

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 REPLY BRIEF OF APPELLANT

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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.

The State’s Answer Brief is referred to as “AB” and the State’s Supplemental Answer is referred to as “Supp. AB”

ARGUMENT IN REPLY

REPLY TO ARGUMENT I

- a) ***Erlinger v. United States* informs Wilcox’s claim of *Hurst* Error because *Hurst v. Florida* Applies Retroactively to Wilcox Under this Court’s Decision in *Mosely v. State*.**

The State argues that *Erlinger v. United States*, 602 U.S. 821 (2024), has no bearing on Wilcox’s claim of *Hurst* error because *Hurst v. Florida*, 577 U.S. 92, does not apply retroactively to Wilcox. Supp. AB-7. The State derives this proposition from *State v. Poole*, 297 So. 3d 487 (Fla. 2020). However, the State fundamentally misunderstands this Court’s holding in *Poole* — it did not, as the State argues, alter *Hurst v. Florida*’s retroactive application.

In *Mosely v. State*, 209 So. 3d 1248, this Court held that *Hurst* error, as established in *Hurst v. Florida* and *Hurst v. State*, applied retroactively on collateral review to cases that became final after the U.S. Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). This Court determined that *Hurst v. Florida* “applied the exact reasoning of *Ring* to Florida’s death penalty sentencing scheme.” *Mosely*, 209 So. 3d at 1273. As such, Florida’s death penalty sentencing scheme “was actually rendered unconstitutional by *Ring*,” *Id.* at 1283, and “the machinery of post-conviction

relief [was] necessary to avoid individual instances of obvious injustice.” *Id.* at 1275 (quoting *Witt v. State*, 387 So. 2d 922 (Fla. 1980)).

In *Poole*, this Court receded from its decision in *Hurst v. State* “except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt.” 297 So. 3d at 507. *Poole* did not address the retroactivity *Hurst* or overturn *Mosley*. See *Id.* Indeed, this Court recently reaffirmed the retroactivity of *Hurst v. Florida* and *Hurst v. State*, reasoning that the *Hurst* decisions “are in some sense procedural . . . they are of substantive character, too, for they speak to the defendant’s right to a unanimous determination of facts on which turn his or her eligibility for a sentence of death.” *Dettle v. State*, SC22-0417, *13 (Fla. Oct. 24, 2024).

Hurst v. Florida applies retroactively to Wilcox.

b) The State Relies on an Unreasonably Narrow Reading of *Apprendi* and its Progeny.

The State argues *Erlinger* neither applies to Wilcox nor establishes *Poole* was wrongly decided. The State’s argument rests on the premise that “*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.” Supp. AB-3.

Insofar as it relates to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the State's argument is patently incorrect. *Apprendi* was not so constrained; it was not even a capital case. See *Id.* at 469-70. Rather, the Supreme Court has applied *Apprendi*'s operative rule in myriad contexts. See e.g., *Ring*, 536 U.S. 584 (capital sentencing); *Blakely v. Washington*, 542 U.S. 296 (2004) (sentencing pursuant to plea bargain); *United States v. Booker*, 543 U.S. 220 (2005) (sentencing guidelines); *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fines); *Alleyne v. United States*, 570 U.S. 99 (2013) (mandatory minimums); *Hurst v. Florida*, 577 U.S. 92 (capital sentencing); *United States v. Haymond*, 588 U.S. 634 (2019) (mandatory minimum for violation of supervised release); *Erlinger*, 602 U.S. 821 (mandatory minimum predicated on facts of prior offense).

Contrary to the State's argument, the Supreme Court has expanded *Apprendi* and *Ring*, not limited them to their facts. Accord *Erlinger*, 602 U.S. at 833 (noting *Apprendi*'s inquiry is "a principal we have since reiterated in response to a variety of other recent sentencing innovations"); see *Alleyne*, 570 U.S. at 103 (overruling *Harris v. United States*, 536 U.S. 545 (2002), as inconsistent with *Apprendi* because "*Harris* drew a

distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum").

Insofar as the State attempts to delimit *Apprendi* and *Ring*, it ignores "the dispositive question," which is not whether a fact is labeled aggravating or mitigating, but rather, whether the fact's existence authorizes an increased punishment. See *Ring*, 536 U.S. at 602. Florida's capital sentencing statute requires findings "that sufficient aggravating circumstances exist as enumerated in subsection (5), and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances" before a death sentence can be imposed. § 921.141(3)(a)-(b), Fla. Stat. (2010) (emphasis added). Regardless of their label, each of these facts "is an 'element' that must be submitted to a jury." See *Hurst v. Florida*, 577 U.S. at 97 (quoting *Apprendi*, 530 U.S. at 494).

In his supplemental initial brief, Wilcox argued *Poole's* semantic distinction between "eligibility" and "selection" findings cannot limit *Apprendi's* operative rule. In response, the State offers yet another semantic distinction, this time, between aggravating and mitigating circumstances.¹ Supp. AB-3. Without any "basis in principle or logic," this

¹ The State claims, "*Ring* reiterated the distinction between facts of mitigation versus aggravation." Supp. AB-3. Granted, *Ring* acknowledged such a distinction, but in the context of defining the scope of *Ring's*

distinction cannot exempt the mitigation finding from *Apprendi*'s operative rule either. See *Alleyne*, 570 U.S. at 116.

The Framers enacted the Due Process Clause and the Sixth Amendment to prevent erosion of the right to trial by jury through semantic distinctions and unprincipled technicalities. See *Erlinger*, 602 U.S. at 829-32. From *Apprendi* to *Erlinger*, the Supreme Court has guarded the Framers' intent by rooting out and rejecting semantic distinctions that erode the jury right. Nevertheless, the State suggests that the content and efficacy of the jury right rest on little more than semantics. This approach would undermine the Due Process Clause and Sixth Amendment interest at the core of *Apprendi*—"to ensure that a judge's power to punish would 'derive wholly' from, and remain always 'controlled' by, the jury and its verdict." *Erlinger*, 602 U.S. at 831 (quoting *Blakely*, 542 U.S. at 306).

argument. *Ring*, 536 U.S. at 597 n.4 (citing *Apprendi*, 530 U.S. at 490-91 n.16). In determining the significance of this distinction, *Ring*'s citation to *Apprendi* is instructive. See *Id.* *Apprendi* distinguished aggravating and mitigating facts insofar as the latter operated *within the authorized sentencing range*. 530 U.S. at 490-91 n.16. Where, as here, the existence or nonexistence of mitigating facts *alters the authorized sentencing range*, this distinction cannot defeat *Apprendi*'s operative rule. See *Alleyne*, 570 U.S. at 116.

c) The State’s Reliance on McKinney is Misplaced Because *McKinney* Pertains Only to Appellate Reweighing. McKinney Has No Bearing on the Violations of *Apprendi*, *Ring*, and *Hurst* that Render Wilcox’s Death Sentence Unconstitutional.

The State attempts to limit the impact of *Hurst v. Florida* by asserting that *McKinney v. Arizona*, 589 U.S. 139 (2020), “specifically rejected the defendant’s argument that [the Supreme Court’s] holding in *Hurst* required a jury to *reweigh* aggravating and mitigating circumstances.” Supp. AB-6 (emphasis added). However, *Apprendi*, *Ring*, *Hurst*, *Erlinger*, and Wilcox’s claim all involve unconstitutional sentencing proceedings conducted in the first instance by trial courts, not reweighing by appellate courts.

Accordingly, *McKinney* is inapposite.

McKinney decided the explicitly narrow issue of whether “after the Ninth Circuit identified an *Eddings*² error, the Arizona Supreme Court could not itself *reweigh* the aggravating and mitigating circumstances.” 589 U.S. at 142 (emphasis added). In 1992, an Arizona jury had convicted McKinney on two counts of first-degree murder. *Id.* at 141. The trial judge found two aggravating circumstances for each murder, weighed them against the mitigating circumstances, and sentenced McKinney to death. *Id.* The Arizona Supreme Court affirmed his convictions and sentences on direct

² *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

appeal in 1996, six years before *Ring*. *Id.* However, 20 years later the United States Court of Appeals for the Ninth Circuit found, "the Arizona courts had failed to properly consider McKinney's posttraumatic stress disorder [] and had thereby run afoul of [the Supreme] Court's decision in [*Eddings*]." *Id.* at 142.

On remand, McKinney returned to the Arizona Supreme Court where he "argued that he was entitled to resentencing by a jury." *Id.* at 142. Rejecting this argument and reweighing the circumstances itself pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1990), the Arizona Supreme Court, once again, upheld McKinney's death sentence. 589 U.S. at 142.

The Supreme Court granted certiorari and held, "state appellate courts may conduct a *Clemons* reweighing of aggravating and mitigating circumstances, and may do so in collateral proceedings as appropriate and provided under state law." *Id.* at 147. In declining to overrule *Clemons*,³ the Supreme Court said, "in a capital 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

³ At trial, Mr. Clemons's jury made the requisite aggravation and mitigation findings necessary to impose death. *Clemons*, 494 U.S. at 743. Wilcox's jury did not make *any* findings.

sentencing decision within the relevant sentencing range.” *Id.* at 145. The State takes this quotation out of context.

The quoted language references a tangential Eighth Amendment issue, namely, whether the Constitution requires states to precondition death sentences on the weighing of aggravating and mitigating circumstances. See *Ring*, 536 U.S. at 606-07 (distinguishing between narrowing elements required by Eighth Amendment and Sixth Amendment protections applied thereto); *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004), 354 . In contrast, *Ring* and *Hurst* addressed whether *the state legislature* made the existence of a fact essential to the death penalty. *Hurst*, 577 U.S. at 99 (quoting *Ring*, 536 U.S. at 592) (“Under state law, ‘Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made.’”); *Summerlin*, 542 U.S. at 354.

As Justice Scalia noted in *Summerlin*, the Supreme "Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty.” 542 U.S. at 354. It follows that neither *Ring* nor *Hurst* exceeded their scope by categorically mandating that a jury weigh aggravating and mitigating circumstances.

Thus, the argument that “*Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances,” 589 U.S. at 145, is not accurate.

Hurst found, as a matter of federal constitutional law, that Florida preconditioned death sentences on the facts “that sufficient aggravating circumstances exist” and “that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” *Hurst*, 577 U.S. at 100. Because Florida law made *both* facts essential to Wilcox’s death sentence, *both* needed to be found by a jury. *Id.* Instead, a judge usurped the jury’s role. *McKinney* does not cure this constitutional defect. This Court should grant relief.

d) *Erlinger* Applies Retroactively to Wilcox and Shows that *State v. Poole* was Wrongly Decided.

The State argues that *Erlinger* does not apply to Wilcox because the opinion “announced no new law or rules.” Supp. AB-7. The parties agree that *Erlinger* announced no new rule. *Erlinger*, like *Ring*, applied *Apprendi*. 602 U.S. at 835 (noting “this case is as nearly on all fours with *Apprendi* and *Alleyne* as any we might imagine”). Thus, *Erlinger* applied long-standing constitutional principles. However, contrary to the State's

argument, this means that *Erlinger* applies to Wilcox.⁴ *Cf. Witt*, 387 So. 2d at 924 (addressing the retroactive application of changes in decisional law); *see also Teague v. Lane*, 489 U.S. 288 (1989) (applying retroactivity analysis to cases that announce a "new rule").

The State offers little substantive rebuttal of Wilcox's *Erlinger* argument. Instead, the State relies on the conclusory assertion that *Erlinger* had nothing "to do with the holding in *Hurst*." Supp. AB-7. This assertion is erroneous.

Erlinger expressly grounded itself in the *Apprendi* line of cases, including *Hurst v. Florida* and *Ring*. 602 U.S. at 833-34. *Erlinger* noted, "the principles *Apprendi* and *Alleyne* discussed are so firmly entrenched that we have now overruled several decisions inconsistent with them. *See, e.g., Hurst v. Florida* (overruling *Hildwin v. Florida* and *Spaziano v. Florida*); *Alleyne* (overruling *Harris v. United States*); *Ring v. Arizona* (overruling *Walton v. Arizona*)." 602 U.S. at 833-34 (internal citations omitted). Thus,

⁴ The State argues that "the rules announced in *Apprendi* and *Ring* do not apply retroactively," and therefore, *Hurst v. Florida* is not retroactive. Suppl. Answer, 7-8. As this Court held in *Mosley v. State* and reiterated in *Dettle v. State*, *Hurst v. Florida* is retroactive in Florida to "postconviction defendants whose sentences of death became final after the U.S. Supreme Court's decision in *Ring v. Arizona*." *Dettle*, SC22-0417, *4.

Erlinger's analysis of the historical content and operation of those principles informs the proper application of *Hurst* and *Ring*. *See Id.*

What is more, *Erlinger* clarified that the *Almendarez-Torres*⁵ exception allows a judge who is imposing a heightened sentence predicated on a prior conviction to "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." 602 U.S. at 838 (quoting *Mathis v. United States*, 579 U.S. 500, 511-12 (2016)). The prior or contemporaneous felony aggravator that was applied to Wilcox required both a showing that his prior felony "involve[ed] the use or threat of violence to the person," § 921.141(5)(b), Fla. Stat. (2010), and involved direct contact between Wilcox and the victim. *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998).

Poole cannot eliminate the constitutional defects in Wilcox's sentence by retroactively revising the elements that were, in fact, essential to his death sentence. Such an approach would raise grave constitutional issues by allowing the *post-hoc* nullification of controlling Supreme Court precedent. *Cf. NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 243 (1959) (holding state supreme court "[was] foreclosed from re-examining the grounds for [the Supreme Court's] disposition" by rejecting previously

⁵ *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

accepted premise upon which Supreme Court's decision rested); *Tyler v. Magwire*, 84 U.S. 253, 282-83 (1872) (noting that "[subordinate courts] have no power either to evade or reverse the judgement of [the Supreme Court] . . . as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect"); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

Erlinger is a straightforward application of *Apprendi* that applies to Wilcox. See *Erlinger*, 602 U.S. at 835. *Erlinger* clarifies that *Poole* relied upon an impermissibly narrow reading of *Hurst v. Florida* and replicated the precise constitutional defect at the core of every *Apprendi* case—a semantic "sentencing innovation" that "improperly invaded the jury's province." 602 at 833. "Judges may not assume the jury's factfinding function for themselves." *Id.* at 834.

This Court should grant relief.

REPLY TO ARGUMENT II

Because the State merged Wilcox's Arguments I and II in its Supplemental Answer, Wilcox relies on the arguments in his Supplemental Initial Brief and Reply to Argument I *supra*.

REPLY TO ARGUMENT III

The State's argument merged Wilcox's Argument III with his Arguments I and II. Thus, Wilcox relies on his Reply to Argument I *supra* and Arguments I and III in his Supplemental Initial Brief.

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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing supplemental reply 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 November, 2024.

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CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this supplemental reply 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 15 pages.

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