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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-1498

DARIOUS WILCOX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

LOWER CASE NO. 08-3736CF10A

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT IN REPLY 1

REPLY TO ARGUMENT I 1

Penalty Phase Ineffective Assistance of Counsel 1

A. Penalty Phase Investigation 1

B. Mental Health Mitigation 11

C. Prejudice 21

D. Challenging the Aggravation 30

E. Credibility Findings 31

REPLY TO ARGUMENT II 34

Hurst Error 34

REPLY TO ARGUMENT III 35

CONCLUSION AND RELIEF SOUGHT 36

CERTIFICATE OF SERVICE 37

CERTIFICATE OF COMPLIANCE AND FONT 37

TABLE OF AUTHORITIES

Cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other Authorities

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

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

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

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

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

ARGUMENT IN REPLY

REPLY TO ARGUMENT I

Penalty Phase Ineffective Assistance of Counsel

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

A. Penalty Phase Investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2PCR-1092 (ellipses in original).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Mental Health Mitigation

In a capital case, counsel must request *appropriate* experts as soon as possible, avoiding reliance on "an 'all purpose' expert who may have insufficient knowledge or experience to testify persuasively." American Bar Association Guidelines for the

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

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

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

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

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

Wilcox's postconviction experts did not simply disagree with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

about if you could avoid it?

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

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

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

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

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

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

C. Prejudice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

evidence. The adults in Wilcox's life not only failed to make sure he made it to school, but failed to assist with his work, support his development, show up to meetings with teachers, or advocate on his behalf. When the school held a meeting on Wilcox's academic needs, neither Lawanda or Nancy showed up. 2PCR-800. Dr. Vinson explained that because Wilcox struggled in school and was made fun of when he "falter[ed] over words," "rather than becoming a place where you learn, [school] becomes a place where you're self-conscious, where you don't feel like you're getting the help you need, and then you start acting out." 2PCR-1150.

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

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

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

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

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

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

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

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

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

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

D. Challenging the Aggravation

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

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

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

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

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

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

E. Credibility Findings

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

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

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

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

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

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

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

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

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

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

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

REPLY TO ARGUMENT II

Hurst **Error**

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

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

The State argues that Wilcox's prior felony conviction and

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

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

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

REPLY TO ARGUMENT III

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

relies on the arguments in his Initial Brief.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Wilcox respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding.

Respectfully submitted,

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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 18th day of October, 2024.

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CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Reply Brief is produced in Bookman Old Style 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.210. Counsel further certifies that this brief contains 6,589 words.

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