

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-1498

DARIOUS WILCOX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

LOWER CASE NO. 08-3736CF10A

**SUPPLEMENTAL INITIAL BRIEF OF APPELLANT
BASED ON *ERLINGER V. UNITED STATES***

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CITATIONS TO RECORD

Citations to the record are as follows: “R(volume)-___”, “T(volume)-___”, and “S(volume)-___”: record, trial transcripts, and supplemental record on direct appeal; “PCR-___”: postconviction record on appeal following the lower court’s summary denial of Wilcox’s initial Rule 3.851 motion; and “2PCR-___”: postconviction record for the current appeal.

PRELIMINARY STATEMENT

On June 21, 2024, the United States Supreme Court held in *Erlinger v. United States*, 144 S. Ct. 1840 (2024), that the Sixth Amendment jury right and Fifth Amendment Due Process Clause require that a unanimous jury make any factual determinations beyond a reasonable doubt that a defendant's prior offenses are sufficient to impose a penalty enhancement.

Mr. Wilcox is before this Court on appeal of his Rule 3.851 motion in which he asserted that his death sentence violates the Sixth Amendment pursuant to *Hurst v. Florida*, 577 U.S. 92 (2016), because a judge, not a jury, made all required findings of fact before imposing his death sentence. Wilcox's jury made only an advisory recommendation for death by a bare majority vote of 7–5. It made no findings of fact concerning the existence or weight of aggravation or mitigation.

SUMMARY OF ARGUMENTS

I. The Supreme Court's decision in *Erlinger* is dispositive here—Mr. Wilcox is entitled to *Hurst* relief because the judge alone made all findings of fact necessary to impose a death sentence. The lower court's application of *State v. Poole*, 297 So. 3d. 487 (2020), to deny Mr. Wilcox *Hurst* relief left intact a death sentence imposed in violation of the Sixth Amendment and Fourteenth Amendment Due Process Clause. *Erlinger*

establishes that *Poole* was wrongly decided and is irreconcilable with the Supreme Court's Sixth Amendment and Due Process jurisprudence. Wilcox is entitled to a new penalty phase that comports with the requirements of *Hurst v. Florida* and *Erlinger*.

II. Mr. Wilcox's sentence violates the Sixth Amendment because the jury did not unanimously find beyond a reasonable doubt each element required to impose a death sentence. The *Erlinger* opinion reaffirms the holding in *Hurst v. Florida*, that a unanimous jury must find the elements that sufficient aggravating circumstances exist and that any mitigating circumstances are insufficient to outweigh the aggravating circumstances. Wilcox is entitled to unanimous jury findings as to every element required to impose death. Relief is warranted.

III. The *Erlinger* decision further establishes that Mr. Wilcox was prejudiced by penalty phase counsel's ineffective assistance when he failed to investigate and present a wealth of available mitigation. In light of the substantial mitigation presented in postconviction and the absence of any jury-found aggravation, prejudice is clear. Penalty phase relief is warranted.

ARGUMENT

Introduction

Under Florida's statute, death eligibility is dependent upon a finding of

certain statutorily defined facts in addition to the jury verdict unanimously finding the defendant guilty of first-degree murder. § 921.141, Fla. Stat. (2010). At the time of Wilcox’s trial, Florida’s capital sentencing scheme permitted a jury to return only a recommendation as to penalty and allowed the judge alone to find the statutorily defined facts necessary to impose a death sentence. § 921.141(3). In *Hurst v. Florida*, the Supreme Court struck down Florida’s capital sentencing scheme as violative of the Sixth Amendment right to a jury trial and Fourteenth Amendment Due Process Clause, relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). *Hurst v. Florida* held that a jury must find the additional statutorily defined facts required to render the defendant death eligible. 577 U.S. at 97. These statutorily defined facts include both that “sufficient aggravating circumstances exist” and that “there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” *Id.* at 100. “[A] jury’s mere recommendation is not enough.” *Id.* at 94.

On remand, this Court held in *Hurst v. State*, that, in addition to the Sixth Amendment and due process requirements set forth in *Hurst v. Florida*, the Eighth Amendment requires a unanimous jury to find beyond a reasonable doubt that statutory aggravating circumstances exist, that the aggravating circumstances are sufficient to impose the death penalty, and

that the aggravating circumstances outweigh the mitigating circumstances. 202 So. 3d 40, 53-59 (Fla. 2016). Thereafter, this Court applied *Hurst* error retroactively to cases final after the Supreme Court decided *Ring*. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

The Supreme Court had previously determined in *Ring* that “if a State makes an increase in a defendant’s punishment contingent on the finding of a fact, that fact—*no matter how the State labels it*—must be found by a jury beyond a reasonable doubt,” 536 U.S. at 602 (emphasis added). *Erlinger* clarified that a jury determination is required for “even seemingly straightforward factual questions.” 144 S. Ct. at 1860. *Erlinger* reaffirms the holdings in both *Hurst v. Florida* and *Hurst v. State*: The Sixth Amendment right to a jury trial and the Fourteenth Amendment Due Process Clause require that “virtually ‘any fact’ that ‘increase[s] the prescribed range of penalties to which a criminal defendant is exposed’” must be resolved by a unanimous jury beyond a reasonable doubt. 144 S. Ct. at 1851 (quoting *Apprendi*, 530 U.S. at 490).

Despite the fact that Wilcox’s jury made no specific determinations as to the statutorily defined facts necessary to impose death, including the existence of sufficient aggravation and the insufficiency of mitigation to overcome aggravation, and the fact that his case was final more than a

decade after *Ring*, the postconviction court denied Wilcox *Hurst* relief. The postconviction court relied on *State v. Poole*, wherein this Court receded from *Hurst v. State* and determined that a death sentence could be imposed whenever a jury found one or more statutorily enumerated aggravating circumstances beyond a reasonable doubt either at the guilt or penalty phase. 297 So. 3d at 502-03. *Erlinger* establishes that Wilcox is entitled to *Hurst* relief because *Poole* was wrongly decided and the application of *Poole* to Wilcox left intact a death sentence imposed in violation of the Sixth Amendment and Due Process Clause.

I. ***Erlinger v. United States* shows that Wilcox must be granted *Hurst* relief despite this Court’s decision in *State v. Poole*.**

The *Erlinger* decision conclusively establishes that *Poole* was wrongly decided. In *Erlinger*, the Supreme Court overturned a sentencing court’s factual findings regarding a defendant’s prior felony convictions for purposes of increasing the defendant’s punishment where there existed a question as to whether the convictions qualified to enhance the penalty. 144 S. Ct. 1840. Although the sentencing judge could find the existence of the conviction itself and its underlying elements, the Supreme Court held that a judge can find no more than that without violating the Sixth Amendment. *Id.* at 1854.

Erlinger reaffirms the requirements of *Hurst v. Florida*, where the Supreme Court determined—as a matter of federal constitutional law—that

the facts “that sufficient aggravating circumstances exist” and “that there are insufficient mitigating circumstances to outweigh the aggravating circumstances” are elements of the offense that must be found by a jury. 577 U.S. at 100. *Hurst v. Florida* reasoned that because Florida’s capital sentencing scheme makes specific, enumerated findings prerequisite to death sentences, those findings must be found by a jury. *Id.* at 99-100 (“[T]he Florida sentencing statute does not make a defendant eligible for death until ‘findings *by the court* that such person shall be punished by death.’”) (quoting § 775.082(1), Fla. Stat.).

1. The existence of a concurrent felony does not abrogate the requirement that the jury must make fact findings as to the sufficiency of aggravation as required by *Hurst v. Florida*.

Poole, however, has altogether abandoned *Hurst v. Florida*’s requirement that the jury determine whether “sufficient aggravating circumstances exist.” 577 U.S. at 100. As *Erlinger* establishes, *Poole*’s reliance on the existence of concurrent felonies, without jury findings as to aggravation, is not alone sufficient to impose a death sentence. The lower court’s reliance on Wilcox’s concurrent armed kidnapping and armed robbery convictions to satisfy the “prior or contemporaneous violent felony aggravator” is improper. 2PCR-1907.

Wilcox’s jury was instructed on four aggravators: 1) he was convicted

of a prior felony, during which he must have come into contact with the victim; 2) the crime was committed while Wilcox was engaged in or attempting to commit robbery, kidnapping, or burglary; 3) the “dominant reason” the crime was committed was to avoid a lawful arrest; and 4) the crime was committed in a cold, calculated and premeditated manner (“CCP”). T21-1258-59. The jury was told that if it found beyond a reasonable doubt that an aggravating factor existed, it must also assign weight to the factor. T21-1265. The jury was also instructed on five nonstatutory mitigators.

Wilcox’s jury returned a recommendation for death by only a bare majority vote of 7–5. Although the aggravators on which the jury was instructed require factual determinations and assignments of weight, the jury made no such findings, let alone unanimous findings beyond a reasonable doubt. The trial court imposed a death sentence after the judge alone made the factual findings that all four aggravating circumstances and five non-statutory mitigators exist. R5-867-71. On appeal, this Court struck the “avoid arrest” aggravator leaving three aggravating circumstances at issue.

Because the jury returned only a recommendation for death without specifying its basis or making any findings as to aggravation or mitigation, *Hurst* error is clear. The trial court was not permitted to usurp the role of the jury and make its own findings; the same is true in postconviction.

Poole is further distinguishable from *Wilcox*'s case. The *Poole* jury was instructed on both the contemporaneous felony aggravator and the "in the course of a felony" aggravator. 297 So. 3d at 493. This Court held that because "the jury in *Poole*'s case unanimously found that, during the course of the first-degree murder . . . *Poole* committed the crimes of attempted first-degree murder[,] . . . sexual battery[,] . . . armed burglary, and armed robbery," "this satisfied the requirement that a jury unanimously find an aggravating circumstance beyond a reasonable doubt." *Id.* at 508.

In *Wilcox*, the State was clear that the concurrent felonies were not to be considered in support of the prior or contemporaneous felony aggravator; and in sentencing, the trial court clarified that it was not relying on the convictions for that aggravator.¹ T21-1259; T23-1394. Instead, the State presented the concurrent felonies to support "in the course of a felony" aggravation. Much like in *Erlinger*, the inquiry here did not end with the mere existence of concurrent convictions; the jury was required to consider whether the crime "was committed while [*Wilcox*] was engaged or an accomplice in the commission or attempt to commit the crime of robbery, burglary or kidnapping." T21-1259. The jury made no such finding, yet in

¹ Mr. *Wilcox* respectfully submits that by failing to pursue this argument below, the State has waived the issue for this appeal.

postconviction, the court denied Wilcox's *Hurst* claim.

As reiterated in *Erlinger*, findings of fact necessary to enhance punishment, "even seemingly straightforward factual questions," require a jury determination. 144 S. Ct. at 1860. The postconviction court is not permitted, as it did here, to create its own finding out of whole cloth. The jury was not instructed to consider the convictions for the contemporaneous felony aggravator; yet, the postconviction court determined that the existence of the concurrent felonies alone satisfied the requirements for the contemporaneous aggravator, and therefore, sufficient aggravation existed to overcome *Hurst* error. 2PCR-1907. In doing so, the postconviction court usurped the role of the jury in violation of the Sixth Amendment and wholly ignored the dictates of *Hurst v. Florida*.

In support of the prior or contemporaneous violent felony aggravator, the jury was instructed to consider Wilcox's felony conviction from age 14.² As argued in the initial brief, testimony taken at the postconviction hearing establishes Wilcox was not aware his codefendant intended to rob or harm anyone, he did not plan the robbery, he did not carry a gun, and he did not encourage Duane Smith, his co-defendant. After the crime, Wilcox got out of

² Mr. Wilcox was questioned without an adult and pled nolo contendere in exchange for a 10-year sentence.

the car and grabbed money from the ground. See 2PCR-1315-23. The jury was told that it must find that Wilcox “came into contact” with the victim. T21-1258. The jury made no such finding.

Erlinger’s reasoning informs the analysis here. As the Supreme Court noted, in arguing aggravating factors, “[o]ften, a qualitative assessment about ‘the character and relationship’ of the offenses may be required.” 144 S. Ct. at 1855 (quoting *Wooden v. United States*, 595 U.S. 360, 369 (2022)).

As for the final factor in aggravation, that the crime was “cold, calculated, and premeditated,” the jury received lengthy instructions requiring factual determinations but yet again made no findings.

Without jury findings, and given that 5 jurors voted for life, it is obvious the jury did not find each aggravator unanimously and beyond a reasonable doubt. Additionally, there is no indication the jury considered or weighed the sufficiency of aggravation. Nor is there any way to determine whether the jurors for death considered aggravating circumstances they should not have. Indeed, there is no telling whether the seventh juror would have voted differently without considering the avoid arrest aggravator this Court struck on direct appeal. As clarified in *Erlinger*, reliance on these aggravators without a jury determination as to their existence and sufficiency violates the Sixth Amendment and Due Process Clause.

2. *Poole* further circumvents *Hurst v. Florida* and the Sixth Amendment by permitting judges sitting alone to find that insufficient mitigating circumstances exist to outweigh the aggravating circumstances.

In *Poole*, this Court determined that *Hurst v. Florida* does not control the constitutionality of section 941.121(3)(b) because *Hurst* concerns “eligibility” to receive a death sentence and a judge’s finding under the statute is a “selection finding.” 297 So. 3d at 501, 503. Despite *Hurst v. Florida*’s express language to the contrary, *Poole* found that a “selection finding” is not an element under *Apprendi*, because it is “mostly a question of mercy” that is too “subjective” to “be analogized to an element of a crime.” *Id.* at 503. And further, the *Poole* Court noted, even if the “selection finding” is a fact, it does not “increas[e] the legally authorized range of punishment,” but rather the finding of one or more aggravators does. *Id.* In doing so, the *Poole* Court has rewritten *Hurst* error. As *Erlinger* establishes, *Poole*’s holding is incorrect on each of these points.

i. *Poole*’s eligibility–selection distinction is irreconcilable with *Apprendi* and its progeny.

Relying on Eighth Amendment jurisprudence, *Poole* cites *Tuilaepa v. California*, 512 U.S. 967 (1994), for the general proposition that the Supreme Court’s death penalty cases “address two different aspects of the capital decision making process: the eligibility decision and the selection decision.”

297 So. 3d at 501 (quoting *Tuilaepa*, 512 U.S. at 971). However, *Tuilaepa* is inapposite; the language *Poole* omitted from the quotation reveals why:

our capital punishment cases *under the Eighth Amendment* address two different aspects of the capital decision making process: the eligibility decision and the selection decision.

512 U.S. at 971 (emphasis added) (citing *Coker v. Georgia*, 433 U.S. 584 (1977)). *Tuilaepa*'s citation to *Coker* is telling. *Coker* held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape." 433 U.S. at 592. Thus, the "eligibility" inquiry referenced in *Tuilaepa* determines whether the offense is categorically eligible for a death sentence as a matter of Eighth Amendment law. This explains why *Tuilaepa* addressed only the issue of "whether three of [California's] penalty factors are unconstitutionally vague under . . . the Cruel and Unusual Punishments Clause of the Eighth Amendment . . ." *Tuilaepa*, 512 U.S. at 969-70. *Tuilaepa* is distinguishable on all other relevant grounds. Most notably, the *Tuilaepa* jury made specific findings during the guilt phase as to both the first-degree murder charge and the "special circumstances" which included a separate finding that the "murder [occurred] during the commission of a robbery." *Id.* at 970. At penalty, the jury was further instructed "to consider the relevant sentencing factors" before it returned a unanimous determination for death. *Id.* at 970. Accordingly, *Tuilaepa* raises no relevant Due Process Clause or

Sixth Amendment issue or authority upon which this Court can rely on to limit the impact of *Hurst v. Florida*.

Moreover, the subjectivity of section 921.141(3)(b) does not affect whether it requires findings of fact that implicate *Apprendi*. *Poole* cites another Eighth Amendment case, *Kansas v. Carr*, 577 U.S. 108, 119 (2016), for the proposition that “whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy,” placing section 921.141(3)(b) “in stark contrast to the ‘aggravating-factor determination,’ which is ‘a purely factual determination.’” 297 So. 3d at 503. Similar to *Tuilaepa*, *Carr* contained no holding directly relevant to the Sixth Amendment and Due Process Clause issue here. 577 U.S. at 118-19. As relevant to *Poole*, *Carr* addressed the issue of whether “the Eighth Amendment requires capital-sentencing courts in Kansas ‘to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt.’” *Id.* (internal citation omitted). *Carr* does not imply that a judge, rather than a jury, should decide the “question of mercy.” *Id.* at 115. In fact, in *Carr*, a jury “found unanimously that the State proved the existence of the four aggravating circumstances beyond a reasonable doubt *and that those aggravating circumstances outweighed the mitigating circumstances.*” *Id.* at 115 (emphasis added).

If *Carr* has any relevance at all to Florida's death penalty scheme, it stands for two propositions. First, a jury is capable of performing the section 921.141(3)(b) balancing inquiry regardless of that inquiry's "subjectivity." *Id.* at 115. And second, the question of whether the facts establishing mitigating circumstances exist is separate from whether the mitigating circumstances themselves outweigh the aggravating circumstances, warranting "mercy." *Id.* at 119 ("It *would* be possible . . . to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance, leaving the judgement whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof."). Notably, Wilcox's jury was not given a mercy instruction.

Section 921.141(3)(b) needs to be *affirmatively answered* in the negative before Section 921.141(3) is satisfied such that it "results in findings by the court that such person shall be punished by death." § 775.082(1), Fla. Stat. Section 921.141(3) is, thus, an element. Three implicit factual findings dictate the finding of this element: 1) whether the facts establishing the mitigating circumstances exist; 2) what weight to assign each mitigating circumstance; and 3) whether the mitigating circumstances outweigh the aggravating circumstances. *Poolle* allows a judge to answer all three of these factual questions and find the element in violation of *Apprendi* and its

progeny.

In every application of Section 921.141(3)(b), the judge wields the authority to reject the existence of the facts establishing mitigating circumstances outright, thereby exposing the defendant to a death sentence. Whether the state has proven one aggravator or sixteen, Section 921.141(3)(b) as construed by *Poole* allows a judge to deny that *any* facts establishing mitigation exist. Similar risks apply to the second and third implicit factual findings. Under *Poole*, the judge has the authority to negate the established mitigating circumstances by assigning them no or little weight without the constitutionally prescribed check—*the jury*.

ii. *Erlinger* demonstrates that the *Poole* decision is antithetical to the purpose of the jury right.

Erlinger highlights that this Court's limiting of *Hurst v. Florida* based on the semantic eligibility-selection distinction contradicts the Framers' purpose underlying the jury right. 144 S. Ct. at 1848-51. *Erlinger* traced the Framers' purpose in adopting the Fifth Amendment's Due Process Clause and Sixth Amendment's jury provisions, determining that both work in conjunction as "checks on governmental power [that] the framers appreciated, were 'anchors' essential to prevent a slide back toward regimes like the vice-admiralty courts they so despised." 144 S. Ct. at 1850 (quoting Letter from T. Jefferson to T. Paine (July 11, 1789), reprinted in 15 Papers of Thomas

Jefferson 266, 269 (J. Boyd ed. 1958)). In the Pre-Revolutionary War Era, British imperial authorities thought “colonial juries ‘were not to be trusted’ because they found for defendants too often,” 144 S. Ct. at 1848, so they manipulated jurisdictional rules to “direct[] more and more cases to vice-admiralty courts where crown-appointed judges, rather than local juries, decided the defendant’s fate.” *Id.* (citing *Jones v. United States*, 526 U.S. 227, 245-46 (1999)). In this historical context, the “founders saw representative government *and trial by jury* as ‘the heart and lungs’ of liberty.” *Id.* at 1848 (emphasis added) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)).

Recognizing the jury right as both necessary to securing liberty and historically threatened by seemingly innocuous procedural rules, the Framers sought to codify a jury right immune to threats posed by pretextual procedural manipulations and to modern “sentencing innovations.” *Id.* at 1851; *see, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340, n.3 (1979) (Rehnquist, J., dissenting) (noting extension of imperial vice-admiralty jurisdiction to deprive defendants of jury right); *Apprendi*, 530 U.S. 466. Thus, the Framers adopted the Due Process Clause and the Sixth Amendment, which checked government overreach by “ensur[ing] that a judge’s power to punish would ‘derive wholly’ from, and remain always ‘controlled’ by the jury

and its verdict.” *Erlinger*, 144 S. Ct. at 1849 (quoting *Blakely v. Washington*, 542 U.S. 296, 306 (2004)). Thereby, the Framers secured the jury’s centrality in judicial proceedings as “a fundamental reservation of power in our constitutional structure.” *Blakely*, 542 U.S. at 306; *Erlinger*, 144 S. Ct. at 1850.

From *Apprendi* to *Erlinger*, the Supreme Court has consistently read the Due Process Clause and the Sixth Amendment in light of the Framers’ purpose in adopting them: to protect against the familiar threat “that the jury right could be lost not only by gross denial, but by erosion.” *Apprendi*, 530 U.S. at 483 (quoting *Jones*, 526 U.S. at 247-48). *Apprendi* gave substance to the Framers’ purpose by demanding close scrutiny when faced with a “constitutionally novel and elusive distinction” such as that “between ‘elements’ and ‘sentencing factors.’” 530 U.S. at 494. *Erlinger* connects the Framers’ purpose to the narrative thread running through *Apprendi* and its progeny. Specifically, states and the federal government have “sought to experiment with new trial and sentencing practices. But in case after case, [the Supreme] Court has cautioned that, while some experiments may be tolerable, all must remain within the Fifth and Sixth Amendments’ guardrails.” *Erlinger*, 144 S. Ct at 1850 (citations omitted); see, e.g., *Apprendi*, 530 U.S. at 477 (rejecting “merely using the label ‘sentence enhancement’ to

describe” an element of the offense and avoid jury scrutiny); *Ring*, 536 U.S. at 609 (rejecting labeling elements “aggravating circumstances”); *Blakely*, 542 U.S. at 300, 302 (rejecting “exceptional sentence” based on facts not in guilty plea or jury verdict); *United States v. Booker*, 543 U.S. 220, 236 (2005) (rejecting removal of elements to Federal Sentencing Guidelines to avoid jury); *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (applying *Apprendi* inquiry to “sentencing factor” that increased mandatory minimum); *United States v. Haymond*, 588 U.S. 634 (2019) (plurality opinion) (applying *Apprendi* inquiry to judicial finding that defendant violated supervised release); *Mathis v. United States*, 579 U.S. 500, 505 (2016) (avoiding *Apprendi* issue by limiting judge to “determine what crime, with what elements, the defendant was convicted of”); *United States v. O’Brien*, 560 U.S. 218 (2010) (avoiding *Apprendi*-violative statutory construction); and *Shepard v. United States*, 544 U.S. 13, 25-26 (2005) (same).

Erlinger establishes that *Poole* subverts the Framers’ purpose of “ensur[ing] that a judge’s power to punish would ‘derive wholly’ from, and remain always ‘controlled’ by the jury and its verdict.” 144 S. Ct. at 1849 (quoting *Blakely* 542 U.S. at 306). Florida’s capital sentencing scheme does not expose a capital defendant to a death sentence unless a judge *affirmatively finds* that “there are insufficient mitigating circumstances to

outweigh the aggravating circumstances.” § 921.141(3)(b), Fla. Stat. Because *Poole* permits a judge alone to make that affirmative finding and to make any of the three implicit factual findings such that an affirmative finding under section 921.141(3)(b) is guaranteed, *Poole*’s holding as to section 921.141(3)(b) violates the Sixth Amendment and the Due Process Clause as construed by *Apprendi* and *Erlinger*.

II. The Sixth Amendment, as reiterated in *Erlinger*, requires unanimous jury findings on prerequisite facts to impose death.

As demonstrated throughout Fifth and Sixth Amendment jurisprudence, the Constitution requires “a unanimous jury to find every fact essential to an offender’s punishment.” *Erlinger*, 144 S. Ct. at 1850. *Erlinger* is clear, a defendant is “entitled to have a jury resolve” the relevant inquiries necessary to enhance his sentence “unanimously and beyond a reasonable doubt.” *Id.* at 1852. There can be no debate that the jury in Wilcox’s case failed to return any findings as to either prong of section 921.141(3).

III. In light of *Erlinger*, prejudice is established as to Wilcox’s claim of ineffective assistance of counsel at the penalty phase.

Erlinger impacts this Court’s analysis of Claim I of Wilcox’s Rule 3.851 appeal wherein Wilcox asserts that penalty phase counsel was ineffective for failing to investigate and present mitigation. 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 v. Washington*, 466 U.S. 668, 694 (1984). The postconviction court denied Wilcox’s claim finding “overwhelming evidence of aggravation and minimal evidence of mitigation,” noting that “the jury and trial judge were presented with abundant evidence to support the finding beyond a reasonable doubt of a prior violent felony aggravator and the cold, calculated, and premeditated [sic] aggravator.” 2PCR-1916. This determination is not only irreconcilable with the record, but also contrary to *Hurst v. Florida* and *Erlinger*.

The prejudice analysis requires the Court to consider “the totality of the available mitigation evidence” presented both at trial and in postconviction and “reweig[h] it against the evidence in aggravation. *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)) (alteration in original). In light of *Erlinger*, the Court is left with no aggravation and a wealth of mitigation not previously presented. Prejudice is clear; therefore, Wilcox is entitled to relief.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Wilcox respectfully urges this Court to reverse the lower court and grant *Hurst* relief and/or a new penalty phase proceeding due to ineffective assistance of counsel.

Respectfully submitted,

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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 6th day of September 2024.

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CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Initial Brief is produced in Arial 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.210. Counsel further certifies that this brief is not more than 20 pages.

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