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

DARIOUS WILCOX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

I & II Wilcox is not entitled to a new penalty phase because *Erlinger v. United States*, 144 S.Ct. 1840 (2024), is not a new statement of the law, does not change any sentencing procedure, and has nothing to do with capital sentencing schemes. The United States Supreme Court has conclusively held that a judge determining the existence of mitigation evidence and its weight in relation to the aggravation is not a violation of the Sixth Amendment.

III *Erlinger* did not alter the law in anyway but was only an application of *Apprendi* and *Alleyne* to a federal criminal sentencing statute. It in no way alters the Supreme Court's death penalty sentencing jurisprudence. Consequently, it can have no effect on the prejudice analysis for an ineffective assistance of counsel claim.

ARGUMENT

I & II *Erlinger* merely applied existing Supreme Court law and has no application to either *Poole* or any death penalty sentencing procedures. (restated)

Wilcox contends that he is entitled to a new penalty phase trial based on the United States Supreme Court's holding in *Erlinger v. United States*, 144 S.Ct. 1840 (2024), because the judge rather than the jury found several of the components required by the Florida Statute to impose a

death sentence in violation of the Sixth Amendment. He goes on to argue that *Erlinger* established that the Florida Supreme Court's holdings in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), were incorrect. He contends that it is the jury, not the court, which must find beyond a reasonable doubt the existence of an aggravator, the sufficiency of the aggravators to impose death, and then that the aggravators outweigh the mitigators, calling them "elements" of the offense. He adds that *Erlinger* impacts the post-conviction court's weighing of the totality of the mitigation and relief should have been granted for the ineffective assistance of counsel claim on mitigation investigation and presentation. Wilcox fundamentally misreads and misinterprets *Erlinger* and the Supreme Court's jurisprudence stemming from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Apprendi* and *Ring*, the Supreme Court held that under the Sixth Amendment, a defendant has a right to have any "fact on which the legislature conditions an increase in their maximum punishment" determined by a jury, even if the State characterizes that factual finding as a sentencing factor rather than an element. *Id.*, 536 U.S. at 589. The Court in *Ring* elaborated that under a statutory scheme in which the death penalty cannot be imposed unless at least one aggravating factor is found

to exist beyond a reasonable doubt, the Sixth Amendment requires the factual determination of the aggravating factor must be found by the jury. "[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime." *Id.* at 605. The Court found that "enumerated aggravating factors [of state laws] operate as the functional equivalent of an element of a greater offense." *Id.* at 609.

The Court in *Ring* expressly observed, however, it was not addressing whether the Sixth Amendment forbade determinations by judges, rather than juries, of mitigating circumstances, the relative weight of aggravating and mitigating circumstances, or the ultimate sentencing decision. In fact, the Court in *Ring* reiterated the distinction between facts of mitigation versus aggravation, as well as its prior pronouncement in *Proffitt v. Florida* that "'[i]t has never [been] suggested that jury sentencing is constitutionally required.'" *Ring v. Arizona*, 536 U.S. 584, 597-98 n.4 (2002) (citing *Proffitt v. Florida*, 428 U.S. 242 (1976). *Apprendi* and *Ring* affected only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based.

In 2016 the Court issued *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616 (2016), holding that a "hybrid" sentencing scheme, in which the jury made a merely "advisory" recommendation of life or death and did not make a binding finding as to the existence of any aggravating circumstance, violated the Sixth Amendment. *Hurst* did not announce a new rule of law; it was merely an application of *Ring* to the sentencing scheme under which the judge alone found the existence of any aggravating circumstance that made the defendant death eligible.

Of particular note in analyzing Wilcox's claim, is that the Supreme Court has consistently maintained that a judge may find the facts necessary to decide a sentence within the statutory range. The *Apprendi* Court specifically stated:

> [N]othing in this history suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case.

Apprendi, 530 U.S. at 481. The Court later further elucidated that a judge is constitutionally permitted to make the fact finding underlying a sentence rather than a jury. In a non-capital criminal sentencing case, the Court stated:

> Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. *See, e.g., Dillon v. United States*, 560 U.S. ——, ——, 130 S.Ct. 2683, 2692, 177 L.Ed.2d 271 (2010) ("[W]ithin established limits[,] ... the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted));. ...
>
> "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Apprendi*, supra, at 519, 120 S.Ct. 2348 (THOMAS, J., concurring). Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law.

Alleyne v. United States, 570 U.S. 99, 117 (2013). In Florida, once a jury has determined the existence of an aggravating factor beyond a reasonable doubt, the sentencing range set by statute available to the court is a minimum of life without parole and a maximum of death. *See Bright v. State*, 299 So. 3d 985, 1009 (Fla. 2020) (death penalty may be imposed on a single aggravator); Fla. Stat. Ann. § 921.141 (West).

The Supreme Court revisited the issue of the judge determining the sentence in a death penalty case. In *McKinney v Arizona.*, 589 U.S. 139 (2020), the Court held that, on remand for a re-weighing of the aggravating and mitigating circumstances, a judge, rather than a jury, could conduct the reweighing. The Court implicitly affirmed the holdings in *Profitt* and *Ring* that a judge could make the factual findings in determining whether the

mitigators were established, and then weigh those mitigators against the aggravators to select the appropriate sentence. The Supreme Court specifically rejected the defendant's argument that its holding in *Hurst* required a jury to reweigh aggravating and mitigating circumstances. The Court reiterated: "[I]n a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *Id.* at 144. The Court explained that *Ring* and *Hurst* stand only for the proposition that a jury must find an aggravating circumstance which makes the defendant death eligible. "In short *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances." *Id.* at144. The Court further clarified its precedent: "'States that leave the ultimate life-or-death decision to the judge may continue to do so.'" *Id.* at 708 (citing *Ring*, 536 U.S. at 612 (Scalia, J. concurring)). *McKinney* clearly refutes Wilcox's positions and arguments.

This history supports this Court's decision in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), discussed later, and is important when analyzing *Erlinger*. Involved in *Erlinger* is a federal recidivist statute which increases the penalty for a defendant with three or more prior violent felony

convictions. Erlinger had three burglary convictions from his teens that the prosecution claimed were three distinct crimes while the defense said they were all one criminal enterprise. The sentencing court made the factual findings about the dates, times, and locations of each crime happened. *Erlinger*, 144 S.Ct. at 825-828. The Court held that these facts increased the maximum sentence and, therefore, had to be found by a jury, not a court. *Id.* at 834. "While recognizing Mr. Erlinger was entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt, we decide no more than that." *Id.* at 835. The Court specifically stated: "Really, this case is as nearly on all fours with *Apprendi* and *Alleyne* as any we might imagine." *Id.* at 835. *Erlinger* announced no new law or rules, nor did it have anything to do with the holding in *Hurst*.

Furthermore, the rules announced in *Apprendi* and *Ring* do not apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348 (2004), first explained that "[t]his holding [in *Ring*] did not alter the range of conduct Arizona law subjected to the death penalty" and that *Ring* therefore was procedural rather than substantive. *Id*. at 358. The Court stated that *Ring* did not establish a "watershed rule of criminal procedure," holding that: "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin*, 542 U.S. at 357. See also

Hughes v. State, 901 So. 2d 837, 838 (Fla. 2005); *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005). Similarly, since *Hurst* is an evolution of *Ring*, it too is not retroactive. *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165 (11th Cir. 2017); *State v. Poole*, 297 So. 3d 487 (Fla. 2020). Wilcox was sentenced prior to the issuance of *Hurst v. Florida* and, therefore, is not entitled to relief since it is not retroactive.

McKinney, *Ring*, and *Apprendi* all say that the court retains its power to find the necessary facts to impose a sentence within the state law prescribed range. The jury is not required to determine whether the aggravators are sufficient to support a death sentence or to weigh the mitigators against those aggravators. In fact, constitutionally the jury is not required to even hear any mitigation at all. In Nebraska, the state capital sentencing scheme requires a jury to only determine the existence of aggravating circumstances. The jury's participation in the death penalty sentencing phase ceases after the determination of aggravating circumstances. A three-judge panel determines the existence of mitigating circumstances, weighs aggravating and mitigating circumstances, and determines the sentence. Neb. Rev. Stat. Ann. § 29-2522 (West) provides the guidelines for the three-judge panel's sentencing determination:

> The panel of judges for the sentencing determination proceeding shall either unanimously fix the sentence at death

> or, if the sentence of death was not unanimously agreed upon by the panel, fix the sentence at life imprisonment.

The Supreme Court has upheld this scheme where the jury does not even hear any mitigation evidence, much less find the sufficiency of the aggravators or does any weighing. *See State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), *cert. denied Lotter v. Nebraska*, 139 S. Ct. 2716, 204 L. Ed. 2d 1114 (2019) (denial of Sixth Amendment claims under *Ring* and *Hurst*). Clearly, the Court allows the judge to determine the actual sentence of either life or death, as Florida's statute does.

The Supreme Court, in *Tuilaepa v. California*, 512 U.S. 967, 114 (1994), described statutory schemes similar to the one in Florida as being composed of an "'eligibility decision,'" where a determination of the existence of one or more prescribed aggravating circumstances must be proven to exist before a defendant is eligible for a sentence of death and a "'selection decision,'" where the sentencer determines whether a death eligible defendant should receive the death penalty, based upon an individualized determination of the defendant's character and the circumstances of the crime. *Id.* The "eligibility decision" stemmed from a series of U.S. Supreme Court decisions holding that in order to render a defendant eligible for the death penalty, the trier of fact must convict the defendant of murder and also find one "'aggravating circumstance' (or its

equivalent) at either the guilt or penalty phase." Id. at 971-72; *See, Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Zant v. Stephens*, 462 U.S. 862 (1983); *Coker v. Georgia*, 433 U.S. 584 (1977). It is this concept and language that this Court used in its analysis in *Poole*. *Poole*, 297 So. 3d 501-506. This court's decision in *Poole* was utterly consistent with and conforms to the Supreme Court precedent of *Apprendi*, *Ring, Tuilaepa*, and *McKinney*.

Wilcox's claims are without merit and should be denied.

III The post-conviction court's prejudice analysis under *Strickland* regarding the penalty investigation and presentation is unaffected by *Erlinger*. (restated)

As argued above, *Erlinger* did not alter the law in any way but was only an application of *Apprendi* and *Alleyne* to a federal criminal sentencing statute. It in no way alters the Supreme Court's death penalty sentencing jurisprudence. Consequently, it can have no effect on the prejudice analysis for an ineffective assistance of counsel claim.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Paul Kalil, CCRC South at Kalilp@ccsr.state.fl.us and Brittney Lacy at Lacyb@ccsr.State.fl.us, this 22nd day of October, 2024.

/s/ Lisa-Marie Lerner
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this foregoing Answer Brief is 14-point Arial, in compliance with Rule 9.045, Florida Rules of Appellate Procedure. I further certify that the document contains 2,260 words from the Preliminary Statement to the Conclusion.

/s/ Lisa-Marie Lerner
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