to the police and only told them something different because they threatened him with jail for lying.

Further, he cannot meet this last *Brady* test given the weight of the other evidence of his guilt presented at trial. The evidence showed that Wilcox was at Richaunda's home next to Johnson's a week before the murder and was present on the day the burglary of Johnson's home occurred. Collier said he knew Wilcox had done it and Wilcox was present when the threats were made. (SR 10:258-59; T 15:566, 570, 653,674-76, 698-702)

On Saturday night, February 2, 2008, Wilcox was at Richaunda's home with her, Collier, Shaquira, Ward, and Wright where he hung out with them until Ward walked his sister home around 11. Wilcox said goodnight to Richaunda and left. The house was locked at 11:30. (SR 19:260-61,263; T:571, 575-76, 582, 596-

99,656, 659-60) Richaunda missed several calls but eventually answered Wilcox's call between 4:30 to 5 A.M. on February 3. He asked for Collier to call him, which he did around 4:45 A.M. At Wilcox's instruction, Collier gathers the defendant's things and goes outside where he sees Wilcox exit Johnson's home, take his things to a white Tahoe he had never before seen Wilcox with, and then return inside Johnson's home. (SR 10:263-66; T 15:661-68) Moments later Collier and Richaunda hear a single gunshot which was consistent with the three women's statements and the 911 call. (T 14:545; SR 9:139-42, 5210:168, 202-5) Wilcox called Collier later that morning and confessed to shooting Johnson because of his suspicions about the burglary. (T 15:672-74) The telephone records of the phone that Wilcox was using were consistent with Wilcox being at Richaunda's early that morning and then traveling to Miami immediately afterwards.

Aguilar saw Wilcox in Miami driving a white Tahoe four or five days before Wilcox was arrested. Aguilar got a ride from Wilcox in the early morning hours on February 9 and went to a couple of clubs with him and his cousin. There were two guns in the car that night.

While stopped at a store on their way home, the police drove into the parking lot. Wilcox and his cousin fled in the Tahoe. (SR 10:215-224) After a police chase, Wilcox was arrested in an apartment, with a line of objects leading between the Tahoe and the home. Police determined that one of the guns recovered from the Tahoe was the murder weapon. (SR 9:55-69) The Tahoe was the one owned by Hankerson and had a temporary registration in it with Wilcox's fingerprints on it. (T 14:472-74, 16:732-759) The investigation also revealed that Wilcox could not be excluded as a source of the DNA on the marijuana cigarette. (SR 9:70-83) The court's summary denial was proper.

C. The court's summary denial was proper on the claim of newly discovered evidence where the record clearly refutes the allegations.

Wilcox claims that the court should have granted him an evidentiary hearing on his claim that newly discovered evidence entitled him to a new trial. The newly discovered evidence was in the form of a letter from the Broward Sheriff's Department (BSO) which said that its DNA laboratory had been advised that it may have inappropriately used the statistic of Combined Probability of

Inclusion (CPI) to calculate the significance of the occurrence of genetic profiles when allelic dropout may have occurred. He argues that this information would have allowed him to impeach the DNA evidence at the trial and sow doubt in the jury about his guilt. The lower court concluded that the record clearly refuted the claim's assertions and the information would not result in a different verdict, so summarily denied it. This Court should affirm that denial.

The post-conviction court found:

[T]here is nothing in the record that reflects there is any newly discovered evidence. This claim is based on a notice disclosed by BSO that there may have been a problem with the combined probability of inclusion (CPI) calculations used by their DNA lab. This Court finds there was no testimony or evidence introduced at trial based on CPI calculations. Even if this Court found there was newly discovered evidence regarding the CPI calculations (which this Court does not find) the Defendant fails to satisfy the second prong of *Jones vs. State*, 709 So.2d 512 (Fla. 1998) which is required to be entitled to relief based on a claim of newly discovered evidence. This Court finds no evidence that any evidence or testimony related to a problem with the CPI calculations would have produced an acquittal at trial or raised a reasonable doubt as to the Defendant's guilt based on the overwhelming evidence of the Defendant's presence at the location of the murder introduced at trial.

(PCR 1919) The competent, substantial evidence in the record clearly supports the court's conclusions and summarily denial.

Wilcox fails to show that the BSO even used CPI or that “allelic dropout” occurred in this case. The BSO crime lab technician merely testified that she discovered two alleles from someone other than Johnson and that she could not exclude Wilcox as a possible donor. (TSR 9:81-91) Dr. Tracey did not work for the BSO; he is a biology professor at Florida International University, doing research in population genetics. (T 16:766-69) He simply testified that only 2% of the whole population have the particular form of the gene D-19 found on the sample tested in this case and Wilcox is part of that 2%. He did not use CPI either.

There is a two-prong test a defendant must satisfy in order to obtain relief based on newly discovered evidence. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test if it “weakens the case against

[the defendant] so as to give rise to a reasonable doubt as to his culpability.” *Jones II*, 709 So. 2d at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. See *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (*Jones I*). The court analyzing such a claim must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial. *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013).

Even assuming this “evidence” applies to Wilcox’s case, there is no way he can show that it would have likely produce an acquittal in a retrial given the enormous amount of evidence of his guilt. As detailed extensively in the previous claim and incorporated here, Wilcox was identified at the location the night of the murder, was seen coming in and out of the victim’s apartment during the crime, and he was arrested in the victim’s stolen car with the murder weapon. This Court should affirm the summary denial of the claim.

CONCLUSION

Based on the foregoing arguments and authority, the State respectfully submits that this Court affirm the denial of relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Paul Kalil, CCRC South at Kalilp@ccsr.state.fl.us and Brittney Lacy at Lacyb@ccsr.State.fl.us, this 6th day of September, 2024.

/s/ *Lisa-Marie Lerner*
LISA-MARIE LERNER
Assistant Attorney General

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this foregoing Answer Brief is 14-point Bookman Old Style, in compliance with Rule 9.045, Florida Rules of Appellate Procedure. I further certify that the document contains 22,215 words from the Preliminary Statement to the Conclusion.

/s/ *Lisa-Marie Lerner*
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