

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-1498

DARIOUS WILCOX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

LOWER CASE NO. 08-3736CF10A

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PRELIMINARY STATEMENT AND CITATIONS TO RECORD

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

Citations to the record will be as follows:

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

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

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

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

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF THE CASE AND FACTS

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

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

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

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

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

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

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

Waiver of Counsel

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

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

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

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

The Guilt Phase

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

Recorded Statements

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

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

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

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

DNA Evidence

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

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

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

T16-795.

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

Penalty Phase

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

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

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

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

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

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

Walsh presented no mental health evidence.²

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

Wilcox's jury was instructed on four aggravating factors:

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

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

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

convicted as a principle [sic] in the offense and not the actual shooter”; and

5) “any of the following circumstances that would mitigate against the imposition of the death penalty: Any aspects of the defendant’s character, record or background; any other circumstances.”

T21-1261-62.

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

Spencer Hearing

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

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

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

The Sentencing Order

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

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

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

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

Direct Appeal

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

The denial of transcripts of witness statements violated Florida's rules of discovery;

The court erred in allowing the State to present evidence of Wilcox's prior conviction;

The court erred in ruling that a witness's recollection could only be refreshed with her own statement;

The court erred in failing to allow compulsory service of process for witnesses;

The jury was improperly instructed on, and the court improperly found, the avoiding arrest aggravator;

The jury was improperly instructed on, and the court improperly found, the CCP aggravator;

The court improperly gave little weight to "significant, uncontradicted" mitigation;

A 7-5 death recommendation is "constitutionally unreliable;" and

Florida's death penalty statute is unconstitutional.

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

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

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

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

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

Postconviction Proceedings

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

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

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

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

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

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

Initial Postconviction Appeal

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

Proceedings on Remand

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

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

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

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

Postconviction Evidentiary Hearing

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

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

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

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

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

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

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

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

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

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

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

could not “think of a case that had more glaring evidence of vulnerabilities.”⁴ 2PCR-1520.

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

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

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

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

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

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

The Order Denying Postconviction Relief

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

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

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

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

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

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

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

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

This appeal follows.

SUMMARY OF THE ARGUMENTS

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

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

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

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

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

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

STANDARD OF REVIEW

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

The lower court's findings of fact are entitled to deference only if they are supported by competent and substantial evidence.

Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004); *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). Factual determinations "induced by an erroneous view of the law" should be set aside. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *see also Hilton v. State*, 961 So. 2d 284, 299 (Fla. 2007).

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

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

ARGUMENT I

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

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

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

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

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

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

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

A. The Mitigation Case

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

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

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

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

§10.7, Commentary (citations omitted).

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

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

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

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

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

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

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

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

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

The Lower Court’s Deficient Performance Findings

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

[M]itigation specialist Sheehan and trial counsel Walsh both did an excellent job as to the preparation and presentation of mitigation evidence.

. . .

This Court notes mitigation specialist Sheehan testified that "she did the best she could." This Court further notes mitigation specialist Sheehan testified that trial counsel Walsh "worked hard" on the case. This Court also notes when trial counsel Walsh was asked if "he gave it his all" his response was "absolutely."

2PCR-1912.

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

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

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

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

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

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

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

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

In finding counsel’s performance was not deficient, the postconviction court adopted the State’s erroneous argument⁶ that “counsel made strategic decisions assessing the positives and negatives” of which mitigation to present. This finding is belied by the record and contrary to law.

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

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

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

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

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

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

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

T11-108.

Mr. Walsh was not reappointed until after the guilt phase.

Testimony at the evidentiary hearing established that Walsh knew five months was a short period to prepare a capital penalty phase presentation. Yet, he waited six weeks to hire an investigator, two and a half months to interview a single witness, and over three months to contact a mental health professional.⁷ Walsh then waited until *two weeks* before penalty to file his only motion for a continuance, which the trial court denied.

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

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

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

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

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

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

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

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

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

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

⁹ Walsh admitted that he hired Rapa “definitely later than I would have liked.” 2PCR-1069.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ASA ROSSMAN: You said you wish you could have gotten some of, you were talking about the psych meds you take, you wish you could have gotten some for Darious to help him with his problems?

MS. WILCOX: Yes.

Q: Are you aware he had a full psychological evaluation and shows zero mental illness? Are you aware of that?

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

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

* * *

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

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

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

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

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

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

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

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

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

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

Neither trial counsel nor the experts explored Wilcox’s cognitive deficits or the impact of Wilcox’s childhood incarceration and his extended periods in solitary confinement. 2PCR-707.

Counsel had Wilcox’s DOC records and reports from the family that Wilcox was different after prison—he had become withdrawn and became a loner but did not investigate and present the information.

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

iii. Prejudice

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

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

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

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

Mitigation Presentation in Postconviction

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

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

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

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

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

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

According to the Miami Herald, in the 1960's and 70's, Black men

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hickson at a block party. 2PCR-1279, 1314.; *see also* 2PCR-833.

They saw Hickson's body lying on the sidewalk. 2PCR-1314.

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

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

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

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

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

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

The poverty, violence, and crime in Perrine— especially the influx of drugs -- greatly impacted the Wilcox family. Linda explained, once drugs came to Perrine, “people wasn't the same. There was drugs coming in; people was getting killed, stabbings, shootings.” 2PCR-1232. All of the siblings were completely immersed in lives of addiction. They would use together, 2PCR-1233, 1237, and encourage each other’s negative behaviors. Indeed, it was Lawanda’s sister, Patricia, who first introduced Lawanda to crack cocaine. 2PCR-693.¹⁵

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Linda remembers the family using crack cocaine together while the children played during birthday parties. 2PCR-1238. Larry was essentially homeless and would stay at Nancy's for days on end, smoking crack cocaine and injecting heroin in front of Darious and the other children. 2PCR-1273. Larry went of his way to make a show of it when he got high. To get the children's attention, he would "sing and dance before he'd do it, and we'd be looking because it was entertaining to us." 2PCR-1273.¹⁷

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

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

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

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

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

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

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

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

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

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

2PCR-1243.

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

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

2PCR-1147.

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

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

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

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

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

would also talk down to him and call him names”

2PCR-1143. Lawanda hit Darious with “whatever object there was.”

2PCR-1383. This abuse was rooted not in discipline, but in Lawanda’s addiction and withdrawal. 2PCR-1383.

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

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

It was painful for him.

2PCR-707.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. Grassian explained:

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

people who are juvenile and people with significant mental illness.

2PCR-1515-16.

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

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

“[O]h, grandma dead.”

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

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

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

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

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

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

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

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

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

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

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

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

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

“[E]xtreme risk of unhealthy life outcomes”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

At the postconviction hearing, psychologist Robert Ouaou, Ph.D. testified that he performed a battery of neuropsychological testing designed to “capture intelligence and domains of cognitive function.” 2PCR-1562. Neuropsychological testing “lay[s] out a map of function, for example intelligence, or the abilities related to memory, attention and concentration.” 2PCR-1546.

Neuropsychological testing can assist in determining why a person exhibits specific behaviors. 2PCR-1546, 1549-50.²⁰

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

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

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

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

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

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

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

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

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

Ouaou concluded that Darius's trauma, abuse and neglect, are "significant risk factors for abnormal development of the brain" and that exposure to these risk factors during adolescence "lead to impairments in memory and executive function." 2PCR-1576.

Darius "demonstrated objective indicators on current testing of acquired brain damage related to traumatic brain injuries and the known neurodevelopmental consequences of childhood trauma and neglect." 2PCR-4095. Ouaou opined that Darius is the "poster child" or "poster adult, for the development of difficulties with executive functions and memory. . ." 2PCR-1582.

The lower court's prejudice findings

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

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

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

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

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

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

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

Even where, as here, subject matter of the trial and postconviction evidence overlaps to some degree, prejudice may be established under *Strickland* where trial counsel fails to adequately describe the nature and extent of abuse the petitioner suffered.

Wiggins, 539 U.S. at 535-36 (finding deficiency and prejudice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

T20-1208.

In closing argument, the State capitalized on this stipulation:

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

T21-1222.

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

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

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

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

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

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

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

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

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

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

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

Walsh testified that he did *not* consider whether to call Waters, 2PCR-1066. When asked on cross-examination whether he would be concerned that calling Waters could open the door to testimony that Wilcox "was at the scene and he was seen taking things, taking something off of the person that was shot and killed," Walsh responded, "I guess that's possible, sure." 2PCR-1090.²³ Walsh's

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

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

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

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

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

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

C. The Lower Court's Credibility Findings

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

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

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

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

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

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

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

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

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

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

ARGUMENT II

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

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

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

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

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

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

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

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

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

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

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

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

A. Wilcox’s *Hurst* Litigation

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

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

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

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

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

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

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

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

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

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

²⁷ Judge Backman left the bench in December 2018.

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

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

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

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

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

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

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

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

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

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

Of the nearly 400 death-sentenced individuals in Florida at the time, 158 were eligible for *Hurst* relief. *Hurst* Data; *see also* *Asay*, 210 So. 3d at 20. Of those, 150 were granted relief²⁸ and two litigants waived postconviction proceedings, leaving six *Hurst*-eligible defendants.²⁹ Of the six, Wilcox is the only defendant sentenced to death by a mere jury vote of 7–5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³¹ Eric Patrick died while pending resentencing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Conclusion

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

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

This Court should reverse.

ARGUMENT III

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

An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. Fla. R. Crim. P. 3.851(f)(5)(A)(i); *see also Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2 (Fla. 2000) (“[A]n evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis”); *Truehill v. State*, 358 So. 3d 1167 (Fla. 2002); *Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question whether the movant has met this burden, the Court will presume that an evidentiary hearing is required, *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007), and “where there is no evidentiary hearing held below [the appellate court] must accept the defendant’s factual allegations to the extent they are not refuted by the record.” *Nordelo v. State*, 93 So. 3d 178, 185 (Fla. 2021) (citing *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999)).

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

In Claim 2 of his motion for postconviction relief, Wilcox alleged that he was denied a reliable adversarial testing at the guilt phase of his capital trial due to ineffective assistance of counsel and judicial error during pretrial proceedings because he was permitted to proceed pro se despite not being competent to knowingly and voluntarily waive his Sixth Amendment right to the assistance of counsel. PCR-729. Wilcox further alleged that appointed counsel had a duty to investigate and challenge whether he was competent to knowingly and voluntarily waive this right, and counsel failed to do so. Because of trial counsel's ineffectiveness, the trial court erroneously found that Wilcox was competent to proceed pro se. Thus, Wilcox was denied his constitutional right to counsel under Sixth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution and the right to a fundamentally fair trial.

Counsel's highest duty is the duty to investigate and prepare. See Guideline §10.7.

Counsel cannot responsibly advise a client about the merits of different courses of action,

the client cannot make informed decisions, and **counsel cannot be sure of the client's competency to make such decisions**, unless counsel has first conducted a thorough investigation with respect to both phases of the case.

Guideline §10.7, Commentary. (emphasis added). Moreover, counsel must start investigating *at the beginning* of the representation. *Id.*

Here, as established above, counsel abandoned their obligations from the very outset of this case. No investigation of Wilcox's background or mental health was done from the time he was arrested through his decision to proceed pro se. Even after, counsel made no effort to ascertain whether Wilcox was competent to do so.

It was incumbent upon the trial court and counsel to ensure that qualified experts were appointed to conduct competency evaluations of Wilcox and to ensure that the trial court immediately scheduled a hearing to determine competency as required under Rule 3.210(b). Counsel did neither.

Because counsel failed to timely seek the assistance of qualified professionals to assess Wilcox's mental health, and failed to ensure that Wilcox was properly evaluated once his competency

was called into question, the trial court was led to believe that Wilcox was “intelligent, articulate, [and] bright.” S8-41.

In his motion for postconviction relief, Wilcox alleged that he has since been thoroughly examined by mental health experts whose opinions all bear upon this claim. Neuropsychological testing reveals that, contrary to Dr. Brannon’s belief, Wilcox’s intelligence is closer to intellectually disabled than “below average.” He suffers from acquired neurologic damage, abysmal memory and executive functioning deficits, poor impulse control, significant deficits in executive functioning, and poor abstract reasoning. Wilcox’s lowest neuropsychological test scores relate to verbal comprehension, precisely the skills necessary to not only to represent oneself at trial, but also make an “intelligent” decision to discharge counsel.

Although Wilcox was arguably competent to stand trial, he suffers from deficits to the point where he was not competent to conduct trial proceedings by himself or knowingly, intelligently, and voluntarily waive counsel. Counsel’s failure to secure an adequate mental health evaluation of Wilcox resulted in the trial court’s erroneous finding.

Wilcox also alleged that trial counsel was deficient for failing to correct the trial court's erroneous belief that Wilcox had an "absolute right" to represent himself. T6-25, 106, 139; S8-41. Counsel failed to inform the court of its error.

In *Faretta*, the U.S. Supreme Court held that the Sixth and Fourteenth Amendments include a constitutional right to proceed without counsel when a criminal defendant "voluntarily and intelligently elects to do so." 42 U.S. at 807. However, contrary to the trial court's belief, and the postconviction court's, that right is not unfettered or "absolute." See *Indiana v. Edwards*, 554 U.S. 164 (2008). The Supreme Court in *Edwards* determined:

[T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.

Id. at 177 (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

The *Edwards* Court based its decision on several factors. First, it recognized that standards to determine competency to proceed "assume representation by counsel and emphasize the importance of counsel," whereas, "an instance in which a defendant who would

choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard.” *Id.* 175. The Court reasoned that the *Faretta* right to self-representation rests “in part on pre-existing state law set forth in cases all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right.” *Id.* (citing *Faretta*, 422 U.S. at 813, and n.9).

Second, the Court recognized that competency to stand trial with the assistance of counsel and competency to waive the right to the assistance of counsel are separate and distinct questions requiring separate and distinct standards. The nature of mental illness “cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself.” *Id.*

The Supreme Court also reasoned that dignity and autonomy of the individual underlie the right to self-representation; however, “a self-representation right at trial will not ‘affirm the dignity’ of a defendant who lacks the mental capacity to conduct his defense

without the assistance of counsel.” *Edwards*, 554 U.S. at 176 (citations omitted) . A defendant’s lack of capacity to conduct the trial risks not only an embarrassing spectacle, it “undercuts the most basic of the Constitution’s criminal law objectives, providing a fair trial.” *Id.* Moreover, “proceedings must not only be fair, they must ‘appear fair to all who observe them.’” *Id.* at 177 (citing *Wheat v. United States*, 486 U.S. 153 (1988)).

An individual with an IQ of 78 who suffers from deficits in memory, executive functioning, impulse control, abstract reasoning, and verbal comprehension lacks the mental capacity to conduct his own defense or make such a decision. Counsel’s failure to timely investigate and zealously advocate on behalf of his mentally, cognitively, and intellectually impaired client fell far below any objective standard of reasonableness for the performance of counsel in a capital case. As a result, Wilcox was denied the right to counsel in violation of the Sixth Amendment.

Counsel’s failings and the trial court’s decision to permit him to proceed without counsel resulted in substantial prejudice in that he was denied the right to counsel under the Sixth Amendment.

“[T]he Sixth Amendment’s guarantee of counsel is one of the

fundamental rights essential to a fair trial.” *Roy v. Wainwright*, 151 So. 2d 825, 826 (Fla. 1963) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). The denial of counsel in a capital trial is structural error requiring reversal. Thus, no further showing of prejudice is necessary for relief to be granted.

To the extent that Wilcox may be required to show prejudice, the prejudice resulting from counsel’s failure to challenge Wilcox’s competency to waive counsel is evident. Wilcox had neither the skills nor the resources to conduct his own defense. Because he was incarcerated, Wilcox was unable to perform any investigation on his own, to secure necessary witnesses to present a defense, and was denied access to exculpatory information. Without counsel to assist him, Wilcox was unable to obtain or view DVD recordings of the sworn police statements of State witnesses, which contained significant impeaching information. Wilcox was also unable to secure experts to effectively challenge scientific evidence, including pathology and crime scene evidence presented by the State. Wilcox was unable to challenge the reliability of the State’s cell phone evidence or challenge the admission of expert testimony by law enforcement officers who were not qualified experts in cell phone

technology. Particularly prejudicial was the State's presentation of DNA evidence that went unchallenged because Wilcox was without the knowledge or ability to challenge it effectively.

Allowing a person who is borderline intellectually disabled to represent himself under any circumstances, no less when his life is in the balance, violates the underpinnings of *Faretta* and does nothing to affirm his dignity or autonomy. Wilcox's lack of capacity to conduct his trial undercut the fairness of the proceeding and "the most basic of the Constitution's criminal law objectives." *Edwards*, 554 U.S. at 176. The result is a proceeding that was neither fair nor appears fair.

The postconviction court denied this claim without an evidentiary hearing, finding that the record establishes that the trial court conducted a "thorough and detailed *Faretta* inquiry" and that counsel was not ineffective for failing to challenge the proceedings. 2PCR-1908. The court reasoned that "there is no evidence that supports the conclusion that trial counsel should have raised the issue of competency pursuant to Rule 3.210 and 3.211." 2PCR-1908. The court also found the claim of trial court error procedurally barred "as it could have and should have been raised

on direct appeal.” 2PCR-1908. Wilcox submits that the court’s denial of this claim is flawed on all fronts.

First, this claim is not procedurally barred because it could not have been raised on appeal. Claims of ineffective assistance of trial counsel are not properly raised on direct appeal absent a showing of fundamental error. *Steiger v. State*, 328 So. 3d 926, 929 (Fla. 2021). Moreover, Wilcox pled *non-record* facts regarding counsel’s performance, Dr. Brannon’s performance, his IQ and cognitive abilities, and his competence to waive counsel that could not be resolved by the trial record alone. The lower court misapprehends the claim that was presented.

The lower court also misapprehends this claim as a challenge to Wilcox’s competency to proceed pursuant to Rule 3.201 or 3.211. However, Wilcox’s claim in fact argues that he was denied effective assistance because trial counsel failed to argue that Wilcox was competent to waive counsel pursuant to *Indiana v. Edwards*, 554 U.S. 164 (2008). In denying relief, the lower court conflates “competency to proceed” with “competency to waive counsel.”

Moreover, the court cannot paradoxically complain that “there is no evidence that supports the conclusion that trial counsel

should have raised the issue of competency,” 2PCR-1908, and, at the same time, deny evidentiary development. This legally sufficient claim raised questions of fact that required an evidentiary hearing.

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

Wilcox was denied an adversarial testing at trial due to the State’s withholding of material, exculpatory evidence and/or the presentation of false evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

To ensure that adversarial testing occurs, a prosecutor is required to disclose to the defense evidence “that is both favorable to the accused and ‘material either to guilt or punishment.’” *United States v. Bagley*, 473 U.S. 667, 674 (1985) (quoting *Brady*, 373 U.S. at 87). A claimant must establish that the government possessed evidence that was suppressed, that the suppressed evidence was exculpatory or impeachment, and that the evidence was material. *Id.*; *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527

U.S. 263 (1999). Evidence is “material” and a new trial or sentencing is warranted “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. *Kyles*, 514 U.S. at 433-34.

A proper materiality analysis under *Brady* must contemplate the cumulative effect of all suppressed information. The materiality inquiry is not a “sufficiency of the evidence” test. *Id.* at 434. The burden of proof for establishing materiality is less than a preponderance. *Williams*, 529 U.S. 362; *Kyles*, 514 U.S. at 434. In other words, “[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” *Kyles*, 514 U.S. at 434-35. Rather, the suppressed information must be evaluated in light of the effect on the prosecution’s case as a whole and the “importance and specificity” of the witnesses’ testimony. *United States v. Scheer*, 168 F.3d 445, 452-53 (11th Cir. 1999).

Moreover, the prosecution’s disclosure must be “at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure.” *Edelen v. United States*,

627 A.2d 968, 970 (D.C. 1993) (citations omitted); accord *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995). A *Brady* violation occurs “if the material came so late that it could not be effectively used.” *United States v. Beale*, 921 F.2d 1412, 1426 (11th Cir. 1991).

The standard for prejudice is lower where the State relies on false or misleading testimony and argument in order to secure a conviction. *Giglio*, 405 U.S. 150. Where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, a new trial is required if there is any reasonable possibility that the false evidence may have affected the judgment of the jury. *Id.* at 154; *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). “[T]he proper question under *Giglio* is whether there is any reasonable likelihood that the false testimony could have affected the court’s judgment as the factfinder in this case.” *Guzman v. State*, 868 So. 2d 498, 507 (Fla. 2003). Additionally, a prosecutor has a duty to correct testimony he or she knows is false. *Routly*, 590 So. 2d at 400; see also *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989), *cert. denied*, 493 U.S. 932 (1989).

At trial, Richaunda testified that the victim Nimoy Johnson, her next-door neighbor, had threatened her household because he believed they had broken into his home. She claimed that Mr. Johnson later told her that after thinking it over, he no longer believed they were responsible. S10-254-58. Richaunda's testimony contradicted what she had previously told Detective Hardy. Hardy's arrest affidavit states that on February 3rd, Richaunda, Shaquira, Terrell, and Willie "denied any knowledge or involvement with the burglary of their neighbor's residence a week prior to the murder." R1-4. However, in her recorded sworn statement—taken the same day that Hardy prepared the arrest affidavit—Richaunda claimed Mr. Johnson had told her he had been "robbed." Further, she denied that her brother, Terrell, had anything to do with the prior burglary or murder.

Wilcox attempted to impeach Richaunda with her sworn statement but, without a transcript, he had to rely on Hardy's arrest affidavit. S10-283-86. The State objected, arguing that Wilcox could not impeach Richaunda with the affidavit because Richaunda had not written it. At that point, for the first time, the State disclosed that Richaunda's recorded statement contradicted Hardy's

affidavit. Hardy's arrest affidavit further states that Richaunda gave a second sworn statement on February 7th wherein she again stated she was unaware of the burglary, R1-5; however, in her recorded statement, she admits that she spoke to Mr. Johnson about it. In both recordings, Richaunda brought up the burglary before Hardy mentioned it ("around the time that Dread was robbed or whatever I wasn't getting weed from him anymore.").

In a similar vein, Hardy's affidavit states that Terrell reported he never heard a gunshot because he was asleep. At trial, however, he testified that he had gotten out of bed and spoken with Wilcox outside; he returned inside and heard one gunshot as he was "halfway up the stairs." T15-668. On cross, Terrell again insisted that he was awake when he heard the gunshot and denied telling Hardy he was asleep. T15-684-85. Likewise, Hardy's affidavit stated that Terrell denied any knowledge of the burglary. R1-4. However, at trial, Terrell denied being present when Nimoy Johnson made the threats about retaliation for the burglary, which contradicts Richaunda's February 3rd sworn statement. T15-656-57. Repeatedly citing "the perils of self-representation," the trial court denied Wilcox's requests for transcripts of the State's primary witnesses'

recorded statements and witness jail calls because the State refused to prepare any transcripts. S-283-86. Wilcox's defense at trial was that Terrell Collier was the actual killer and that he was framed. Thus, any information that contradicted the witness's testimony would be valuable, even if only for impeachment. The State agreed to give Wilcox the DVD copies of the statements and calls, knowing full well that he would not be able to view the recordings because he was incarcerated.

Wilcox argued that failing to provide transcripts of the statements constituted a discovery violation because, as an incarcerated defendant, he was unable to view the DVDs the State had provided.

On direct appeal, Wilcox argued that the State's refusal to transcribe Richaunda's recorded statement constituted a violation of Florida's discovery rules. This Court determined that "the State did not violate either the spirit or the technical requirements of the criminal discovery rules" because "[t]he rules do not require the State to produce and disclose information which is not within the State's actual or constructive possession." *Wilcox*, 143 So. 3d at 376.

The State refused to prepare transcripts citing “the extensive costs,” T-68-70; yet, it had at least ten other recorded witness statements transcribed. The only statements not transcribed are those most helpful to Wilcox. Notwithstanding Florida’s discovery obligations, the State still had an obligation under the Sixth, Eighth and Fourteenth Amendments to disclose the exculpatory information, including impeachment those statements contained.

Wilcox was entitled to the exculpatory information—transcribed or not. Thus, the State was required to produce the material in an accessible format. For example, even if Wilcox was represented, the State would not be permitted to provide discovery in an inaccessible format using proprietary software the Defense does not have access to.

The State’s obligations under *Brady* and *Giglio* are not abrogated by the fact that Wilcox chose to proceed pro se. Wilcox cannot be forced to surrender one constitutional right to assert another. *United States v. Simmons*, 390 U.S. 377 (1968). Wilcox’s right to representation cannot foreclose other constitutional protections.

The State waited until the middle of Wilcox's cross-examination of Richaunda to disclose that Hardy's arrest affidavit was materially incorrect; there were material inconsistencies between the witnesses' sworn police statements and the testimony given at trial. The State's failure to timely disclose the material inconsistencies constitute *Brady* and *Giglio* violations.

Prejudice is clear. Terrell and Richaunda were damning witnesses who put Wilcox in the area at the time of the crime, as the State emphasized. These statements were vital to defense preparation, and Wilcox had no other means to obtain them.

Richaunda, Terrell, and Ward all had motive to lie to exculpate themselves from both the prior burglary and the subsequent murder of Mr. Johnson. Their evolving, contradictory statements to police and at trial demonstrate that they lacked any credibility. Had the State timely provided Wilcox with the contradictory information contained in the witnesses' untruthful and inconsistent sworn statements, Wilcox would have been able to effectively impeach these witnesses. There is, at the very least, "a reasonable probability that, had the evidence been disclosed to the defense, the

result of the proceedings would have been different.” *Kyles*, 514 U.S. at 433-34.

The postconviction court summarily denied Wilcox’s claim, finding that it was “conclusively resolved as a matter of law and by reliance on the record.” 2PCR-1917. Without hearing any evidence, the court determined that the “sole and complete cause of Defendant’s inability to view the contents of the DVD recordings was his decision to proceed while incarcerated in the Broward County Jail” and further noted that the Sheriff “is not required to operate a law office” and provide facilities for the defendant to view his discovery. 2PCR-1918.

Focusing only on the disclosure of DVDs versus transcripts, the lower court gave no consideration to Wilcox’s claim that the State had a duty to disclose *the information* contained in the recordings. Whether the information is stored electronically, as media, or in written form is not the issue. Pursuant to *Brady*, the question is whether the State withheld material, exculpatory *information* from the defense.

As to whether the State violated *Giglio*, the recordings themselves are irrelevant. The question is not what Wilcox knew at

trial. Rather, the court must determine whether the State allowed untrue testimony to come before the jury. These questions of fact can only be resolved with evidentiary development. Wilcox seeks remand for an evidentiary hearing, and thereafter, relief is warranted.

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

In Claim 5 of his motion for postconviction relief, Wilcox argued that newly discovered evidence establishes that the forensic science used to convict and sentence him to death was neither reliable nor valid.

Newly discovered evidence establishes that the forensic science used to convict and sentence Wilcox to death was neither reliable nor valid, thus, he was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. To the extent that exculpatory impeachment evidence was withheld, the State violated *Brady* and/or *Giglio*.

DNA testing relies upon “the calculation of population frequency statistics and population genetics.” *Brim v. State*, 695 So. 2d 268, 270 (Fla. 1997). While the science of DNA is generally

accepted, “there may be problems in a particular case with how the DNA was collected, examined in the laboratory, or interpreted, such as when there are mixed samples, limited amounts of DNA, or biases due to the statistical interpretation of data from partial profiles.” Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United States: A Path Forward, at 3-12 (2009).

Contrary to the lower court’s findings, these problems are apparent in Wilcox’s case. On January 12, 2017, the State of Florida issued a “Notice Pursuant to Rule 3.220(b)(4)” to another death-sentenced inmate, Richard Knight. The notice disclosed that the American Society of Crime Laboratory Directors/Laboratory Accreditation Board advised the Broward Sheriff’s Office Crime Laboratory that there was “inappropriate use of the statistic known as the Combined Probability of Inclusion (CPI) to calculate statistical significance of occurrence of genetic profiles when allelic dropout is known and/or suspected to have occurred.” The lab gave

notice to defendants wherein “DNA population genetic calculations may have been inaccurately tabulated.”³⁴

This disclosure demonstrates that the Broward Sheriff’s Office Crime Laboratory was incorrectly tabulating population genetic calculations when it was investigating Wilcox’s case. This evidence was either withheld from Wilcox at the time of trial or, if not knowingly withheld, constitutes newly discovered evidence. Had Wilcox known of BSO’s improper procedures, it would have provided invaluable impeachment of the State’s DNA evidence.

Under *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), to obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. *Id.* (citing *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994)). Second, the evidence “must be of such nature that it would probably produce an

³⁴ The State did not provide a notice to Wilcox. Postconviction counsel only received the records after litigating the issue pursuant to Rule 3.852, to which BSO objected.

acquittal on retrial.” *Id.* (citing *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991)). Newly discovered evidence satisfies the second prong of the *Jones* test if it “weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.” *Id.* at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)).

Obviously, Wilcox did not know, nor could he have known through the use of due diligence, that the Broward Sheriff’s Office was improperly tabulating DNA population genetic calculations when investigating his case. This information could only be known once the State disclosed it.

Further, this impeachment evidence “weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.” *Id.* “The probative power of DNA typing can be so great that it can outweigh all other evidence in a trial.” *Hayes v. State*, 660 So. 2d 257, 263-64 (Fla. 1995). The State knew the impact of DNA evidence on juries and that Wilcox was without the resources or knowledge to challenge it. The State made much of this testimony in closing argument to rebut Wilcox’s claim that his cousin, Terrell, is actually responsible for these crimes. This evidence went unchallenged because it was unknown to Wilcox that

the methods and practices of the BSO Crime Laboratory were substandard and scientifically unsound. Had Wilcox been able to impeach the DNA evidence, the jury would have had a reasonable doubt as to his culpability.

To the extent that the State withheld this information from Wilcox in violation of *Brady*, the resulting prejudice is apparent. Had this impeachment information been available to Wilcox, there is, at the very least, a reasonable probability that the result of the proceedings would have been different.

The lower court summarily denied Wilcox's claim, finding that the record reflects there is no newly discovered evidence. 2PCR-1919. This was error.

The very nature of a newly discovered evidence claim is that information is new, and therefore, not part of the existing record. Moreover, despite summarily denying the claim, the court did consider additional evidence—the substance of the BSO notice included in Wilcox's claim, disclosing that it made errors in DNA mixture cases. By considering this non-record evidence without allowing Wilcox to present testimony about the notice, or the

breadth of the errors BSO made, the court denied Wilcox a full and fair hearing on the claim.

The court's errors require remand for an evidentiary hearing, and thereafter, relief is warranted.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Wilcox respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding, or, in the alternative, remand to the trial court for a full and fair opportunity to be heard at an evidentiary hearing, and grant such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been provided by electronic service to counsel for Appellee, Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, *capapp@myfloridalegal.com*, this 24th day of March, 2024.

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CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Initial Brief is produced in Bookman Old Style 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.210. Counsel further certifies that this brief contains 26,486 words and that a Motion to Exceed Word Limitations is being filed simultaneously with this brief.

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