IN THE SUPREME COURT OF FLORIDA

JERRY MICHAEL WICKHAM, Appellant, v. THE STATE OF FLORIDA, Appellee.	:: :: :: :: :	CASE NO. SC05-1012

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS[1]

On March 5, 1986, Morris Fleming stopped on the side of the road in northern Florida and was shot to death by Jerry Wickham. Wickham was part of a group consisting of his wife Sylvia, her sons Jimmy, Mark and Matthew, Jimmy's girlfriend, Tammy Jordan, and her newborn baby, and Larry Schrader, driving back to Tampa in two cars from Gaylesville, Alabama. (R 1077, 1186-87.) The group members, who had consumed large quantities of alcohol and drugs, made a detour through Pensacola, for reasons that are not absolutely clear, and eventually found themselves on I-10. (R 1078.) The party stopped at a rest stop near Tallahassee, only to discover that they had no money, and that they were also low on gas. (R 1078, 1081.) After entertaining the idea of asking for help at a church, they decided that they would rob someone. (R 1078-79, 1381.)

From I-10, the group took Highway 319 and headed north (again, for reasons that are not entirely clear) towards Thomasville (R 1079), stopping just south of the Florida-Georgia border (R 984).

After members of the group parked the cars about a half-mile apart (R 1233), Wickham, Schrader, and Jimmy Jordan went into the woods, each carrying a firearm. (R 1081.) Tammy Jordan stood alongside one of the cars and, feigning a car problem, flagged down Fleming. (R 1195-97.) Fleming looked at the engine of Tammy Jordan's car and said he did not see anything wrong with it. (R 1197.) Wickham then came out of the woods, and Fleming started walking back to his car. (R 1197.) Without uttering a

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[1] Citations will be designated as follows:
"R" followed by the page number (record from Wickham's trial);
"PC-R" followed by the page number (post-conviction record on appeal).

word, Wickham took out his gun and shot Fleming in the back and in the shoulder area. (R 1086, 1199.) Wickham then shot Fleming in the head twice, killing him instantly. (R 979, 1199.) He looked through Fleming's pockets for money, finding only four dollars. (R 1087-88.) He did not look in Fleming's wallet or his truck. (R 1113, 1177.) The group drove to a gas station to buy gas, and drove back to the murder scene to retrieve the other car. (R 1200-03.) They put gas in the other car and drove away. (R 1204.)

The crime remained unsolved until September 1987, when an investigator with the Marion County Sheriff's office questioned Schrader about an unrelated burglary. (R 1060.) During the questioning, Schrader gave a statement about the killing in Leon County. (R 1064.) The investigator contacted the Leon County Sheriff's office, and Wickham and the others involved in the killing were arrested.

An indictment filed in the Circuit Court for Leon County on October 22, 1987 charged Wickham and co-defendants Sylvia Wickham, Larry Schrader, Tammy Jordan, and Jimmy Jordan with one count of first-degree murder and one count of armed robbery. (R 1.) The indictment also charged Wickham with one count of possession of a firearm by a convicted felon. (R 1-2.) The charges against Wickham's co-defendants were reduced to second-degree murder after they agreed to cooperate with the State.

PROCEDURAL HISTORY

A. Trial

After three other counsel resigned because they were unable to get Wickham to cooperate with them, Philip Padovano, a private lawyer paid for by the State, took over Wickham's representation. He represented Wickham in his criminal trial before the Honorable Charles McClure in the Circuit Court of the Second Judicial Circuit in Florida from November 28 through December 8, 1988.

At trial, Padovano argued that Wickham was not guilty by reason of insanity, and presented the testimony of Dr. Joyce Carbonell. Dr. Carbonell testified about Wickham's history of psychological problems, including periods of commitment to psychiatric hospitals during his youth. Her testimony established that Wickham, born in 1945, lived at home for ten years, during which he was beaten by his alcoholic mother and father. (R 1490-91.) In 1957, a Michigan court ordered Wickham committed to a psychiatric hospital because he was a childhood schizophrenic with convulsive tendencies. (R 1493, PC-R 364.)

Available evidence not presented at trial shows that Wickham spent twelve years in Northville State Hospital ("Northville") and Ionia State Hospital ("Ionia"). (PC-R 364.) At certain points during his hospitalization, he was given tranquilizing drugs or Thorazine, and was ultimately placed in a closed children's ward. (PC-R 375-76, 386.) While he was in Northville, Wickham was diagnosed as a schizophrenic, and over time it was determined that he had a "poor prognosis." (PC-R 392.) In 1964, Wickham was transferred to Ionia, (PC-R 392).

In 1966, Wickham was readmitted to Northville, and put in a closed ward, his prognosis gauged at fair to poor. (PC-R 393.) On February 14, 1968, Wickham was discharged from Northville. (PC-R 364.) There is no indication as to why he was discharged.

The State presented evidence that in September of 1968, Wickham kidnapped a cab driver, shot him three times, and robbed him. (R 1928-31.) Wickham was caught, and in 1969 pleaded guilty to armed robbery, resulting in 14 years of imprisonment.

The State also presented evidence that on April 19, 1983, Wickham stole a car in Colorado, and led the police on a high-speed chase, during which he collided multiple times with a police car and a truck. (R 1950-56.) Wickham was convicted of first-degree aggravated motor vehicle theft and sentenced to prison. (R 1963-64.) He was paroled on April 9, 1985. In August of that year a warrant was issued for his arrest after he violated the terms of his parole. (PC-R 1964.)

At the conclusion of his capital trial, in December 7, 1988, Wickham was convicted of first-degree murder and armed robbery.

B. Sentencing

The day after the verdict, the Court proceeded to a brief penalty phase. After the closing statements, the judge instructed the jury to weigh the aggravating and the mitigating factors and to render an advisory sentence. By a vote of 11 to 1, the jury recommended that Wickham receive the death sentence. Padovano waived the statutory requirement for written sentencing findings, and the Court sentenced Wickham immediately to death without identifying aggravating or mitigating factors. (PC-R 2045, 2047.) On December 19, 1988, the Court adopted the State's memorandum as its

sentencing order. The order listed six aggravating factors, including that (i) Wickham committed the felony "for the purpose of avoiding or preventing a lawful arrest," (ii) in a "cold, calculated and premeditated manner," and (iii) the felony was "especially heinous, atrocious, or cruel." (R 248-49.) The Court found no mitigating factors. (R 252.)

C. Direct Appeal

A divided Florida Supreme Court affirmed. As part of its December 12, 1991 ruling, the Florida Supreme Court ruled that the trial court erred in finding that the murder was "heinous, atrocious, or cruel." *Wickham v. State*, 593 So. 2d 191, 193 (Fla. 1991). Additionally, the Florida Supreme Court ruled that the trial court erred in failing to find and weigh any mitigating circumstances. Ultimately, however, the Court found the error "harmless beyond a reasonable doubt." *Id.* at 194.

D. State Post-Conviction Proceedings

On May 19, 1995, Wickham filed a motion pursuant to Rule 3.850 for post-conviction relief with the Florida Circuit Court, which included a claim that the State had not provided Wickham with crucial public records. On December 18, 1995, Judge J. Lewis Hall, Jr. ordered the State to produce all records from Wickham's pretrial detention and granted Wickham 90 days from the State's compliance to amend and re-file his motion. The State produced copies of some documents only on May 16, 2001. At the May 21, 2001 status hearing the Circuit Court granted Wickham permission to move for a public record hearing. On October 4, 2001, the Circuit Court held an evidentiary hearing on the missing records issue. On August 1, 2002, the Circuit court denied Wickham's motion for retrial on this issue, and later denied Wickham's motion to reconsider.

Also on May 19, 1995, Wickham filed a motion to disqualify Judge McClure and all other Second Judicial Circuit judges from presiding over his post-conviction relief motion on grounds that Padovano had since been elected to the position of Chief Judge of the Second Circuit. Wickham requested that his post-conviction relief motion be heard by a de facto circuit judge appointed by the Chief Justice of the Florida Supreme Court.

Two members of the Second Judicial Circuit subsequently recused themselves from Wickham's case: Judge Janet E. Ferris, Judge Padovano's wife, and Senior Circuit Judge J. Lewis Hall, Jr. On October 2, 2001, Judge Charles A. Francis, the Second Judicial Circuit judge who was then presiding over the case, dismissed Wickham's May 19, 1995 motion for disqualification of judges of the Second Judicial Circuit, as well as filed a motion for rehearing. The case was eventually assigned to the Honorable Kathleen Dekker.

On November 17, 2003, Judge Dekker held a hearing pursuant to *Huff v. State of Florida*, 622 So. 2d 982 (1993), to determine which of the 21 claims from Wickham's post-conviction relief motion merited an evidentiary hearing. In an order dated January 30, 2004, Judge Dekker granted an evidentiary hearing with respect to claims 6 (ineffective assistance of counsel ("IAC")), 8 (newly discovered evidence), and 10 (improper arguments by the prosecutor), summarily denied in part and granted an evidentiary hearing in part with respect to claims 2 (incompetence to stand trial and related due process and IAC claims), 7 (some IAC claims), 9 (State's failure to turn over exculpatory information), and 21 (additional IAC claims), and summarily denied the remaining claims, including Wickham's request to disqualify all judges in the Second Judicial Circuit.

Between June 2 and June 7, 2004, Judge Dekker held four days of hearings on claims 6, 8, and 10 of Wickham's post-conviction relief motion.

Padovano's Testimony. During the post-conviction evidentiary hearing, Judge Dekker heard testimony from Wickham's trial counsel, Padovano. Padovano acknowledged that after being appointed by Judge McClure to be Wickham's defense counsel on or about April 21, 1988, he announced his candidacy for Circuit Court judge on July 22, 1988. (PC-R 3325). He confirmed that he recorded 187 hours of working on the case on his time sheets (PC-R 3325), including approximately 100 hours preparing for Wickham's trial (PC-R 3319), and 87 hours during trial (PC-R 4398). As Padovano's record show, in April 1988 he spent 5.2 hours on the case, in May he worked for 18.1 hours, in June 3.7 hours, in July 3.6 hours, in August 2 hours, and in September 0.3 hours. (PC-R 3329-30; R 242-44.) Padovano stated that part of the reason for the distinct decrease in the amount of time he spent on Wickham's case was due to the fact that he was running for election. (PC-R 3330.)

Padovano acknowledged that he reviewed a mental health family background mitigation defense checklist that included principal witnesses in the case, but that he only spoke to one of them. (PC-R 3346.) He acknowledged that he did not interview principal witnesses in his case, and relied on his investigators (PC-R 3352), who, in turn, spent a total equal to three work days on the case (PC-R 3354), conducting interviews of witnesses exclusively by phone. (PC-R 3361.)

Padovano stated that although he knew that Wickham was diagnosed as a childhood schizophrenic, had a low intelligence quotient, and very possibly had some form of an

organic brain dysfunction (PC-R 3367), he did not reach out to a psychiatrist, neuropsychiatrist, or child development expert (PC-R 3360).

The defense also presented, the following expert testimony, testimony from several qualified experts:

Dr. William Riebsame testified that Wickham had a "neuropsychological impairment" (PC-R 3599) with "severe impairment in terms of difficulty with planning, foresight, impulsivity." (PC-R 3596.)

Dr. Wilfred Van Gorp testified that Wickham was impaired in the front left temporal lobe of his brain (PC-R 3672, 3676, 3690-91), and that this impairment affected Wickham's ability to deliberate and anticipate consequences, especially when the effects of the illnesses were enhanced by alcohol (PC-R 3689-90, 3694-95): "[t]he frontal lobes organize the world for us. We organize things we see and encode them. That is how we make things meaningful in our minds. [Wickham] is not doing that." (PC-R 3678.) He further testified that the pre-trial psychological testing was inadequate to determine the extent of Wickham's brain damage. (PC-R 3766-67.) As to Wickham's competency, Van Gorp concluded that "there were enough red flags that [a competency hearing] definitely should have been put in motion to see what the outcome would have been." (PC-R 3704.)

Dr. Mark J. Mills testified that Wickham has an organic encephalopathy of unknown ideology, whereby Wickham's frontal lobes are "seriously malfunctioning" (PC-R 3735), with evidence of diffuse cortical dysfunction, a history of temporal lobe epilepsy that was not adequately documented nor adequately evaluated, and a history of significant substance abuse, including years of treatment with anti-convulsive medication (PC-R

3735, 3742). In terms of Wickham's temporal lobe epilepsy, Mills testified that Wickham would have "absence attacks" that lasted from a couple of seconds to a couple of minutes, and these could lead to acting in a way "that is pointless and seems totally internally preoccupied, autistic." (PC-R 3743.) Mills found that "in the aggregate there [were] lots and lots of reasons to question [Wickham's] competency at the time." (PC-R 3756.)

Several family members – none of whom had been interviewed by Padovano prior to trial – also testified.

Sylvia Mae Roberts (formerly Wickham), Wickham's former wife, testified that she had not been approached regarding Wickham's mental state around the time of the trial even though she would have told Padovano about Wickham's substance abuse and his occasional going off by himself and inability to recognize her, which happened two to three times a week. (PC-R 3941-47.)

Alice Wickham Bird, Wickham's older sister, testified about Wickham's horrible abuse throughout his childhood. She described Wickham's father, a chronic alcoholic, as sexually abusive towards his children. (PC-R 3964.) Wickham's father used to hit Wickham "with anything he could pick up; a board, a rock, his belt, the belt buckle, anything he could reach." (PC-R 3964.) She testified that Wickham's stepfather's family would also hit Wickham "every time they got a chance." (PC-R 3965.) Bird testified about Wickham's institutionalization at the age of ten in Northville, an institution that was eventually shut down for its cruelty, and that Wickham often appeared during visitation "all black and blue and in a straitjacket." (PC-R 3968.)

Marguerite Ann Lavalley, Wickham's older sister, testified that Wickham's mother also contributed to his tormented childhood. Lavalley cited one instance when his mother "hit him in the back of the head with a hammer." (PC-R 3997.) Regarding Jerry's time in psychiatric care, Lavalley testified that when he wasn't "spaced out and all spelled up from the medications," Wickham would behave "like a ten-year-old child." (PC-R 3999-4000.) Lavalley testified that she was never contacted by any of Wickham's attorneys prior to the trial. When she met Padovano for the first time in court, "he didn't give . . . time to say anything." (PC-R 4002.)

Gary Edway Welch, Wickham's second cousin, testified that in mapping the family genealogy, he discovered several incidents of epilepsy from speaking to family members. (PC-R 4013.) He also testified that not only had he never spoken to any investigators on Wickham's defense team, but that he had "never heard of" Padovano. (PC-R 4014.)

Donald Edway Welch, Wickham's first cousin, testified that he personally witnessed Wickham endure physical abuse from his mother and step-father. (PC-R 4017.) Welch testified that he was never contacted by Wickham's attorney. (PC-R 4016.)

Based on Wickham's behavior at the hearing and on expert testimony, the State asked for a competency hearing, which the Court denied. (*See* PC-R 3623-24, 3795-98.)

On January 13, 2005, Judge Dekker issued a written decision denying all counts of Wickham's post-conviction relief motion.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial

court's findings of fact. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999); *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001).

SUMMARY OF THE ARGUMENT

During his trial, Wickham had the benefit of a talented and qualified trial lawyer – Philip J. Padovano, now a Judge on the First Circuit Court of Appeal. However, Wickham did not receive a fair trial. Because his counsel was campaigning for, and then elected to, the position of a Circuit Court judge, counsel's attention and efforts were elsewhere prior and during Wickham's trial. Padovano's lack of attention and preparation caused him to spend far less than the bare minimum amount of time on the case. He never interviewed any of the fact or mitigation witnesses. He engaged only one psychologist with no medical training or expertise, where there was an obvious need for medical experts. Until a week before trial, when the State deposed the defense's psychologist, Dr. Carbonell, Padovano met with her only a couple of times, briefly, in his office parking lot. Despite numerous signs that Wickham was not competent to stand trial, Padovano never requested a competency hearing.

Counsel's lack of preparation had devastating effects: First and foremost, no competency hearing was held despite numerous warning signs. At trial, the judge and jury had only a cursory understanding of Wickham's circumstances – they heard that he was mentally ill and possibly brain-damaged, but were not given the tools to appreciate the history of mental illness for which Wickham was committed to a mental institution from the time he was 10 until he was 20 years old. They were never given the tools to appreciate the implications and severity of Wickham's brain damage, and never learned he was epileptic. They never learned Wickham was sexually abused by his father, who

abused both him and his sisters. Ultimately, trial counsel's ineffective representation allowed the State to portray a deeply disturbed, brain damaged, epileptic individual, as a casual and calculated murderer undeserving of even a sliver of compassion. Padovano also did not object to clear errors in the jury charge, which caused the judge and jury to consider aggravators that were incorrect and unconstitutionally vague.

In addition, the State put tremendous pressure on Wickham's co-defendants and cellmates to come up with testimony that would seal Wickham's death sentence. At trial, Wickham faced false testimony that portrayed him as the mastermind of an attempt to escape prison, and as having planned all along to eliminate the witness to the robbery. Wickham's trial counsel intuited some of these falsities, but did little to counteract them at trial, and many of them went undetected until those witnesses confessed, in affidavits and testimony at the 3.850 hearing, that their trial testimony was false or misleading. Because of his grievous mental condition, Wickham, who "decompensated" during trial, was unable to assist his attorney in detecting and responding to the false testimonies lodged against him.

Due to the ineffectiveness of his counsel, to Wickham's incompetence and inability to participate in his own defense, to the State's willingness to elicit false testimony from co-defendants and cellmates and to withhold exculpatory evidence from the defense, Wickham did not get a fair trial. His conviction and sentence should be vacated and he should get a new trial, preceded by a competency hearing. At the very least his death sentence should be vacated and he should be re-sentenced based on the correct and full mitigating and aggravating circumstances.

ARGUMENT

I. THE CIRCUIT COURT'S DENIAL OF WICKHAM'S MOTIONS TO DISQUALIFY CONSTITUTES REVERSIBLE ERROR

Wickham's post-conviction motion demonstrated (a) that his trial counsel, (now Judge) Padovano, was ineffective; and (b) that the prosecutor, (now Judge) Hankinson, put on testimony he knew to be misleading, and withheld important information from the defense. Immediately after Wickham's trial, Padovano was appointed to Florida's Second Judicial Circuit, where he became Chief Judge in 1993. Hankinson joined him on the bench of the Second Judicial Circuit, as did Padovano's wife, Judge Ferris. Padovano has served since 1996 on the First District Court of Appeals, where he hears appeals from the Second Judicial Circuit, including from the decisions of Judge Dekker. Judge Hankinson and Judge Ferris serve on the Second Judicial Circuit to this day.

A. The Circuit Court Judge Was Required To Determine The Credibility of Two Judicial Colleagues

1. Padovano's Credibility In Connection With Wickham's Competency

Although Judge Dekker's opinion depended in many unacknowledged respects on her unquestioning acceptance of Padovano's testimony, her implicit – but crucial – reliance on it was most obvious with respect to the issue that went to the core of Wickham's motion: whether he was competent to stand trial. A post-hearing evaluation of this issue should have included an analysis of two contrasting versions as to whether Padovano was aware of cognitive or other difficulties that impaired Wickham's ability to communicate:

In 1995, Padovano was interviewed by two attorneys then representing Wickham as they prepared to file his Rule 3.850 motion. Both took independent notes of the

interview; one of them (Ann Jacobs) testified at the 3.850 hearing. According to Jacobs's notes, Padovano in the interview said the following of Wickham's behavior during trial:

- "P said JW was totally unmanageable and that McClure's getting a personal waiver from JW was absurd: JW is barely functioning and the Judge is asking waiver questions." (PC-R 6826.)

- "JW was totally stressed at the time of trial." (PC-R 6826.)

- "[Wickham is] the kind of person who's marginally able to function to begin with, and the stress of the trial destroyed what little social ability he may have had to control himself." (PC-R 6826.)

- "[Wickham] was just like a little kid. He had the mentality of a little kid. He showed childish behavior. He would refuse to come out for trial, just like a kid would refuse to come out of his room." (PC-R 6826.)

- "There were times in the trial where P couldn't talk to JW." (PC-R 6826.)

- "JW decompensated a lot during trial. He wasn't someone who could help himself in his defense. He had almost 'zero' ability to help with his defense." (PC-R 6826.)

Ann Jacobs' observations are corroborated by the handwritten notes of attorney Bonny Forrest from the same meeting (PC-R 3798):

- "totally unmanageable. One thing judge McClure seemed to say that he was going to get a personal waiver—absurdity of it all—judge is asking him if he understands—very . . . ." [remainder cut off] (PC-R 6833.)

- "doesn't have ability to control his behavior" (PC-R 6839.)

- "coming out –> Jerry was stressed. Marginally able to function. Little social ability was gone" (PC-R 6837.)

- "he was –> unable to talk—he confided in me 'different' during the trial –> like a 'puppy'" (PC-R 6837.)

- "worse during the trial –> decompensated –> argue and the[n] apologize." (PC-R 6838.)

- "Jerry wasn't able to provide much help for defense" (PC-R 6841.)

In contrast, Padovano testified at the Rule 3.850 hearing that he had no reason to think Wickham was incompetent. Padovano testified that Wickham was competent to assist in his defense (PC-R 3439, 3441), and was able to discuss and understand "complex," "complicated" legal issues (PC-R 3442). Under oath, Padovano denied he ever met Jacobs. (PC-R 3479.) Later in the hearing, however, the State called Padovano back to the stand where he admitted that he met the two attorneys, and that the meeting was reflected in his diary records. However, Padovano continued to deny that he ever said the things that both Forrest's and Jacobs's notes indicate he said. (PC-R 3480.)

In resolving the question of Wickham's competency, and throughout her decision, Judge Dekker cited extensively to Padovano's testimony (*see, e.g.*, PC-R 7724-25), and relied on it to deny the claim. Judge Dekker never acknowledged the existence of written documents that contradicted Padovano's testimony on this crucial point.

2. Hankinson's Credibility With Respect To *Brady* And *Giglio* Claims

As stated more fully below, during Wickham's trial the prosecution headed by Hankinson, knowingly put on witnesses who gave false and misleading testimony. The State also withheld exculpatory evidence from the defense, both in violation of Wickham's constitutional right to due process. At the 3.850 hearing, Wickham presented evidence from Hankinson's own notes and from affidavits and testimony of virtually all key trial witnesses attesting to the tremendous pressure the State placed on witnesses to add details that would seal Wickham's conviction.

These serious allegations put Judge Dekker in the untenable position of assessing the credibility of her circuit court colleague, Judge Hankinson. Judge Dekker unquestioningly credited Hankinson's testimony and found no *Brady* violations.

B. Due Process Requires That Wickham Be Granted A New Evidentiary Hearing Presided Over By A Judge Outside The Second Judicial Circuit

To prevail on a motion to disqualify pursuant to Florida Statute, Section 38.10 and Rule 2.330 of the Florida Rules of Judicial Administration, Wickham had only to show that the motion was legally sufficient. *See Barnhill v. State*, 834 So. 2d 836, 842-43 (Fla. 2002). For purposes of a motion to disqualify where no judge has previously been disqualified in the case on that motion, the facts alleged by the movant must be taken as true. *See id.*; *see also* §§ 38.02, 38.10; Fla. Stat.; Fla. R. Jud. Admin. 2.330(f); *Cave v. State*, 660 So. 2d 705, 707-08 (Fla. 1995).

The legal sufficiency of Wickham's disqualification motions is supported by ample precedent. *See, e.g.*, *State v. Melendez*, Case No. CF84-1016A2-XX (Cir. Ct. Polk County Fla. Oct. 26, 2000) (PC-R 2534-43); *State v. Brown*, Case No. CF90-3054A1 (Cir. Ct. 10th Cir. Polk County Fla. May 14, 1997) (PC-R 2545); *cf. Hodges v. State*, 885 So. 2d 338, 344-45 (Fla. 2003); *State v. Dailey*, Case No. 85-7084 CFANO (Cir. Ct. 6th Cir. Pinellas County Fla. Sept. 2005) (PC-R 2546-47) (recusing judge reasoned that the ineffectiveness of counsel claim raised by the defendant would require the judge to "pass upon the credibility of a fellow judge who presides within the same circuit and courthouse.").[2] Florida courts apply an objective standard to determine the legal

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[2] *Mungin v. Florida*, 2006 Fla. LEXIS 553, at *10-11 (Apr. 6, 2006) a recent disqualification case, is inapposite. In *Mungin*, the Supreme Court rejected an argument by an appellant, who never moved to disqualify his post-conviction

sufficiency of a motion to disqualify a judge. *See Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983). Disqualification is required when a court "conclude[s] that the appellant could have a reasonable fear that he could not receive a fair trial." *Id.* at 1087; *see also* Fla. R. Jud. Admin. 2.330(d)(1) ("A motion to disqualify shall show that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge"). The disqualification remedy is particularly appropriate in "prosecution for first-degree murder in which appellant's life is at stake and in which the circuit judge's sentencing decision is so important." *Livingston*, 441 So. 2d at 1087.

Canon 3E(1) of Florida's Code of Judicial Conduct provides that a judge has an affirmative duty to enter an order of disqualification in any proceeding "in which the judge's impartiality might reasonably be questioned." *See also* 5 Fla. Prac., Civil Practice § 5.3 (2007 ed.). A new evidentiary hearing, presided over by an impartial judge should be granted. *See Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063 (Fla. 2000).

II. INEFFECTIVE ASSISTANCE OF COUNSEL AS TO THE PENALTY IMPOSED IN WICKHAM'S CAPITAL TRIAL

The performance of Wickham's counsel fell well below constitutionally mandated standards with respect to the penalty phase, the guilt-innocence phase, and the issue of

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judge until after the judge ruled against him. Furthermore, the argument in *Mungin* was that Mungin's former counsel was a county judge, which does not present the same level of prejudice and potential for bias as in this case where Wickham's former prosecutor is a circuit judge and his own counsel is an appellate judge. Finally, appellant's allegations in *Mungin* respecting his former counsel were not as crucially dependent on the former's counsel credibility as the claims raised by Wickham.

Wickham's competency to stand trial, as demonstrated in this and the following two chapters. Wickham's counsel, Philip Padovano, is not inherently an incompetent lawyer. The ineffective representation he provided to Wickham derived instead from a decision he made shortly after agreeing to represent Wickham in a trial in which Wickham's life was on the line: Padovano decided to run for the post of circuit judge in Tallahassee. From the moment he made that decision until days before trial, Padovano virtually ignored the many tasks necessary to prepare for Wickham's trial, and did not engage in even the most rudimentary investigation that would have developed evidence crucial for Wickham's defense. He also failed to develop any significant evidence for the penalty phase despite the availability of such evidence, and he marched right by innumerable "red flags" that his client was not, in fact, competent to stand trial.

The bare chronology and the undisputed numbers are as follows:

Padovano took on Wickham's representation on April 21, 1988. (PC-R 3295, 3325.) Between then and July 1988 he began to organize a credible defense: he engaged an investigator with a long experience developing mitigation evidence for the penalty phase, and he personally spent 26 hours working on the case. (*See* PC-R 3345-47, 4398.)

In July 1988, however, Padovano learned that Judge Cooksey of the Circuit Court decided not to seek another term, leaving a vacancy, and almost immediately decided to run for the post. (PC-R 3325.) His time records – compiled as a chart admitted in the 2004 hearing (PC-R 4398) – show what happened thereafter.

- Overall, Padovano spent 14.4 hours between his announcement in July and his election in October, averaging less than five hours a month, a figure that includes significant time spent on two motions for continuance. (R 242-44; PC-R 4390, 4397.)

- His experienced investigator, having compiled a list of tasks necessary to represent Wickham (particularly at the penalty phase), had quit, in part because Padovano refused to spend time on the case, or even meet with her. (R 242-44; PC-R 3534.)
- Padovano waited two months before hiring a new investigator. The new investigator had no death penalty experience, received little direction from Padovano, and therefore did little, and uncovered none of the evidence adduced at the 2004 hearing. (R 242-44; PC-R 3421, 4395-97.)
- Padovano hired only a single psychologist (not a psychiatrist or any other expert who would have immediately noticed Wickham's incompetence to stand trial) to investigate a potential defense, and met with her only fleetingly – literally "in the parking lot." (R 242-44; PC-R 3424-25, 3557.)

As a result, Padovano approached the new trial date of November 28, 1988 unprepared, having interviewed not a single defense witness, having spent almost no time with his inexperienced investigator, and having spent almost no time at all with his single (and inappropriate) expert. Upon his successful election in October 1988, moreover, Padovano, who previously asked for two extensions in order to campaign, did not apply for an extension of the trial date – at a time when he really did need one in order to prepare for trial. Although he refused to admit it, the reason is clear: Padovano now hoped to be (and in fact eventually was) sworn in as a judge on January 1, 1989; any further extension that would have permitted a more appropriate defense or a competency hearing would have put him at risk of postponing his swearing-in.

At the conclusion of the 3.850 hearing, the Circuit Court denied the IAC claim. It either attributed Padovano's failure to strategy, or found most of the evidence cumulative.

(*See* PC-R 7731-39.) The Court erred in both respects. The extensive evidence not discovered and presented was qualitatively and substantively different than anything presented at trial. Strategy cannot justify Padovano's deficient performance, because his inadequate investigation prevented him from making informed strategic decisions.

A. Padovano's Perfunctory Investigation Of Mitigation Evidence

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *see also Ragsdale v. State*, 798 So. 2d 713, 716 (Fla. 2001) ("[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." (quoting *State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000)). A reasonable investigation is a crucial prerequisite to the presentation of mitigating evidence. *See State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002) (stating that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated – this is an integral part of a capital case."). *Accord Orme v. State*, 896 So. 2d 725, 731 (Fla. 2005); *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). An attorney's failure to investigate and present available mitigating evidence is a matter of "critical concern" in determining whether counsel's performance was ineffective at the penalty phase. *Reichmann*, 777 So. 2d at 350.[3]

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[3] Of course, Padovano was handicapped by the fact that the State withheld crucial evidence. *See* Part V *infra*. However, his inadequate investigation prevented him from discovering and presenting crucial evidence that was available to him.

1. Padovano Did Not Adequately Investigate Family History

Padovano did not invest the time required to conduct a reasonable investigation of readily available mitigation evidence. Upon taking over the case in April 1988, Padovano recognized that he would need to focus on mental health mitigation evidence and that prior counsel had not conducted any investigation into mitigation evidence. (PC-R 3338-40, 3364-65, 3521, 4404-05.) However, Padovano did not speak with any potential lay witnesses, other than two brief conversations with Wickham's sisters about their travel arrangements. (PC-R 3346, 3352-54.) Padovano's preparation of his two lay witnesses consisted of a brief encounter in the courthouse. (PC-R 4002) ("He didn't give us time to say anything. He was just in and out."). *See Sochor*, 883 So. 2d at 772 (finding "clearly deficient" the performance of counsel who did not interview or prepare lay witnesses for testimony).

Counsel's failure to interview any witnesses contrasts starkly with his own investigation in his only other death penalty case. In that case, "Padovano spoke with hundreds of potential witnesses including members of the defendant's family." *Smith v. State*, 457 So. 2d 1380, 1382 (Fla. 1984) (quoting the trial court's findings).

2. Padovano's Investigators Did Not Properly Investigate

Padovano initially retained Jennie Greenberg, an experienced mitigation investigator. However, Greenberg soon resigned because she "had a very deep conviction" that Padovano was not preparing the case competently. (PC-R 3533-34.) She prepared a list of "where to start at the background investigation," which Padovano ignored. (PC-R 3345, 4399.) Padovano lost more than two months before he hired another investigator. Eventually, he hired Bill Harris, who, as Padovano did not contest, had no death penalty

experience. (*See* PC-R 3337, 3421, 3521.) Harris spent only 24.75 hours on the case and never visited Wickham's family in Michigan or elsewhere. (*See* PC-R 3354, 3361, 4397.) Padovano had minimal interaction with Harris. (*See* PC-R 4397) (recording a total of two hours spent communicating by phone with Harris).

3. Padovano Did Not Retain Necessary Expert Witnesses

Despite Wickham's history of mental illnesses and deficiencies, Padovano did not adequately hire or prepare expert witnesses. Padovano conferred infrequently with his single expert, psychologist Joyce Carbonell. (*See* PC-R 4600, 4597) ("We have not had very many conversations about Jerry at any length. . . . We talked in May and then there was a long gap."); (PC-R 3372) (Padovano acknowledging that he had "very little contact" with Dr. Carbonell prior to her deposition a week before trial).

Padovano did not retain a psychiatrist or neuropsychologist to evaluate Wickham, despite Greenberg's advice (*see* PC-R 3360, 4404), and his own belief that more testing was necessary (PC-R 4405-06). At the post-conviction hearing, Drs. Riebsame, Van Gorp, and Mills testified that it was imperative for Padovano to retain a psychiatrist and a neuropsychologist in order to interpret Wickham's medical records, to further test Wickham's abnormal EEG records, and to diagnose Wickham's brain damage. (*See* PC-R 3602, 3604-05, 3693-94, 3708, 3741, 3744); *see also Harvey v. Florida*, 946 So. 2d 937, 951 (Fla. 2006) (Anstead, J, concurring in part and dissenting in part) (counsel was deficient in ignoring advice to consult a psychiatrist); *Phillips v. State*, 894 So. 2d 28, 45-46 (Fla. 2004) (Pariente, CJ, concurring in part and dissenting in part) (resentencing counsel failed to secure testing to confirm the presence or extent of brain damage, despite psychologists' previous testimony that further testing was necessary).

4. Because Of His Inadequate Investigation, Padovano Did Not Present Crucial Mitigation Evidence

As a result of his inadequate investigation, Padovano did not discover or present the bulk of available mitigating evidence. In the penalty phase, Padovano relied on the guilt phase testimony and recalled Carbonell for brief testimony, taking up only nine transcript pages. Padovano's case at the guilt phase, in turn, consisted solely of testimony from two of Wickham's sisters and Carbonell. Direct examination of Wickham's sisters took the entirety of nine transcript pages each. Thus, the sum total of lay testimony elicited by Padovano in the entire trial consisted of about half an hour of testimony. Had Padovano interviewed Wickham's family and retained a neuropsychologist and psychiatrist, he would have discovered and presented evidence of the deprivation and abuse Wickham suffered as a child and the full extent of Wickham's mental illnesses.

(a) Padovano Did Not Present The Severe Deprivation And Abuse That Wickham Suffered As A Child

Having conducted virtually no investigation, Padovano elicited brief and general evidence that was the tip of the iceberg of the abuse and brutalization that characterized Wickham's formative years. Most of the testimony presented to the jury about Wickham's childhood was hearsay, relayed through Carbonell, in a way that diminished its effectiveness as compared to available direct testimony. Padovano elicited cursory testimony that Wickham was beaten, particularly by his step-family; that the abuse included being hit with a stick; and that Wickham was forced to remain at the table all night to finish his dinner and was hit to stay awake. (*See* R 1386, 1396, 1490-91.) Carbonell also relayed that Wickham's parents were alcoholics. (R 1490-91.) Carbonell's summaries of her conversations with Wickham's sisters and brother

contained minimal details, taking up little over two transcript pages. (*See* R 1386, 1396.) Wickham's sisters' testimony about his childhood each occupied less than one transcript page. (*See* R 1386, 1396.) Other than Carbonell's passing references, (*see* R 1974-75), there was no testimony about Wickham's childhood in the penalty phase.

The jury, therefore, either never learned, or heard only secondary evidence, that:

- Wickham spent the first four years of his life homeless and in extreme poverty without the most basic necessities. He and his family lived a nomadic existence in run-down shacks without heat or electricity. (*See* PC-R 3963) (testimony of Alice Bird) ("Basically my dad was an alcoholic. And he would pull the car over and say, find a place to sleep. If we found a house, okay. And if [we] didn't, we would make a pallet on the grass and drink water from the creek.").
- Wickham's family was in a constant state of hunger. (PC-R 3963.) He and his siblings were dressed in rags and were rarely clean. (*See* PC-R 3998) (testimony of Marguerite Ann LaValley).
- Delbert, Wickham's father, was an alcoholic who mercilessly beat Wickham's mother and sexually and physically abused the children. (PC-R 3964, 3997.) He inflicted particularly severe and frequent beatings upon Wickham because of his skin color. (*See* PC-R 3964) ("He hit him with anything he could pick up; a board, a rock, his belt, the belt buckle, anything that he could reach."); (PC-R 3996.) Wickham's mother abused him as well, including hitting him on the back of his head with a hammer. (PC-R 3997.)

- Wickham was sexually abused as a child and watched his father sexually abuse his sisters. (*See* PC-R 3612, 3964.) The abuse was so severe that Marguerite slept on her stomach until adulthood. (PC-R 3964, 3997.)

- After Wickham's mother divorced Delbert and married Martin O'Dell, Wickham was exposed to further abuse by the O'Dells, who were "exceedingly cruel" to Wickham. (PC-R 3965); (*see also* PC-R 3998) (testimony of Marguerite Ann Lavalley that the O'Dells threw objects at Jerry "[l]ike boards, bats. Whatever they could find, they [would] just throw it at him.").

The details not presented at trial are not merely cumulative. They make the difference between being raised in an overly stern household and suffering extreme and brutal abuse with life-long repercussions. Counsel's failure to discover and present this evidence and the effect this emotional and physical abuse had on Wickham constitutes ineffective assistance. *See State v. Lara*, 581 So. 2d 1288, 1289 (Fla. 1991) (affirming finding of ineffective assistance when witnesses would have testified of defendant's difficult childhood including eating dirt because his father would not feed him, harsh abuse by father, early alcoholism, hearing the devil's voice, and a head injury).[4]

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[4] This Court has found in a similar case that counsel's failure reasonably to investigate and present mitigation evidence constituted deficient performance. In *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001), counsel was deemed ineffective for failing to investigate and present mitigating evidence about Ragsdale's childhood and mental health. *Id.* at 716. Lay testimony at the evidentiary hearing revealed that Ragsdale had a "horrific" childhood, enduring abuse from his father and migrating with his impoverished family from trailer to trailer. *Id.* at 716-17. Ragsdale abused drugs and alcohol and suffered head traumas from childhood accidents. *Id.* at 717. Counsel did present testimony of the head trauma, but only in limited fashion. *Id.* Ragsdale's attorney did not present expert testimony at the penalty phase about the abuse, substance abuse, or the head traumas. *Id.* As with Padovano, Ragsdale's counsel was appointed after various lawyers had withdrawn expecting the case to be near trial-ready. *Id.* at 718. The Court held that counsel's inadequate investigation precluded strategy as a justification for his failure to

(b) Padovano Did Not Discover And Present Evidence Of Wickham's Mental Illness

Because of Padovano's inadequate investigation he never discovered or presented readily available evidence that Wickham suffers from epilepsy and damage to his frontal lobes and temporal lobe. Wickham has a family history of epilepsy, and exhibited numerous symptoms of epilepsy throughout his life. (*See* PC-R 4013-14 Gary Welch; PC-R 3742-43 Mills; PC-R 3969 Alice Bird; PC-R 4000 Marguerite Ann LaValley; PC-R 4218 Darnell Page; PC-R 6893 John Hanvey; R 1537-38 Carbonell.) Padovano's failure to discover indications that Wickham suffered from epilepsy constitutes ineffective performance. *See Armstrong v. Dugger*, 833 F.2d 1430, 1433-1434 (Fla. 1988) (finding ineffective assistance of counsel when counsel did not investigate epileptic seizures, mental retardation, and organic brain damage).

As a psychologist, Dr. Carbonell was not trained to evaluate the location of Wickham's brain damage. At the evidentiary hearing, Drs. Van Gorp and Mills, respectively a neuropsychologist and forensic psychiatrist, testified about the severity and location of Wickham's brain damage and the effect of the specific conditions on Wickham. They testified that Wickham's frontal lobes are seriously malfunctioning, his temporal lobe is significantly damaged, and he has a diffused cortical dysfunction. (*See* PC-R 3682-83, 3687-92, 3735.) Wickham's forms of brain damage manifest themselves in behavioral inappropriateness, difficulty handling novel situations, and the inability to

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present evidence of Ragsdale's childhood; "since counsel did not conduct a reasonable investigation, he was not informed as to the extent of the child abuse suffered, and thus he could not have made an informed strategical decision not to present mitigation witnesses." *Id.* at 720.

plan effectively, including impulsive behavior and persisting with ineffective problem-solving solutions. (*See* PC-R 3689, 3695, 3752-53.) At the evidentiary hearing, Mills further testified that Wickham's diagnosis, "schizophrenia in remission" is a serious mental condition that leaves Wickham with "chronic deficits." (PC-R 3735.) He testified that Wickham suffered from two significant effects of schizophrenia. First, Wickham suffers inertia, withdrawal, isolation, and lack of energy, focus, organization, and motivation. (PC-R 3736-37.) Wickham exhibits these symptoms "in spades." (PC-R 3736.) Second, as supported by the psychological tests, Wickham's schizophrenia impedes his cognitive abilities. (PC-R 3736-37.)

5. Padovano Did Not Refute Crucial Aspects Of The State's Case

There was ample evidence that contradicted the testimony of several key prosecution witnesses, including prior inconsistent statements from those very witnesses. Because of his poor preparation, Padovano never introduced this evidence that would have impeached witnesses on whose testimony the jury and the court founded their sentence of death.

(a) Hanvey and Moody

Because he was unprepared, Padovano could not discredit John Hanvey and Michael Moody's testimony that was crucial to the State's claim of aggravating factors. Hanvey testified that Wickham masterminded a plan to escape from jail, and that Wickham told Sylvia Wickham prior to the robbery that he would not leave any witnesses behind. (R 1324-25.) Moody testified that Wickham claimed to have killed Fleming to eliminate a witness. (R 1613.)

Padovano did not depose either Hanvey or Moody. He did not conduct any investigation into the inculpatory statements Wickham allegedly made to them. He did not learn that both witnesses had been given reduced sentences in return for testifying against Wickham. (*See* PC-R 4043-04, 4039-40, 4507-09, 7200-04.) Padovano did not attempt to contact Darnell Page, who was the fourth inmate in the cell with Hanvey, Moody, and Wickham, despite: (1) Greenberg's advice that he should obtain the Department of Correction files of Page as a starting point (PC-R 4400), (2) references to Page in the police accounts of the alleged escape (PC-R 7205, 7215-16, 7218-37), and (3) reference to Page in Hanvey's testimony as someone who was present when Wickham allegedly made the incriminating statements (PC-R 3849-51, 3877-78, 6893-6902).

Page would have testified that the escape plan was entirely his design and that Wickham played no role in it. (PC-R 4217-18, 4231.) Contrary to Hanvey and Moody's testimony, Page would have testified that Wickham did not talk about his case and, in fact, "didn't talk very much to anybody really." (PC-R 4218-19.) He would have testified that Leon County officials asked him to fabricate testimony against Wickham in exchange for leniency in his own sentence and that he observed contact between officials and Hanvey and Moody indicating that they were being offered incentives to testify against Wickham. (PC-R 4220-27.) Page also would have testified vividly about Wickham's seizures and epileptic episodes. (*See* PC-R 4218, 4231) ("[H]e would be in some type of daze sometimes. He like goes into a conversation and stops in the middle of the conversation and blinks off and snaps back to where we were talking at.")

(b) Tammy Jordan

Alone among the State's witnesses, Tammy Jordan testified on direct examination that Wickham discussed a possible killing when the group stopped at the rest stop. (R 1191.) After her arrest, Jordan gave one written statement and two taped statements to police, all of which had been provided to the defense. In preparing for the trial, however, Padovano only reviewed her written statement, which did not include Wickham's supposed discussion of a possible killing. (R 1256-59.) During Padovano's cross examination, he attempted to show that Jordan's testimony was recently fabricated. (R 1207, 1211-13.) The attempted impeachment was derailed, however, when Detective Sam Bruce testified that one of Jordan's previous taped statements corroborated parts of her trial testimony. Padovano admitted that he never would have embarked on that line of questioning had he been aware of Jordan's taped statements. (R 1258-59.)

Had Padovano properly prepared for the trial, he could have pointed out that, in one statement, Jordan said, contrary to her trial testimony, that she had no idea there might be a killing that day and that Wickham said he was sorry for what happened. (PC-R 4269, 4330, 7357-60.) Padovano could also have challenged Jordan's account in several ways. Counsel could have questioned Jordan about the fact that other witnesses denied that Wickham had discussed a possible killing. (R 1145, 1162, 1243.) Padovano could have shown the contradiction between Jordan's account and Schrader's testimony that the victim said nothing to Wickham during the incident. (R 1115-16.) Instead, the attempt to discredit Jordan's testimony as a recent fabrication ruined any chance to impeach her as a direct result of Padovano's failure to familiarize himself with the readily available evidence. Although the Circuit Court found that counsel attempted to minimize the role

of Jordan's testimony in arguing to the jury (PC-R 7728), that analysis completely discounts the botched impeachment and counsel's ineffectiveness in not preparing to confront the State's witness.

(c) Sylvia Wickham

In Ms. Wickham's initial statement to police, she denied that the robbery was planned and said it was a spontaneous decision when the group ran out of gas. (PC-R 570, 585.) Her story changed at trial to conform to that of the other State witnesses that the robbery had been discussed at the rest stop. (R 1143-45.) This demonstrates that contrary to the State's opening argument (R 934-36, 940), there had been collaboration among the State's witnesses to bring their differing accounts into line, and is inconsistent with the State's argument that the killing was planned and carried out to eliminate witnesses. Nonetheless, counsel failed to introduce Sylvia Wickham's prior statement.

(d) Larry Schrader

Schrader testified that Wickham said that he killed Fleming so that "there wouldn't be no witnesses to testify against him." (R 1089.) This directly contradicted Schrader's previous deposition testimony, in which Schrader stated that Wickham never said that he killed the victim to eliminate any witnesses. Padovano was unable to impeach Schrader despite the stark contradiction. He tried to show that Schrader's testimony was recently fabricated (R 1110), but Schrader falsely responded that he had never been previously asked why the victim was killed. At that point, Padovano failed to point out that Schrader was lying or to introduce Schrader's deposition. Counsel then tried to impeach Schrader with his deposition testimony that he and Wickham had not discussed the killing beforehand. (R 1111-12.) On redirect, the State had Schrader read only a portion

of his deposition, implying that Schrader did say that Wickham had killed the victim so there would not be a witness. (R 1117.) On recross Padovano inexplicably tried to show that that portion of Schrader's deposition related to Wickham threatening the Jordans, while ignoring and not presenting the fact that Schrader had expressly denied that Wickham said he killed the victim to eliminate him as a witness. (R 1118.) The State then got Schrader to directly state, in contradiction to his sworn deposition, that Wickham also said he killed the victim to eliminate him as a witness. (R 1119.) Padovano let the false testimony stand. (R 1119-20.) Padovano also never presented to the jury the original taped statement of Larry Schrader taken by Detective Alan Blair. Detective Blair first spoke to Schrader about the events of that day, before his story was reworked and altered in the wake of an investigation by law enforcement to build the case against Wickham. In Schrader's initial statement, there was no plan devised at a rest stop by Wickham to kill anyone. (PC-R 545-60.) According to Schrader, Jimmy Jordan's car did run out of gas, contrary to what the jury heard during the trial, and it was not even clear what the group was going to do once someone pulled over. (*Id.*) Schrader's statement contains no allegation of eliminating witnesses, or of other prominent staples of the State's case against Wickham. Yet the jury never heard about these omissions.

6. Padovano Did Not Object To Unconstitutionally Vague Jury Instructions Concerning Two Aggravating Circumstances

Jury instructions are unconstitutionally vague when they fail adequately to guide juries as to what they must find to impose the death penalty. *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). The jury instructions for two aggravating factors were vague, and Padovano rendered ineffective assistance by not objecting to them.

First, Padovano did not object to instructions that a crime is heinous, atrocious, and cruel ("HAC") if it is "especially wicked, evil, atrocious or cruel." (R 2037.) Just four months before trial, the United States Supreme Court held that an almost identical Oklahoma jury instruction was unconstitutionally vague. *Maynard v. Cartwright*, 486 U.S. 356 (1988); *see also Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992) (striking down the Florida instruction and describing it as even less "specific and elaborate" than the unconstitutional instructions in *Maynard* and *Godfrey v. Georgia*, 446 U.S. 420, 428-32 (1980)). This Court later ruled that the Circuit Court erred in finding HAC, but, given the jury's recommendation, found it to be "harmless beyond a reasonable doubt." *Wickham*, 593 So. 2d at 193. But for the unconstitutionally vague instruction, to which Padovano failed to object, the jury may have issued a different recommendation.

Second, Padovano did not object to the instruction that the jury should find the cold, calculated, and premeditated ("CCP") aggravating circumstance if the crime "was committed in a cold, calculating, and premeditated manner with no moral or legal justification." (R 2037.) In *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994), this Court held that "[t]he premeditated component of Florida's standard CCP instruction poses the same problem" as the instruction in *Maynard* and struck the CCP instruction. Padovano should have recognized that the instruction failed to guide the jury, because in 1987 and 1988, the Florida Supreme Court ruled three times that CCP required nothing less than a showing of "heightened premeditation" and "a careful plan or prearranged design," (both of which were not supported by the fact presented at trial. *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987); *Mitchell v. State*, 527 So. 2d 179, 182 (Fla. 1988); *Hamblen v.*

State, 527 So. 2d 800, 805 (Fla. 1988). But for Padovano's failure to object to the unconstitutionally vague instruction, the jury's recommendation may have been different.

7. Padovano Did Not Object To An Aggravating Circumstance Based On A Constitutionally Flawed Conviction

One aggravating factor cited in the Circuit Court's Findings In Support of the Sentence of Death was Wickham's 1969 conviction for armed robbery in Michigan. (R 2047.)[5] However, the Michigan conviction was obtained in violation of Wickham's constitutional rights. It was based on Wickham's guilty plea, rendered without being advised of his rights to a jury trial, confront witnesses, or against self-incrimination. *People v. Wickham*, 200 N.W.2d 339, 340 (Mich. Ct. App. 1972). The Michigan appellate court recognized that Wickham would "ordinarily be entitled to a reversal of his conviction" under *People v. Jaworski*, 194 N.W.2d 868 (Mich. 1972) (implementing *Boykin v. Alabama*, 395 U.S. 238 (1969)). *Wickham*, 200 N.W.2d at 340. It affirmed only because Wickham's plea was accepted four months before *Boykin*. *Id*. at 340-41.

The Michigan conviction should not have served as the predicate for an aggravating factor almost 20 years *after* Boykin was decided. The Michigan Court of Appeal balanced the constitutional flaw embedded in Wickham's conviction with the public interest of finality and decided to uphold the conviction. This compromise does not alter the fact that Wickham's conviction was constitutionally defective, and that allowing it to constitute an aggravator in Wickham's 1989 sentencing, well after *Boykin*, is a

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[5] The Court also relied upon Mr. Wickham's 1983 Colorado conviction for first-degree aggravated motor vehicle theft. As discussed in the habeas petition Part I, this conviction does not meet the standard of a violent felony under Florida law.

prospective use and a current deprivation of Wickham's due process rights. *See State v. Holsworth*, 607 P.2d 845, 849 (Wash. 1980). The United States Supreme Court has held that a conviction obtained in violation of a defendant's Sixth and Fourteenth Amendment right to counsel cannot be used to enhance the punishment for another offense. *Burgett v. Texas*, 389 U.S. 109, 115 (1967) ("[S]ince the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right."). As an extension of *Burgett*, Florida holds that prior convictions based on guilty pleas that were not made knowingly and voluntarily may not be used to increase the level of a subsequent offense. *Allen v. State*, 463 So. 2d 351, 359 (Fla. 1st DCA 1985) (reasoning that "a waiver of these constitutional rights not made knowingly and voluntarily is the equivalent of no waiver at all."). Aggravating factors in sentencing are considered to be enhancements to the punishment, as opposed to elements of the crime itself. *See, e.g., Jones v. United States*, 526 U.S. 227, 271-72 (1999) (Kennedy, J., dissenting); *United States v. Henderson*, 75 F.3d 614, 616 (11th Cir. 1996). As invalid pleas cannot be used to increase the level of offense as established in *Allen*, neither can they be used to support the prior violent felony aggravating factor. Indeed, "the special need for reliability in the death penalty context is undermined whenever a prior conviction (upon which a death penalty judgment is based) is tainted by a fatal fundamental constitutional defect," *People v. Horton*, 11 Cal. 4th 1068, 1135 (Cal. 1995), and Wickham's trial counsel was ineffective in not objecting to it.

8. Padovano Failed To Object To The State's Inflammatory Language At The Guilt And Penalty Phases

Padovano was ineffective when he did not object to the State's inflammatory language in opening and closing arguments at the guilt and penalty phases of Wickham's trial. The prosecutor's inflammatory language included misleading statements regarding the jury's role and its responsibility (R 936, 1743, 1745-46, 1749 guilt phase), improper insinuation of the prosecutor's personal opinion and experience (R 1753, 1766, 1834 guilt phase; 2015 penalty phase), and arguments designed solely to inflame the passions and fears of the jury (R 2016-17 penalty phase).

The most disturbing instance of the prosecutor's inflammatory language consisted of the following comments during his penalty phase summation:

> I know also that we can't afford to have this defendant on the streets. There is only one way to assure that he's not on the streets. I'm sure Mr. Padovano is going to get up here and say that 25 years before parole. First, we don't know what that means. And second, 25 years may seem like a pretty long time. But you think back to Francis Daniels, 20 years ago, 20 years ago when this defendant shot him in the head three times and came out and this defendant found another victim. There's only one way to be certain that this defendant isn't on the street. Only one way that we can be assured that there isn't another victim. (R 2016-17.)

By arguing that Wickham should be put to death because he would be eligible for parole after 25 years and might kill again, the prosecutor violated the Eighth and the Fourteenth Amendments. *See generally Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985). In *Teffeteller v. State*, 439 So. 2d 840, 845 (Fla. 1983), the prosecutor's comments focused on the fact that the defendant would be eligible for parole in 25 years and might kill again, and the prosecutor urged the jury: "Don't let Robert Teffeteller kill

again." *Id.* The Court held "that it was reversible error for the trial court to deny appellant's motion for a mistrial or for a cautionary instruction." *Id.*

To the extent that counsel failed to object to this misconduct and move for a curative instruction or a mistrial, counsel provided ineffective assistance of counsel. Additionally such egregiously improper prosecutorial conduct constitutes fundamental error that requires reversal of the convictions and death sentences, even in the absence of an objection by trial counsel. *Pait v. State* , 112 So. 2d 380, 385 (Fla. 1959).

9. Padovano Waived Wickham's Right To Written Sentencing Findings

Padovano inexplicably waived the statutory requirement for written sentencing findings. (R 2045.)[6] Instead, the Court immediately sentenced Wickham to death without identifying aggravating or mitigating factors. (R 2047.) Two weeks later, the Court adopted the State's memorandum as its sentencing order. As a result, the Court never independently weighed the aggravation and mitigation evidence. Indeed, the Court, by relying on the State's memorandum, erroneously failed to find and weigh *any* mitigating evidence. *See Wickham*, 593 So. 2d at 194.

Without any apparent benefit to his client, Padovano waived a vital protection – the right to individualized sentencing. *See Perez v. State*, 648 So. 2d 715, 720 (Fla. 1995) (purpose of the rule that a trial court must make written findings prior to sentencing is "to reinforce the court's obligation to think through its sentencing decision and to ensure that

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[6] Padovano had a personal motive for this: Having been elected just before the trial, he hoped to be – and in fact was – sworn in on January 1. The preparation for and conduct of an adequate penalty hearing, and respect for procedural regularities during the penalty phase, might have jeopardized this schedule.

written reasons are not merely an after-the-fact rationalization for a hastily reasoned initial decision imposing death."); *State v. Dixon*, 283 So. 2d 1, 5 (Fla. 1973.)

10. Strategic Considerations Cannot Justify Padovano's Failure To Investigate and Present Further Mitigation Evidence

Padovano's failure to investigate and present mitigation evidence cannot be excused as trial strategy. The Circuit Court cited Padovano's explanation that he: (1) did not call more lay witnesses because he adequately painted the picture of Wickham's childhood and duplicative witnesses would weaken the effect of the testimony, and (2) did not call more expert witnesses to preserve a perceived favorable match up between Carbonell and the State's expert. (*See* PC-R 7737.)

Because he did not conduct an adequate investigation, Padovano was not in a position to make an informed strategic choice about the presentation of crucial mitigation evidence. This Court has held that a court may not defer to counsel's decision not to present mitigation evidence unless counsel conducted a reasonable investigation of that evidence. *See Harvey*, 946 So. 2d at 951 (Anstead, J, concurring in part and dissenting in part) ("As our death penalty jurisprudence makes clear, counsel's duty is to thoroughly investigate first, and then evaluate in order to develop a sound defense strategy."); *Armstrong v. State*, 862 So. 2d 705, 725 (Fla. 2003) ("In order to avoid uneven dispensation of the death sentence, it is essential for counsel to fully investigate the available mitigation so that any decision on whether or not to present such information is made on a reasonable basis."); *Rose v. State*, 675 So. 2d 567, 572-73 (Fla. 1996); *Stevens v. State*, 552 So. 2d 1082, 1087 (Fla. 1989); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

B. Padovano's Failure To Investigate Prejudiced Wickham

In contrast to the brief and generalized testimony Padovano presented of alcoholism and abuse, Wickham, in fact, endured a childhood of indescribable distress before his almost life-long incarceration. Wickham was sentenced to death without the judge and jury learning that he spent the first ten years of life without the basic life necessities of adequate food, shelter, and clothes; and that his parents and his step-family frequently and savagely abused him and his sisters. It is impossible to understand Wickham's offensive conduct without understanding the history of neglect and abuse by his family. (*See* PC-R 3613-15) (Riebsame). Wickham's history also helps explain his mental illnesses. (*See* PC-R 3613) (Riebsame).

1. Expert Evaluations Of Wickham Would Have Substantially Weakened Aggravating Evidence

Presentation of evidence about Wickham's epilepsy and the location and significance of Wickham's brain damage, when combined with the testimony of his schizophrenia, would have discredited the State's theory of Wickham as a calculated criminal mastermind, and thereby would have weakened two aggravating factors. First, Wickham's conditions precluded him from committing the offense for the purpose of avoiding or preventing lawful arrest or to effect an escape from custody. (*See* PC-R 3607 Riebsame, 3694-95 Van Gorp, 3746-47 Mills). Second, Wickham's frontal lobe brain damage strongly weakens the possibility that he could have committed the offense in a cold, calculated, and premeditated manner. (PC-R 3696 Van Gorp, 3751-52 Mills.) Wickham's history of impulsive and poorly planned interactions while institutionalized, including aggressive actions and escape attempts, and his inability to cooperate with

experts hired by his own defense indicate that he does not comprehend his behavior and its impact on his future circumstances. (*See* PC-R 3608-09 Riebsame).

2. Expert Evaluations Of Wickham Would Have Shown That He Qualified For Statutory Mitigators

Expert evaluations of Wickham would have supported two statutory mitigating factors. First, Wickham committed the offense while under the influence of extreme mental or emotional disturbance. The Circuit Court rejected this mitigating circumstance, because it concluded that the "only testimony respecting this mitigating circumstance was the conclusory opinion of Dr. Joyce Carbonell" who "failed to identify specific factors indicated that at the time of the homicide the Defendant was extremely disturbed." (R 250.)

Padovano could have presented specific and convincing evidence that Wickham's brain damage and schizophrenia place him under extreme mental or emotional disturbance. (*See* PC-R 3610, 3696, 3752.) Mills testified that the brain damage and schizophrenia are "by their very nature extreme conditions of high significance," and Riebsame testified that those conditions "easily place[d]" Wickham in the category of extreme emotional disturbance. (PC-R 3752, 3610.) Both conditions existed at the time of the offense. (*See* PC-R 3696.)

Second, the trial court ruled that Wickham did not qualify for a mitigating factor based on his substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law in light of the "conclusory opinion of Dr. Carbonell." (R 251.) Expert evaluation of Wickham's brain damage would have provided strong support for this mitigating circumstance. Wickham's frontal

lobe damage, as well as his schizophrenia, cause him to act impulsively. (*See* PC-R 3611) (testimony of Riebsame that "[h]e may know what he is doing is wrong, but he is not considering the consequences whatsoever on himself or others. So there is that substantial impairment of his ability to conform his conduct to the quality of the law."); (3697) (testimony of Van Gorp that "[i]t is that disconnect between thought and action. A frontal lobe patient acts disconnected with the thinking."); (3753) (testimony of Mills that Wickham's brain damage "means that he is highly impulsive, lacks the ability to plan; his executive functions are highly diminished.").

3. Padovano's Failure To Refute Crucial State Testimony Undermines Confidence In The Outcome Of The Penalty Phase

Counsel's failure to investigate, and his resulting inability to expose the flaws in the testimony of the State witnesses (e.g. Hanvey and Moody), led to the jury and Court's finding of the aggravating circumstance that Wickham committed the offense to avoid or prevent a lawful arrest. The Court relied upon the testimony of the two cellmates as corroboration of co-defendant Schrader's testimony that Wickham had killed the victim to ensure that there were no witnesses. (*See* R 248.) This corroboration was important because Schrader had testified under a plea with the State, but the jury and Court did not know that Hanvey and Moody had been given reduced sentences in return for testifying against Wickham.

4. Prejudice Occurs Where Important Mitigation Evidence Is Not Presented

The United States Supreme Court has recognized that the presentation of mitigation evidence, including disadvantage in childhood and mental illness, is crucial to the penalty

phase and that the failure to present such evidence may be prejudicial. Such evidence is relevant to the sentencing judge and jury's assessment of the defendant's moral culpability. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Supreme Court stated:

> "If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Id.* at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Supreme Court held that it was prejudicial for counsel not to discover and present evidence of severe privation and abuse in childhood and diminished mental capacities. *Id*. at 535. This Court has found prejudicial performance in cases where counsel failed to present evidence of severe mental disturbance. *See, e.g., Rose*, 675 So. 2d at 573-74 (holding that counsel's failure to present mitigation evidence that defendant suffered from schizophrenia, organic brain damage, and a personality disorder prejudiced the defendant). Psychiatric evidence can dramatically change the sentencing hearing by connecting the homicidal conduct to the mental illness, thus weakening aggravating factors, and strengthening mitigating factors. *See Hannon v. State*, 941 So. 2d 1109, 1165 (Fla. 2006) (Anstead, J. dissenting); *Rose*, 675 So. 2d at 573 ("In evaluating the harmfulness of resentencing counsel's performance, we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order . . . and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." (citations omitted)); *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1998) (stating that psychiatric evidence "has the potential to totally change

the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior" and that "psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors" (quotation omitted)).

The instant case is analogous to *Orme v. State*, 896 So. 2d 725 (Fla. 2005). Orme's attorney presented two mental health experts at the penalty phase who testified that he suffered from a personality disorder and depression and was a cocaine addict. *Id.* at 734. Counsel also presented as mitigation evidence of intoxication. *Id.* at 736. However, counsel failed to investigate information that Orme suffered from bipolar disorder and did not present evidence at the penalty phase about the existence and effects of Orme's mental illness. *Id*. at 735. This Court held that these failures prejudiced Orme. It noted that bipolar disorder is "a serious and significant diagnosis" and concluded that testimony about the disorder would have undermined the State's argument that Orme's intoxication evidence was an attempt to use his addiction to excuse his actions. *Id.* at 736.

Here, the evidence of Wickham's epilepsy and brain damage would have undermined the State's argument that Wickham's mental health problems were in the past and should not serve as mitigating evidence.[7] Further, the evidence about his childhood deprivation and abuse and his mental illnesses would have undermined the State's dismissal of Wickham's experiences and mental health diagnoses during his institutionalization. The

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[7] The State argued, "But the question becomes, when do you stop riding on childhood problems and childhood mental problems and start taking responsibility for what this person has done." (R 2012.) Shortly afterwards, the State maintained, "At some point in time you have to quit saying, well, I had a hard time as a child, and start saying this person is responsible for his actions." (R 2014.)

State argued, "The picture that they're trying to paint is that the mental institution formed him into what he is. You look at those records. You'll see that he was a problem from the beginning." (R 2013.)

The incomplete record Padovano presented allowed the Court to dismiss Wickham's mental deficiencies in finding aggravating circumstances. (*See*, *e.g.*, R 252) ("The Defendant's deprived childhood and institutionalization, given its remoteness to the event in question, is hereby rejected as [a] nonstatutory mitigating circumstance[s]."). [sic] This Court relied upon the State's arguments in finding in the direct appeal that the Circuit Court's failure to find and weigh mitigating evidence was harmless error. *See Wickham*, 593 So. 2d at 194 ("[T]he State controverted some of this mitigating evidence, thus diminishing its forcefulness. Wickham had not been hospitalized for mental illness for many years . . .") Had Padovano performed effectively, he would have presented evidence that (1) the term "childhood problems" grossly understates Wickham's horrific childhood; (2) that Wickham's mental deficiencies and illnesses were serious conditions that continued to affect his life and decision making – not remote "childhood mental problems"; and (3) that the unimaginable abuse and deprivation Wickham suffered as a child and the serious mental health conditions he suffered from at the time of the offense significantly mitigated his responsibility for his actions.

III. INEFFECTIVE ASSISTANCE OF COUNSEL AS TO WICKHAM'S GUILT AND PENALTY

A. Padovano's Failure To Request A Competency Hearing

As detailed below, there were ample warning signs that Wickham, a man whose mental illness and brain damage were never in dispute, "decompensated" during the trial

and was therefore incompetent to stand trial. Florida law is clear that, when there is a reasonable ground to believe that a defendant may be incompetent, a competency hearing, including an examination by two or three experts, must be conducted. However, Padovano, acting based on his lay opinion, and in a rush to finish the trial, never moved for a competency hearing, and in that respect, as well, was ineffective. The Circuit Court erred as a matter of law in denying Wickham's argument based principally on Padovano's testimony that he believed Wickham was competent.

1. The Constitutional Right Not To Be Tried While Incompetent

A defendant who is incompetent has the right not to stand trial under the due process clause of the United States and Florida constitutions. *See Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); Fl. R. Crim. Proc. 3.210(a) (1988). The standard for competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). *Accord* Fla. R. Crim. Proc. 3.211(a) (1980); *Hill v. State*, 473 So. 2d 1253, 1257 (Fla. 1985). At the time of trial, the Florida Rules listed eleven non-exclusive factors for ascertaining competency to stand trial. Fl. R. Crim. Proc. 3.211(a)(1).

The constitutional rights to due process and a fair trial also require that the court inquire into a defendant's competency. A court has the obligation to inquire into and immediately order a competency hearing when there exists a reasonable ground to believe that the defendant is not competent to stand trial. *See* Fla. R. Crim. Proc. 3.210(b) (1988); *Hill*, 473 So. 2d at 1257 (citing *Pate v. Robinson*, 383 U.S. 375 (1966)). Under the Rules, a competency hearing must include an examination by two or three experts as

well as a hearing. Fl. R. Crim. Pro. 3.210(b); *see also Hill*, 473 So. 2d at 1257-58 (citing *Pate*, 383 U.S. at 386, for the proposition that the trial court's observation of mental alertness at trial is not sufficient to eliminate the need for a hearing if other information raises questions about defendant's competency).

2. The Circuit Court's Reliance On Padovano's Lay Opinion

Even aside from the issue of Padovano's credibility on this issue, *see* Part I. A. 1. *supra*, the Circuit Court erred in denying this claim based on Padovano's lay and self-interested opinion that Wickham was competent to stand trial, because Padovano had numerous reasons – including Wickham's past institutionalization, schizophrenia, brain damage, and childlike behavior – to believe that an investigation was warranted. (PC-R 7724.) The Court's reliance on Padovano's lay opinion about Wickham's competency was contrary to the legal standard for ineffective assistance of counsel, which requires a determination of whether Padovano failed to explore Wickham's competency despite reasonable grounds to do so. *See Wood v. Zahradnick*, 430 F. Supp. 107, 111 (E.D. Va. 1977), *aff'd*, 578 F.2d 980, (4th Cir. 1978) ("If reasonable grounds exist for questioning the sanity or competency of a defendant and counsel fails to explore the matter, the defendant has been denied effective assistance of counsel"); *Hill*, 473 So. 2d at 1259 (the court failed to explore "whether the evidence necessitated a hearing upon defendant's competency to stand trial").

A defendant's "mental alertness at trial is not sufficient to eliminate the need for a hearing if other information brings a defendant's competency into question." *Hill*, 473 So. 2d at 1257-58; *see id.* at 1259 (finding erroneous the trial court's position that "the issue of competency was a judgment call to be decided by the defense attorney"). *Accord*

Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978) (defense counsel "was not entitled to rely on his unsubstantiated belief about the defendant's mental condition").

In addition to ignoring the indications that Wickham was incompetent (discussed in the section below), the Circuit Court erroneously placed little weight on Padovano's testimony that Wickham "acts like a child" and is "child like" in stressful situations. (PC-R 3441.) Experts testified that Wickham's cooperation with Padovano was consistent with the behavior of an incompetent person suffering from organic brain damage. Dr. Riebsame explained, "If you have an attorney that will treat your client in sort of a childlike manner and coach your client as you would a child, you would—I expect to hear the attorney say that I got along with him as long as I parented him effectively because his behavior was so childlike." (PC-R 3619.) Such behavior is to be expected for a person like Wickham, who "really is below the first percentile in terms of his functioning," with brain damage that would manifest itself in his inability to "deliberate in any kind of meaningful way." (PC-R 3746.)

3. The Circuit Court's Reliance On Alleged Conclusions Of Mental Health Experts About Wickham's Competency

In addition to Padovano's testimony, the Circuit Court erroneously supported its denial of Wickham's claim by asserting that both the defense expert, Carbonell, and the State expert, McClaren, had found Wickham to be competent. (PC-R 7725-26.)

First, the Circuit Court erred in relying on Carbonell's fleeting opinion of Wickham's competency as one that adequately determined Wickham's competency "at the time of trial." (*Id.*). Although expressed during the deposition a week prior to trial, Carbonell's opinion was based on an observation conducted six months prior to trial, in May 1988.

(*See* PC-R 4510.) At no time did Padovano ask Dr. Carbonell to perform an additional competency examination after May 1988:

> "Q: After you concluded that he was competent, did you rely on others to communicate to you any change that would require you to reevaluate that competency had changed?
>
> A: The question was never raised to me again, and I was not asked. I was not told that there was an issue of competency again."[8] (PC-R 3553-54.)

Since a defendant's competency to stand trial can change over time, Carbonell's statement was insufficient to establish that Wickham was competent at the time of trial. *See Lane v. State*, 388 So. 2d 1022, 1025 (Fla. 1980) (expert's finding of competency made nine months prior to trial did not control in view of other evidence of possible incompetence).

Additionally, Carbonell's observation of Wickham from May 1988 was unreliable because it did not include a consideration of the factors then relevant to competency under Florida law. "In order for an expert's psychological evaluation to constitute evidence adequate to support a trial court's competency determination, it must include a discussion of each of the specific factors which [Fla. R. Crim. Proc.] 3.211(a) enumerates." *Martinez v. State*, 712 So. 2d 818, 821 (Fla. 2d DCA 1998) (citation omitted). Dr. Carbonell, who does not have a medical degree, never actually performed a full evaluation of Wickham with a written report. Padovano later could not recall on

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[8] The State at no time attempted to determine Wickham's competency for trial. (PC-R 4171.) Dr. McClaren apparently attempted to conduct a competency evaluation on Wickham during his evidentiary hearing, but based that evaluation solely on observations of Wickham smiling from across the courtroom. (*Id*. at 4127-29.)

what basis Carbonell found Wickham to be competent, or what tests she did to evaluate his competency. (*See* PC-R 6826.) It was therefore inapposite for the Circuit Court to treat Carbonell's opinion of Wickham's competency – based on an observation six months prior to trial – as sufficient to satisfy the requirements of Rule 3.211(a).

Further, Carbonell stated in the evidentiary hearing that had she been aware of all of Wickham's erratic behavior, she would have wanted to make further inquiries into his competency. (PC-R 3561-62.) Padovano did not inform Carbonell of his own personal experiences with Wickham (PC-R 3438) and did not provide her with Wickham's jail records, despite her request for them (PC-R 3551-52). As a defense witness, she was not in the courtroom for Wickham's outbursts and other erratic behavior, and testified that upon learning about such behavior from a newspaper, she had concerns about Wickham's competency to stand trial. (PC-R 3562, 3567.)

Second, the Circuit Court erred in relying on the "conclusion" of the state expert, McClaren, that Wickham was competent to stand trial. (PC-R 7726.) McClaren in fact testified that he was "never asked" to evaluate Wickham's competency. Rather, he stated that in reviewing his sixteen-year-old notes and memory of interactions with Wickham, nothing caused him to think Wickham was not competent. (PC-R 4110.) Even if McClaren had "concluded" at the evidentiary hearing that Wickham was competent, such conclusion would be even less reliable as an indication of Wickham's competency at the time of trial than Carbonell's opinion, especially since McClaren never actually performed an evaluation of Wickham's competency. Additionally, McClaren testified that he would have also wanted to know more information about many of the

behaviors that were unknown to Carbonell and himself before making a competency determination with respect to Wickham. (PC-R 4172-76.)

Thus, in relying on the incomplete and outdated evaluation of Carbonell and in mischaracterizing McClaren's evaluation of Wickham, the Circuit Court erred in finding that "there were no reasonable grounds existing to believe that defendant was incompetent." (PC-R 7726.)

4. Padovano's Deficient Performance

Padovano understood that a major defense in Wickham's case was his mental condition, knew that Wickham had schizophrenia, a low intelligence quotient and organic brain damage, and was confronted with an overwhelming number of Wickham's irrational behaviors, but nevertheless neglected to protect Wickham's right to stand trial while competent by (i) not seeking a competency hearing, and (ii) not providing crucial information to mental health experts at the time who would have explored further Wickham's competency.

First, Padovano acted unreasonably by not requesting a competency hearing despite Wickham's impaired mental condition and numerous signs that Wickham was incompetent. Counsel "has a duty to investigate a client's competency to stand trial." *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1993) (citing *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989)). The duty to investigate the issue of competency is even greater where, as here, defense counsel was aware of the defendant's mental conditions and past institutionalization at mental hospitals. *See Profitt v. Waldron*, 831 F.2d 1245, 1248-49 (5th Cir. 1987) (counsel was ineffective for failing to secure records or pursue inquiries at mental institution from which defendant escaped and relying on

report of court-appointed psychiatrist indicating defendant was sane in foregoing insanity defense); *Walker v. Mitchell*, 587 F. Supp. 1432, 1440-44 (E.D. Va. 1984); *Lambright v. Schriro*, No. 04-99010, 2007 U.S. App. LEXIS 11113, at *34-35 (9th Cir. May 11, 2007) ("Moreover, when 'tantalizing indications in the record' suggest that certain mitigating evidence may be available, those leads must be pursued." (citations omitted)).

Padovano testified that during trial preparation, the major area he had to learn, build up and present was Wickham's mental health and related issues. (PC-R 3340.) He stated that although he knew that Wickham was diagnosed as a childhood schizophrenic, had a very low intelligence quotient, and very possibly had some form of organic brain dysfunction (PC-R 3367), he spoke only with a psychologist with no background or expertise in brain damage, and did not reach out to a psychiatrist, neuropychiatrist, or child development expert (PC-R 3360). Padovano even admitted to the jury during the penalty phase of the trial about Wickham's organic brain damage, "we don't know what effect it may have had on this offense, what effect it may have had on his behavior. It may have had a profound effect on his behavior. We simply don't know that." (R 2027.)

Padovano's failure to investigate or raise Wickham's competency is striking, considering the number of Wickham's irrational behaviors that confronted Padovano while preparing for trial, behaviors that hindered Padovano's ability to aid in Wickham's defense. Padovano learned upon being assigned to Wickham's case that several of Wickham's defense attorneys had resigned because they could not get Wickham to cooperate. (PC-R 3327.) Wickham refused to cooperate in mental health testing that was "very important" for his insanity defense. (PC-R 3330-31, 3453, 3548.) Carbonell tried

on four occasions to give Wickham the MMPI and failed each time until Padovano eventually administered the test himself. (PC-R 4511.)

At trial, Wickham continued to show a marked inability to assist his attorney. Padovano's statements to Wickham's counsel in 1995 regarding Wickham reveal the dysfunction in communication between Padovano and Wickham. Padovano stated that Wickham "decompensated" during his trial to the point where he was "barely functioning." (PC-R 6826, 6837; *see also* PC-R 3651-53.) He said Wickham had almost "zero" ability to assist with his defense. *Id.* In fact, he described Wickham as "unmanageable" and "very hard to control" at trial. *Id.* At one point, Padovano informed the Court that it would take "forty-five minutes" to explain a routine matter to Wickham and asked the Court not to require a waiver from Wickham for that reason. (R 1034-35.)

In the courtroom, Wickham also exhibited irrational behaviors indicative of his severe mental impairment. Wickham informed bailiffs that he would not attend pretrial proceedings, requiring the Court to order Wickham's presence at all such proceedings "by use of reasonable force if necessary." (R 80.) In addition, he refused to attend either charge conference (PC-R 3704-05), and he threatened not to attend the penalty phase of his own trial until the Court warned he would be forcibly brought to court. (R 1873.) He "flipped the bird" at the prosecutor (R 1888), at the media, and at courtroom spectators (R 2048; PC-R 3440). He made "inappropriate remarks" to the jury (PC-R 3340) and screamed obscenities in the courtroom (R 2048). Wickham stated in court that he hoped the victim's father "gets hit by a car and dies" and made other obscene suggestions about the victim's father. (R 1914.)

Further, Padovano had access to information about Wickham's behaviors from various sources that established a disturbing pattern of irrationality. Just prior to trial, Padovano heard the deposition testimony of Carbonell that Wickham had an "inability to understand, [or] reason accurately" and that he "ha[d] trouble with cause and effect." (PC-R 4524-25.) She said that Wickham reported periods of "blackouts," (PC-R 4532; *see also* PC-R 3550) and that Wickham was a "disturbed person who [was] trying to say that he really [was] a very good person." (PC-R 4531.) Jail officials observed that Wickham fell into a "frozen stare" with enough frequency to note it in his prison records. (PC-R 6823.) They told Wickham's mental health expert that Wickham "was a weird one" and displayed "unusual behavior." (PC-R 3552.) Indeed, Wickham inexplicably set fire to toilet paper in his jail cell in an effort to heat coffee (PC-R 6824), urinated in the hallway at jail (*See* PC-R 3620, 3704, 3757), and threw coffee at an officer (PC-R 4255). Wickham's cellmates also described Wickham as "zon[ing] out," "daz[ing] out," not "see[ing]" his cellmates, and going into "trances" on a continuous basis. (*See, e.g.*, PC-R 4224, 4247.) Padovano also had access to Wickham's wife, Sylvia Wickham, who testified at the evidentiary hearing that she had seen Wickham talking to himself and that he once told her "he had seen the devil." (PC-R 3944.) She testified that two to three times per week Wickham wandered off and could not recognize her. (PC-R 3944-45.)

In sum, Padovano faced numerous signs that served singly or cumulatively as "reasonable grounds" to doubt Wickham's competency. *See* Fla. R. Crim. P. § 3.210(b) (1980). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competency to stand trial are *all* relevant in determining whether further inquiry is required, but that even one of these factors standing alone may,

in some circumstances, be sufficient." *Drope*, 420 U.S. at 180 (emphasis added). "What activates the need for a competency hearing is some type of irrational behavior or evidence of mental illness that would raise a doubt as to the defendant's present competency." *Lane*, 388 So. 2d at 1025-26.

As discussed above, Padovano did not fulfill his duty to inform the mental health experts about Wickham's deteriorating mental condition prior to and during trial. A defense counsel's failure to provide mental health experts with information necessary to a mental evaluation is ineffective assistance of counsel. *See Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985) (failure to give psychiatrist a copy of defendant's confession prevented proper diagnosis of defendant's sanity); *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1998) (counsel must conduct an investigation to determine what sort of experts to consult, and then present those experts with information relevant to the conclusion of the expert). This responsibility is even more critical for competency, where the defense counsel may be the sole hope that the defendant's mental condition will be brought to the attention of the court. *See Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990). (Indeed, in the context of counsel's duty to investigate a defendant's mental condition, courts have noted the "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981).

Further, defense counsel has a duty to monitor continually a defendant's competency. *See Lane*, 388 So. 2d at 1024-25 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to [changes] suggesting [that he is no longer competent]." (quoting *Drope*, 420 U.S. at 179)). The testimony

of Carbonell and Padovano reveal that neither monitored Wickham for competency, because each relied on the other to alert him or her of any competency-related issues. Carbonell testified at the evidentiary hearing that after her initial competency evaluation in May 1988 she was never asked to reevaluate Wickham's competency and that "it would have been more likely that Padovano would have raised [concerns about Wickham's competency] to me." (PC-R 3553-54, 3561.) Padovano, meanwhile, testified that he relied on Carbonell to inform him "if there was any chance that [Wickham] was incompetent to stand trial." (PC-R 3437.) He relied on Carbonell despite the fact that he did not "dwell" on his experiences with Wickham in his discussions with Carbonell, concluding that "she didn't need the benefit of my assessment." (PC-R 3438.) In not disclosing pertinent information to Carbonell and then relying on her partially-informed opinion of Wickham, Padovano did not take the reasonable steps necessary to protect Wickham's right to stand trial while competent.

5. Wickham Was Prejudiced By His Counsel's Failure To Request A Competency Hearing

Padovano's inaction in not requesting a competency hearing prejudiced Wickham. Wickham's behavior and mental condition before and during trial raised serious questions about his ability to satisfy at least seven of the eleven factors delineated in Fla. R. Crim. P. 3.211(a)(1) (1980):

(iv) Wickham's capacity to disclose to his attorney facts surrounding the alleged offense. (PC-R 3615-16, 3700-01, 3756.)

(vi) Wickham's ability to assist his attorney in planning a defense. (PC-R 3616, 3701.)

(vii) Wickham's capacity to realistically challenge prosecution witnesses. (PC-R 3616, 3701-02.)

(viii) Wickham's ability to manifest appropriate courtroom behavior. (PC-R 3616-17, 3702.)

(ix) Wickham's capacity to testify relevantly. (PC-R 3617, 3702.)

(x) Wickham's motivation to help himself in the legal process. (PC-R 3617, 3702-03.)

(xi) Wickham's capacity to cope with the stress of incarceration prior to trial. (PC R 3617, 3703.)

Referring to Wickham's actions before and during trial, Van Gorp stated, "in the aggregate, they are overwhelming red flags." (PC-R 3705.) Similarly, Mills testified, "[i]n the aggregate, there [were] lots and lots of reasons to question his competency at the time. And as I read the record as a forensic psychiatrist, had I been involved in 1988, I would have said these issues need to be much more clearly explored." (PC-R 3756.) He also emphasized that "this is one case where the effects are multiplicative [rather] than additive, where one plus one plus one equals five, not one plus one plus one equals three." (PC-R 3758.) Van Gorp confirmed that "there were enough red flags that [a competency hearing] definitely should have been put in motion to see what the outcome would have been." (PC-R 3704.) Even McClaren acknowledged that, in the aggregate, he "would want to know further information" about Wickham's competency. (PC-R 4174.) In fact, all of the mental health experts who testified at the evidentiary hearing, including the State's expert, agreed that further inquiry into Wickham's competency was warranted at the time of his trial. *See* Carbonell (PC-R 3652, 3657); McClaren (PC-R 4172, 4175-76); Riebsame (PC-R 3620-21); Van Gorp (PC-R 3704-06); Mills (PC-R 3757-58.).

There is a reasonable probability that had Wickham undergone a competency hearing, mental health experts would have found Wickham incompetent to stand trial. Because Wickham's was prejudiced by Padovano's failure to raise the issue of Wic kham's competency to stand trial, Padovano provided ineffective assistance of counsel to Wickham.

IV. THE TRIAL COURT AND THE STATE SHOULD HAVE DETERMINED WICKHAM'S COMPETENCY TO STAND TRIAL

Wickham was denied his constitutional rights to due process of law and a fair trial under the sixth and fourteenth amendments to the U.S Constitution and Article I, Sections 9 and 16 of the Florida Constitution because the Court did not determine Wickham's competency to stand trial and because the State tried him while he was not competent to stand trial.[9]

A. The Circuit Court's Erroneous Holding

In its *Huff* Order, the Circuit Court summarily denied Wickham's claims that the trial court failed to conduct a competency hearing and that he was incompetent to stand trial. The Court held that competency claims not raised on direct appeal are procedurally barred, citing *Carroll v. State*, 815 So. 2d 601 (Fla. 2002) and *Patton v. State,* 784 So. 2d 380 (Fla. 2000).

The Circuit Court erred in ruling as a matter of law that competency claims are barred when not raised on direct appeal, because the Florida Supreme Court has reviewed

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[9] The laws and the constitutional obligation for the trial court to ensure that Wickham was not tried while incompetent have been stated above. *See supra* Part III. A. 1.

claims concerning the defendant's competency raised for the first time on collateral review when the court never conducted a competency hearing. *See, e.g.*, *Mason v. State*, 489 So. 2d 734, 735-36 (Fla. 1986) (remanding for evidentiary hearing on whether defendant should have received a competency hearing); *Hill*, 473 So. 2d at 1260 (vacating the conviction and sentence because the court failed to hold a hearing when competency was not raised in direct appeal (*Hill v. State*, 422 So. 2d 816 (Fla. 1982)).

Both of the cases relied upon by the Circuit Court are inapposite, because they concerned the question of whether a defendant may challenge on collateral review the court's decision following a competency hearing. In those cases, although the defense attorney raised the issue of competency and the court held a competency hearing, the defense attorney failed to raise the issue of competency on direct appeal. *See Carroll*, 815 So. 2d at 610-11; *Patton*, 784 So. 2d at 393. In *Thomas v. Wainwright*, 788 F.2d 684, 688 (11th Cir. 1986), the Court explained the rationale for barring such collateral attack: while the issue of competency to stand trial "can not be waived or foreclosed by procedural default . . . [t]his does not mean, however, that once the issue of competency to stand trial is raised and the state court takes the proper steps to resolve the issue, the defendant is free to drop the issue or later pick it up as it suits his purposes."

If Wickham was tried while incompetent, this Court must vacate the conviction and sentence and remand with directions that the State may choose to re-prosecute the defendant after it is determined that he is competent to stand trial. *Drope*, 420 U.S. at 183; *Pate*, 383 U.S. at 386-87; *Hill*, 473 So. 2d at 1259 ("As was determined in *Drope* and [*Pate*], this type of competency hearing to determine whether Hill was competent at the time he was tried cannot be held retroactively").

B. The Circuit Court's Failure to Hold A Competency Hearing

The Circuit Court did not hold a competency hearing despite Wickham's repeated behaviors before, during, and immediately after trial that established reasonable grounds to believe that he may not have been competent to stand trial. Prior to trial, the Court knew that several defense attorneys resigned from Wickham's case because they could not get along with him. (PC-R 3327.) Wickham refused to be fingerprinted and had to be forced to do so by deputies (PC-R 4607-11), and he informed bailiffs that he would not attend pretrial proceedings, resulting in the Court ordering his presence "by use of reasonable force if necessary" (R 80).

One week prior to trial, the trial court received information further indicating Wickham's mental illnesses and his inability to participate in his own defense. Padovano filed a motion informing the Court that Wickham would rely on the defense of insanity and that Carbonell had determined that he was insane at the time of the offense. (*See* PC-R 4511.) The motion noted that Wickham had "an extensive psychiatric history" and that he had been "involuntarily committed" to a mental hospital for ten years. (PC-R 4510.) Counsel told the Court that Carbonell had determined that Wickham was competent to stand trial six months before trial. (*Id.*) However, Padovano informed the Court that over the subsequent six months Carbonell had tried "on numerous occasions" to administer the MMPI psychological test to Wickham, but that "[o]n at least four separate occasions the defendant failed to complete the examination." (PC-R 4511.) The Court learned as well that Wickham only completed the exam when counsel sat with him "for intermittent periods of time during two days." (*Id.*)

As discussed *supra* in Part III. A. 4, throughout the trial and immediately after sentencing, the Court observed Wickham engage in irrational, inappropriate, and bizarre behavior and was informed by Padovano of the difficulties he had in communicating with Wickham. (*See* R 1034-35, 1873, 1888, 1914, 2048; PC-R 3440, 3496.)

Wickham's behavior raised a reasonable ground to believe that he may be incompetent, because the trial focused on Wickham's mental health. Thus, the Court viewed Wickham's behavior at the same time as the Court heard evidence about Wickham's schizophrenia, brain damage, and low intelligence quotient.

The Court deprived Wickham of his due process right to a fair trial by neglecting to observe the procedures adequate to protect Wickham's right not to be tried or convicted while incompetent to stand trial. *See Drope*, 420 U.S. at 172; Fla. R. Crim. Proc. 3.210(b) (1988); *Hill*, 473 So. 2d at 1257. The Court's duty to monitor Wickham's competency extended throughout the trial process due to the fact that competency can change over time. *See Drope*, 420 U.S. at 181 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competency to stand trial."). The Florida Rules required the Court immediately to order an examination by two or three experts and schedule a hearing once the Court had a reasonable ground to believe that Wickham *may* not have been competent. *See* Fl. R. Crim. Pro. 3.210(b); *Tingle v. State*, 536 So. 2d 202, 203 (Fla. 1988) (noting that under Rule 3.210 "the question before the court is whether there is reasonable ground to believe the defendant *may* be incompetent, not whether he *is* incompetent." (citations omitted)). Thus, this Court should find that the Trial Court violated Wickham's right to due process

when it did not hold a competency hearing because Wickham presented sufficient evidence to raise a bona fide doubt as to his competency at trial.

Amazingly, at the 3.850 hearing, the State advocated a competency hearing even though Wickham exhibited significantly less improper behavior at the hearing than at trial. (*See* PC-R 3623-24) (the State demanding a competency evaluation when Wickham asked to return to death row and Riebsame testified that he "had questions" about Wickham's competency); (PC-R 3795-98) (the State asking for an immediate competency hearing after Wickham refused to attend the hearing and requesting that McClaren evaluate Wickham). The State asked for a competency hearing even though there is a significantly higher standard of competency for a post-conviction evidentiary hearing. *See* Fla. R. Crim. P. 3.851(g) (mandating a competency hearing in capital collateral proceedings only if the movant's input is necessary to the proceedings).

V. THE STATE PRESENTED FALSE AND MISLEADING EVIDENCE AND WITHHELD EXCULPATORY EVIDENCE FROM THE DEFENSE

A. Preliminary

After Wickham's trial, prosecutor notes as well as affidavits and testimony from virtually all the key witnesses at the trial indicated that (a) the State put tremendous pressure on witnesses to come up with testimony that would incriminate Wickham resulting in false testimony as to the single issue that dominated Wickham's trial, and (b) the State withheld important impeachment information from Wickham's trial counsel pertaining to witnesses who testified as to the same issue.

That issue was whether Wickham shot Fleming as a part of a cold, calculated and premeditated plan to eliminate a witness and avoid arrest, as the State argued, or whether

Wickham acted impulsively, under the influence of alcohol and drugs, consistent with his undisputed mental illness and brain damage, as argued by the defense. In its Findings in Support of the Sentence of Death, the Trial Court completely embraced the State's theory, based on testimony that Wickham told various people that he intended to kill the victim of the robbery. The Findings also relied on testimony that Wickham was the mastermind of a failed plan to escape prison after his arrest to generally reject defense expert testimony as to Wickham's impaired state. In his Rule 3.850 Motion, Wickham submitted evidence that the State withheld from Wickham's trial counsel information that could have served to effectively impeach the State witnesses who testified on these key issues. In denying the Motion, the Circuit Court misapplied the relevant legal tests.

B. Factual Background

1. Trial Testimony As To Wickham's Planning Of The Killing And Generally As To Wickham's Ability to Plan

During the trial, several witnesses testified that Wickham intended and planned to kill the victim of the planned robbery in order not to leave witnesses. Tammy Jordan, a co-defendant, testified that Wickham told her: "there might be a killing involved in it." (R 1191.) Larry Schrader, another co-defendant, testified that Wickham told him (after the fact) that "there wouldn't be no witnesses to testify against him."

Obviously perceiving a need to bolster these testimonies, the State introduced testimony from Wickham's cellmates, to whom Wickham allegedly confessed about his crime: John Hanvey testified that Wickham conveyed to him and to two other cellmates (Michael Moody and Darnell Page) that Wickham had told Sylvia Wickham (another co-defendant) that "he would not leave any witnesses behind" (R 1324); Moody testified in

the same vein (R 1613). The State also relied on Hanvey, Moody and another prisoner, Wallace Boudreaux,[10] for testimony that Wickham masterminded a failed plan to escape from prison (*see* R 1290-91, 1323-24), and later used that testimony to refute Wickham's claim that he did not have the capacity to plan (R 1656).

The Court specifically and heavily relied on these testimonies in its Findings: in establishing the aggravating factor that the "capital felony was committed for the purpose of avoiding or preventing a lawful arrest" (R 248); in establishing the aggravating factor that the "capital felony was committed in a cold calculated, and premeditated manner" as establishing "'heightened' premeditation" (R 249-50); implicitly in rejecting both statutory mitigating factors connected to mental deficiencies, finding Carbonell's testimony that Wickham is unable to premeditate and plan a killing "conclusory," "without foundation, believability or credibility" (R 250); and once more in distinguishing Wickham from the other co-defendants finding that "none of them suggested that Morris Fleming be killed" (R 251).

In short, the testimony of these specific witnesses was essential to the State's argument for the death penalty, and for the trial Court's findings. Had the State performed its constitutional obligation to share material information in its possession about the witnesses, counsel would have been able to effectively impeach the witnesses who testified on this point, and effectively undermine the claim that Wickham is a calculating, cold blooded, criminal mastermind.

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[10] Boudreaux and Hanvey were called by the State in its case in chief (R 1266-1311, 1321-30.) Moody was called by the State in its rebuttal case. (R 1611-19.)

C. The State Withheld Impeaching Evidence From The Defense

As he explained in his Rule 3.850 hearing testimony, defense counsel wanted for obvious reasons to elicit any benefit that Boudreaux, Hanvey, and Moody hoped to gain from testifying for the State in order to discredit their credibility in the eyes of the jury. (PC-R 4028-29, 4040-43.)

1. Wallace Boudreaux

At trial, Wallace Boudreaux testified over objection that his first contact with Wickham was when they "talked about the possibility of escape." (R 1267.) Boudreaux then testified that Wickham confessed to him in jail, explaining how he planned the robbery. (R 1293-94.) On cross, Boudreaux denied that he testified in the hope of benefiting from his cooperation with the State, testifying: "[t]he possibility was there but that was not my intention, to receive a break" (R 1308). Padovano asked, "You just did it out of the goodness of your heart?" Boudreaux responded:

> I took a good look at myself and I seen that, well, Wally, it's about time you started doing this different, you know. You're not really accomplishing anything sitting here in jail looking at the penitentiary again. What's wrong? What are you doing wrong?
>
> And so I decided to try and change my life around a little bit, to try and really rehabilitate myself by being honest. Not only with me, myself, but with other people concerning the incidences as well. That's why I decided to become a snitch, to reveal the truth, no matter what it cost. (R 1308.)

In redirect, Boudreaux testified that he had already been sentenced in his case "and the judge exceeded the guidelines in my sentence, and I did receive an extensive sentence." (R 1309.)

That testimony was misleading, but Padovano was not provided the information with which to impeach it. At the Rule 3.850 hearing, documentary evidence was presented

about the charges that Boudreaux had faced in two different criminal cases and their resolution. The court file in Boudreaux's grand theft case, Case No. 86-4235 (PC-R 7010), was introduced into evidence, as well as the February 17, 1988, Pre-Plea Investigation in Case No. 87-787. (PC-R 7089.) The Pre-Plea Investigation was marked "confidential." (PC-R 3906-07.) Padovano testified that he would not have had access to the confidential Pre-Plea Investigation unless access was specially provided by the State. (PC-R 4030-31.) Also introduced into evidence were records from the Department of Corrections regarding Boudreaux showing the sentences he received. (PC-R 7109-53.)

According to the Pre-Plea Investigation, in February 1987 Boudreaux attempted to escape from jail by conspiring with friends to kill a prison guard who was taking Boudreaux to receive an x-ray at a local radiology clinic. This attempted escape/murder occurred while Boudreaux was in jail on grand theft charges filed in October of 1986. (PC-R 7010.) In Case No. 87-787, Boudreaux was charged with conspiracy to commit first degree murder, aiding an escape, conspiracy to commit an escape, attempted escape, and possession of a firearm by a convicted felon. (PC-R 7090.) A guideline score sheet showed a sentence of 12-17 years. In the Pre-Plea Investigation, Boudreaux's attorney advised that the State had agreed to drop the conspiracy to commit murder charge. The Pre-Plea Investigation also included the following statements from law enforcement personnel:

> Captain Howard Schleich of the Leon County Jail was contacted. Captain Schleich described the defendant as a very dangerous person in whom he would not trust. Lt. Lowell McDonald, of the Leon County Sheriff Office was contacted. Lt. McDonald stated that the subject is a dangerous person. Lt. McDonald recommends that the subject be given a lengthy prison sentence. (PC-R 7098.)

The records from Case No. 86-4235 included a judgment dated October 20, 1988, showing an entry of a nolo plea to grand theft. (PC-R 7080.) A separate document in the court file shows that the nolo plea was entered on August 11, 1988. (PC-R 7086.) The sentence accompanying the judgment reflected the imposition of a five-year term of incarceration, concurrent to the sentence in Case No. 87-787. (PC-R 7082.)

The DOC records include the judgment and sentence from Case No. 87-787. (PC-R 7111-13.) This judgment is also dated October 20, 1988. It reflected that a nolo plea had been entered as to 1) conspiracy to commit an escape; 2) attempted escape; 3) possession of firearm by a convicted felon; and 4) use of firearm in commission of a felony. (PC-R 7111.) The sentence imposed on count 3 was a term of five years incarceration, with another five years of incarceration on count 4, but imposition of the sentence on counts 5 and 6 were withheld. The sentence included the recommendation that "the defendant not be placed in an institution where there are people he testified against." (PC-R 7115.) The list of names set forth included Jerry Wickham and his co-defendants. (PC-R 7115.) Also included in the DOC records was a document "From Leon Co Jail" which stated:

> 7/31/88 Inmate has been housed in Jefferson Co. Jail for us. Inmate was attempting to escape. Staff at Jefferson Co. Jail intercepted information concerning escape, Jefferson Co. brought inmate back to LCJ.
>
> 8/1/88 Inmate will be housed in max custody and treated as an escape risk. Advised all shifts on his ability to harm the staff. (PC-R 7150.)

Padovano testified that he deposed Boudreaux on June 29, 1988. (PC-R 4032.) During the deposition, Wickham's prosecutor indicated to defense counsel that he did not know "what is going on in terms of the plea agreement or any sort of plea negotiations in

the case because he is not the assigned prosecutor." (PC-R 4032.) The prosecutor also advised defense counsel that Boudreaux was represented by counsel who was not present for the deposition. (PC-R 4033.) Accordingly, Wickham's attorney did not question Boudreaux about the facts of the cases pending against him. (PC-R 4034.) ("I thought I had an obligation to Boudreaux not to do that without his counsel present.")

Padovano testified that he did not recall having any information regarding the fact that a conspiracy to commit first-degree murder charge had been pending against Boudreaux and had been dropped by the State. (PC-R 4036.) Padovano also testified that he did not recall having any information that in July 1988, several months before his testimony against Wickham, Boudreaux attempted an escape from the Jefferson County jail where he was being housed. (PC-R 4036.)

2. John Hanvey

Hanvey, another cellmate, testified that Wickham told him that he had said to his wife prior to the killing, "that he would not leave any witnesses behind; that whoever stopped, that he was going to kill." (R 1324.) During cross examination, defense counsel asked Hanvey why he was in jail. Hanvey responded, "[e]scape and aggravated battery." (R 1329.) When asked about the escape, Hanvey explained: "It wasn't escape from a jail. I walked away from a work-release center." (R 1329.)

That testimony was misleading. Hanvey left out of his testimony that he had been permitted to enter a nolo plea to escape and misdemeanor battery and received a withheld adjudication on the condition that he "cooperate with [the] State and testify truthfully." (PC-R 4509, PC-R 4040.) At the Rule 3.850 hearing, the file maintained by the clerk of court in *State v. Hanvey,* Case No. 87-2905CF, was introduced into evidence. (PC-R

4477.) In the Information, Hanvey was charged with one count of escape and one count of aggravated battery with a deadly weapon. (PC-R 4479.) According to the criminal complaint, the alleged aggravated battery occurred on July 25, 1987, when Hanvey struck "the victim about the head approximately five times with a heavy iron skillet, approx. ten inches in diameter." (PC-R 4486.) "The victim received lacerations and a contusion to the forehead and was transported to T.M.R.M.C. by ambulance." (PC-R 4486.) This incident occurred while Hanvey was serving "three years on 24 counts of forgery, uttering a forgery." (PC-R 4480.) At the time, Hanvey was on work release. A judgment dated May 25, 1988, indicated that Hanvey entered a nolo plea to escape and to misdemeanor battery (a lesser offense). This judgment showed that the court "withheld sentence" and gave Hanvey 1-2 years of "community control" in lieu of jail in exchange for his agreement to "cooperate with [the] State and testify truthfully." (PC-R 4507-09.)

At the Rule 3.850 hearing, Padovano observed that whether or not a deal existed that could be clearly linked to the Wickham case, the information itself would still have been potent impeachment evidence. (PC-R 4041.) Further, Padovano acknowledged that Hanvey's previous convictions of forgery were likely admissible under the rules of evidence as crimes of dishonesty, but he did not recall if he was provided any information regarding Hanvey's convictions for forgery. (PC-R 4038-39.)

3. Michael Moody

Moody was the third of Wickham's cellmates called by the State to testify at trial. Defense counsel cross examined Moody as to whether he received a deal for his testimony. (R 1615-17.) Moody acknowledged that his lawyer attempted to make a deal with the State. (R 1615.) However, "[t]he State said they weren't going to buy a pig in a

poke." (R 1616.) So "I told the State about it before they cut a deal." (R 1616.) Moody testified that in response, the State "didn't say they were going to give me any clear-cut deal." (R 1617.) On redirect, Moody testified that he got "[t]hree ten-year sentences and eight five-year sentences, running concurrent." (R 1618.) He said that he essentially received "a ten-year sentence." (R 1619.) In re-cross, defense counsel asked, "[w]hat was the maximum penalty" for the crimes with which Moody had been charged. Moody answered, "Ten years." (R 1618.) When asked if he got the maximum, Moody testified, "I think I did." (R 1618.)

That testimony was misleading. At the Rule 3.850 hearing, documents were introduced regarding the sentence that Moody received. On June 20, 1988, Moody wrote his sentencing judge and explained that he was sentenced to 20 years, when his expectation, based on negotiations with the State, was to have his penalty run concurrently, so that he will serve only 10 years. (PC-R 7203-04.) The letter was stamped as received by the Circuit Court on June 23, 1988. On June 22, 1988, Moody's attorney filed a Motion to Amend Sentences. (PC-R 7201.) This motion explained that nothing appeared in the June 9, 1988 sentence indicating that it was concurrent to the April 21, 1988 sentence. As a result, "Defendant is facing a twenty-year (20) sentence." (PC-R 7201.) However as the motion explained, the agreement worked out with the State was for Moody to receive "a total sentence of ten (10) years on all of the above-cited cases" (PC-R 7201.) The motion represented that Assistant State Attorney Poitinger had been fully advised and authorized counsel to advise the court that he had no objection to the motion. On June 23, 1988, Moody's sentence in all of the cases was

reduced to 10 years. (PC-R 7200.) Thus, a few months prior to Wickham's trial, and with the specific acquiescence of the State, Moody's sentence was cut exactly in half.

At the evidentiary hearing, defense counsel testified that he did not recall having the motion to amend the sentence and/or the order amending sentence. (PC-R 4044.)

4. Tammy Jordan

Tammy Jordan was one of Wickham's co-defendants. She testified against Wickham after pleading guilty to second degree murder. At the evidentiary hearing, handwritten notes by the prosecutor of what Tammy Jordan had to say were introduced. (PC-R 4423.) These notes were dated February 11, 1988,[11] and set forth in the margin "w/ Lyn Thompson & Ralph Johnson / Tammy Jordan." The prosecutor confirmed that the notes were in his handwriting. (PC-R 4423.) Jordan was the sole co-defendant to testify at trial that Wickham had allegedly said "[t]here might be a killing involved in it." Prior to the February 11, 1988 meeting with the State, Jordan had three recorded interviews with the police in which she did not mention anything about premeditation or that there might be a killing. These words appear for the first time in the chronology in the trial prosecutor's handwritten notes dated February 11, 1988. (PC-R 4423.) There was no evidence that these notes were disclosed to Wickham's defense counsel.

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[11] Tammy Jordan's plea agreement, signed on March 22, 1988, was introduced as Def. Ex. N. (PC-R 4424.) Approximately one month after the February 11 interview, Jordan entered a guilty plea to second-degree murder and armed robbery in lieu of a first-degree murder prosecution. In exchange for this plea, she agreed to "testify fully, completely and truthfully . . . against any and all parties involved in the murder of Morris Fleming." (PC-R 4428.)

D. The State's Due Process Obligation

1. Disclose Favorable Information To The Defense

In order to insure a fair trial, certain duties are imposed upon the prosecuting attorney. The prosecutor must disclose to the defense information "that is both favorable to the accused and 'material either to guilt or to punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985), quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) ("the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable").[12] As a result, constitutional violation occurs when:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

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[12] The prosecutor has a "duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police". *Kyles* at 437. The prosecutor has an obligation to learn of any favorable evidence known by individuals acting on the government's behalf and to disclose any exculpatory evidence in the State's possession to the defense. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). A prosecutor specific knowledge of the favorable evidence does not matter, if the favorable evidence is in the possession of other State agents. *Kyles*, 514 U.S. at 438-39 ("Since, then, the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.")

Under *Strickler*, defense counsel's diligence is not an element of a Brady claim.[13] "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 124 S. Ct. 1256, 1263 (2004).[14]

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. *Garcia v. State*, 622 So. 2d 1325, 1330-31 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.[15]

This Court has found *Brady* violated where the prosecutor's notes from an interview of a witness contained impeaching information that was favorable to the defense and where the failure to disclose the information contained in those notes undermined

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[13] But of course, if defense counsel was not diligent, his performance was deficient and failed to meet the constitutional standards imposed upon him. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996).

[14] Accordingly, "[t]he prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976). "[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles*, 514 U.S. at 439.

[15] "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

confidence in the reliability of the outcome of the trial. *Young v. State*, 739 So. 2d 553 (Fla. 1999).[16] In deciding whether collateral relief is warranted, "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." *Rogers v. State*, 782 So. 2d at 385.[17] Further, the undisclosed favorable information not heard by the jury must be evaluated "collectively, not item-by-item" in deciding whether relief is granted. *Kyles v. Whitley*, 514 U.S. at 436; *Young v. State*, 739 So. 2d at 559.

2. Correct false or misleading evidence.

In *Giglio v. United States*, 405 U.S. 150, 153 (1972), the Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." As the Supreme Court explained, a prosecutor is:

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[16] This Court has not hesitated to order new trials in capital cases wherein confidence was undermined in the reliability of the verdict as a result of the prosecutor's failure to disclose exculpatory evidence. *Floyd v. State*, 902 So. 2d 775 (Fla. 2005); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004); *Cardona v. State*, 826 So. 2d 968 (Fla. 2002); *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001); *State v. Hugins*, 788 So. 2d 238 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Gorham v. State*, 597 So. 2d 782 (Fla. 1992); *Roman v. State*, 528 So. 2d 1169 (Fla. 1988).

[17] Favorable information subject to disclosure includes information giving rise to impeachment presentable through cross-examination challenging the "thoroughness and even the good faith of the [police] investigation." *Kyles v. Whitley*, 514 U.S. at 446. See *Scipio v. State*, 928 So. 2d 1138 (Fla. 2006). It also includes undisclosed contact between the State and a witness. The existence of undisclosed contact could be used to suggest that across time "the prosecutor had coached" the witness as to what to say. *Kyles*, 514 U.S. at 443.

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88 (1935).[18]

Where a prosecutor intentionally or knowingly presented false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process was violated and relief required unless the error is harmless beyond a reasonable doubt. *Kyles v. Whitley*, 514 U.S. 419, 433 n.7 (1995).

E. The Circuit Court's Analysis Employed The Wrong Legal Standard Under both *Brady* and *Giglio*

In addressing Wickham's due process claim, the Circuit Court treated it solely as a *Brady* claim. It then addressed only certain aspects of Wickham's allegations.

First, the Circuit Court took up allegations regarding Hanvey. After discussing testimony from the evidentiary hearing as to whether or not there was "a deal" between Hanvey and the State, the Circuit Court concluded:

> The court will not infer from notations on a plea agreement entered into eight months prior to the Wickham trial, that "cooperate with the State" referred to cooperation in the Wickham trial. Accordingly, the defendant has not proven his allegation that the State failed to disclose a deal with Mr. Hanvey and the Brady claim is denied.

(PC-R 7740-41.)

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[18] The prosecution has a duty to alert the court, the defense, and the jury when a State's witness gives false testimony, *Napue v. Illinois*, 360 U.S. 264 (1959). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." *Garcia v. State*, 622 So. 2d 1325, 1331 (Fla. 1993). A prosecutor is prohibited from knowingly relying upon false impressions to obtain a conviction. *Alcorta v. Texas*, 355 U.S. 28 (1957).

This is a misapplic ation of *Brady,* under which the question is not whether the undisclosed information demonstrated that the witness had "a deal", but whether the undisclosed information was favorable – that is, whether it tended to impeach the witness in some fashion. One way to impeach a witness is to demonstrate that the witness had reason to curry favor with the State. *Davis v. Alaska*, 415 U.S. 308, 317-318 (1974). There, the Supreme Court stated:

> we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." *Douglas v. Alabama*, 380 U.S., at 419. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. (footnotes omitted)

It is not a matter of Mr. Wickham proving bias or proving the underlying fact of bias or motive being used to impeach a State's witness. The defense is entitled to present circumstances that it can argue affords a basis for an inference of bias or motive.[19] Under *Kyles*, the materiality analysis of a Brady claim requires looking at the undisclosed information from the defenses perspective and seeing how the defense could have used the information had its existence been disclosed.[20] The fact that Hanvey's sentence was conditioned upon his agreement to "cooperate with [the] State and testify truthfully", was

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[19] In *Kyles*, 514 U.S. at 442 n. 13, the Supreme Court noted that the undisclosed Brady material "would have revealed at least two motives" for a witness to come forward to implicate Kyles in the murder, i.e. "[t]hese were additional reasons [for the individual] to ingratiate himself with the police".

[20] Throughout the materiality analysis that the United States Supreme Court conducted in *Kyles*, the Court considered how the defense "could have" used the *Brady* material at trial, what "opportunities to attack" portions of the State's case, and what the defense "could have argued." 514 U.S. at 442 n. 13, 446, 447, 449.

a matter that demonstrated that he had reason to curry favor with the State when he testified approximately six months later at Mr. Wickham's trial on behalf of the State . (PC-R 4509.)[21]

Even though the Circuit Court did not address the aspect of the Hanvey claim premised upon *Giglio,* it is also clear that a *Giglio* violation is not dependent upon the answer of the simplistic question as to whether or not there was "a deal". The touchstone of a *Giglio* claim is whether or not the State failed to correct false or misleading testimony or evidence.[22]

Second, the Circuit Court misapplied the law in its brief discussion of the due process claims premised upon Boudreaux. The Circuit Court stated:

> Judge Hankinson testified that he did not recall any agreements with Mr. Bordeaux [sic] but if any plea agreements had been entered into they would have been disclosed to the defense. (Attachment QQ - Ev. Hr. At 141-142). **The defendant did not introduce any evidence that the State willfully withheld any information.** (PC-R 7741) (emphasis added).

Whether the State acted "willfully," however, is not the relevant test. Under *Strickler*, a due process violation occurs when: "The evidence at issue [was] favorable to the

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[21] It isn't a matter of what the State says about the undisclosed information, it is a question of how the defense "could have" used the undisclosed information and what "opportunities to attack" portions of the State's case would have arisen. It is a matter of what the defense "could have argued" if the undisclosed information had been disclosed. *Kyles v. Whitley*, 514 U.S. at 442 n. 13, 446, 447, 449.

[22] Certainly this Court understood that in *Garcia v. State* 622 So. 2d at 1331-32 (the prosecutor cannot obtain a conviction based on "deliberate obfuscation of relevant facts"). Under due process, the prosecution has a duty to alert the court, the defense, and the jury when a State's witness gives false testimony, not just when the witness has "a deal" with the State. *Napue v. Illinois*, 360 U.S. 264 (1959).

accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either **willfully or inadvertently**; and prejudice [ ] ensued." *Strickler*, 527 U.S. at 281-82 (emphasis added).

F. Application Of The Proper *Brady* Standard

Under the proper *Brady* analysis the court should first identify each bit of favorable evidence that the State did not share with the defense, and then conduct a cumulative analysis of all of the undisclosed information in order to determine whether the undisclosed information in its totality undermines confidence in the trial's fairness. Given the significance of Boudreaux, Hanvey, Moody, and Tammy Jordan to the State's case in rebutting the defense's mental health expert at the guilt phase, and particularly in establishing aggravating circumstances that warranted imposing the death sentence, confidence must be undermined in the outcome.

At the evidentiary hearing, Wickham established that a wealth of favorable information was in the State's possession that could have been used by the defense to impeach various State witnesses, including:

1) the extent of Boudreaux's potential criminal liability in October of 1988 when he entered his negotiated plea and the conspiracy to commit first degree murder charge was dismissed;

2) the statements by law enforcement officers that Boudreaux was not trustworthy and deserved a lengthy prison sentence;

3) the requirement contained in his sentence that Boudreaux was not to be housed with Wickham and others who he was testifying against;

4) the fact that Boudreaux had again attempted to escape in July of 1988, and no charges were filed regarding the matter;

5) Hanvey's potential criminal liability when he entered his negotiated plea in May of 1988, for charges arising to facilitate an escape he struck "the victim about the head approximately five times with a heavy iron skillet, approximately ten inches in diameter" (Def. Ex. P);

6) the reduction of the aggravated battery charge to a misdemeanor when Hanvey pled;

7) Hanvey's prior convictions on 24 counts of forgery, "uttering a forgery" (Def. Ex. P);

8) the agreed upon sentence of 1-2 years of "community control" that Hanvey received in exchange for his agreement to "cooperate with [the] State and testify truthfully" (Def. Ex. P)(T. 766-69);

9) the potential criminal liability Moody faced when he entered his negotiated plea and received a ten-year sentence;

10) the assistance Moody received when DOC interpreted the sentence that he received as a 20-year sentence;

11) the statement in the motion to amend Moody's sentence that there was an "agreement worked out with the State was for Moody to receive 'a total sentence of ten (10) years on all of the above-cited cases'" (Def Ex. ZZ);

12) the appearance of a statement by Tammy Jordan that Wickham had said "There might be a killing involved in it" in handwritten notes from her February 11, 1988 meeting with the State.

The undisclosed Pre Plea Agreement regarding Boudreaux could have been powerful impeachment evidence against Boudreaux's claims that his motive for testifying was to turn his life around. The jury never heard that Boudreaux had been caught (and confessed) to trying to escape from jail by killing his prison guards less than a year prior to taking the stand against Wickham. (*See* PC-R 7089-7108.) Moreover, law enforcement officials had made statements that Bourdreaux was untrustworthy and deserved a lengthy prison sentence. Obviously, when he made his deal with the State, he

was aware of these negative comments that would have warranted finding a means of curry favor with the State. It is very likely that this information would have impacted the jury's perception of Boudreaux's testimony. Then while facing substantial criminal liability, Boudreaux made another escape attempt right before he worked out his plea agreement, and less than five months before testifying against Wickham. Certainly, a jury could have found Boudreaux's willingness to kill to get out of prison, informative as to his willingness to lie on the stand to reduce his sentence on his attempted escape and murder case.

But this was not the extent of the undisclosed information. Hanvey had received a three-year sentence for 24 counts of forgery, a crime involving dishonesty, which could have been presented to the jury as impeachment. The State also failed to disclose that it was at a meeting between the prosecutor and Tammy Jordan and her attorneys while discussing a negotiated settlement that Jordan first made any mention of an alleged statement by Wickham anticipating a killing in the planning stages of the crime.

Each one of the State's failures to disclose favorable information to the defense precluded the presentation of impeachment evidence. This alone would have given the defense the argument that if these witnesses are so willing to obfuscate and deceive to help the State, their testimony regarding what Wickham did or did not say is entirely unworthy of belief.

G. Application Of The Proper *Giglio* Standard

The Circuit Court in its order denying relief ignored Wickham's due process arguments premised on the *Giglio* line of cases.[23] Under *Giglio*, due process precludes a prosecutor from presenting false or misleading evidence or argument. This is because the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." *Giglio*, 405 U.S. at 153.

Here, the record clearly demonstrates instances in which State witnesses presented false, or at the very least misleading, testimony, as detailed above[24] and which were never corrected by the State. When a conviction is obtained through the "knowing use" of false evidence, the conviction "must be aside if there is **any reasonable likelihood** that the false testimony could have affected the judgment of the jury." *Bagley*, 473 U.S. at 678 (*citing Agurs*, 427 U.S. at 102) (emphasis added). If there is "any reasonable likelihood" that uncorrected false and/or misleading argument **affected** the jury's determination, a new trial is warranted. Accordingly, if the prosecutor knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. *See Kyles*, 514 U.S. at 433 n. 3.

Here, the jailhouse informants presented grossly misleading testimony about the state of their conviction and their motives for testifying. Hanvey's claim minimizing the

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23 Within Claim IX of his amended motion to vacate, Wickham pled due process violations under both *Brady* and *Giglio*. (PC-R 1103.)

24 Under *Alcorta v. Texas*, 355 U.S. 28 (1957), any technical distinction between false testimony and testimony that technically is not false, but just misleading, *i.e.* obscuring or obfuscating the truth, is meaningless for purposes of due process.

escape charge that had been pending was false by omission. The escape charge did not arise merely because he walked away from work release. The charge was accompanied by an aggravated battery charge arising from his use of a frying pan as a deadly weapon which he used to pound the head of the person charged with monitoring him. Entirely left out of his testimony was the fact that the aggravated battery charge was reduced to a misdemeanor and he received a sentence of 1-2 years of community control in exchange for cooperating with the State.

Additionally, the State failed to disclose the fact that Moody's testimony that the 10-year sentence he received was the maximal penalty for the felonies he committed was misleading, and that it was not true that he stood to gain nothing by testifying against Wickham. He faced substantially greater criminal liability; in fact at one point, he received a 20-year sentence, which he quickly sought to have reduced because it was contrary to what had been worked out.

These uncorrected testimonies cannot be harmless beyond a reasonable doubt. The witnesses' testimony went to the guilt phase issue of premeditation, in that they indicated that while he was in Slammer 4, Wickham had confessed the killing and had told Sylvia Wickham in advance that he planned to kill anyone who stopped to assist them. This evidence was also crucial to the State's attempt to show heightened premeditation at the guilt phase of trial, and heightened premeditation involved in the "cold, calculating and premeditation" aggravating circumstance used at the penalty phase to justify a death sentence. The trial court's inclusion of the jailhouse informants' testimony in its findings in support of Wickham's death sentence demonstrates the importance of their testimony to the State's case. (R 248.) Had the State corrected the misleading testimony of these

witnesses as it should have, it would have severely hindered the State's attempts to show both premeditation of the killing and aggravating circumstances meriting a sentence of death. Such a failure cannot be deemed harmless beyond a reasonable doubt.

VI. THE STATE INAPPROPRIATELY PRESSURED WITNESSES TO TESTIFY AGAINST WICKHAM AT TRIAL AND NOT TO TESTIFY ON HIS BEHALF AT THE RULE 3.850 HEARING

After the trial, Tammy Jordan, Jimmy Jordan, Larry Schrader, Michael Moody, and John Hanvey signed sworn statements in which they described how the State put tremendous pressure on each of them to testify against Wickham. As stated above (Part V.B.1) these witnesses' trial testimony provided the foundation for Wickham's death sentence. During the Rule 3.850 hearing the State went out of its way to deter these witnesses from testifying. The Circuit Court denied Wickham his due process rights by allowing the State to use threats of criminal prosecution, arrest, and withdrawal of plea agreements to silence witnesses who were willing to testify about prosecutorial abuse. Furthermore, the Circuit Court refused to make any findings of fact concerning admissible evidence as to prosecutorial abuse, remarking tersely that "the Court will not address this claim as it is legally insufficient." Both of the Court's decisions constitute clear errors.

A. Four Crucial Witnesses Gave False Testimony At Trial And Were Deterred From Correcting It At The Rule 3850 Hearing

1. Tammy Jordan

Tammy Jordan arrived at the courthouse on June 4, 2004 ready to testify in accordance with her May 17, 1995 affidavit and May 26, 2004 deposition. In her 1995 affidavit she corrected her trial testimony, saying

> I never heard any talk about anybody maybe getting killed or hurt. I had my baby with me, and if I had heard anything about there being a shooting or anything like that, I would never have flagged down Mr. Flemming that day. All I knew was that we were out of money and out of gas and we were gonna ask someone for help. . . . I let [the prosecutors] talk me into that stuff about us having a plan and I testified the way I did at trial because I thought it would help me, but what I am saying now is the truth of the matter. (*See* PC-R 7357-60)

At her deposition -- only a week before the hearing – she confirmed her affidavit by denying "any recollection of anybody talking about the possibility of there being a killing" as part of the robbery. (*See* PC-R 4269.) She later specifically denied her trial testimony that Wickham had said "there might be a killing." (PC-R 4330.)

Yet when she was ready to take the stand, the prosecutor pressed the Court to instruct the witness on the risk of perjury. Given that the State had not charged Jordan with perjury after her 1995 affidavit, the State's zeal to protect the witness was transparently an attempt to scare Jordan off of the witness stand and preclude Wickham from presenting Jordan as a witness who would reveal the State's use of coercive tactics and disregard for the truth. At the prosecutor's insistence, the Court instructed Jordan:

> **The Court**: There is a chance, I don't know whether it is a real possibility or not, but the general idea is that if somebody says something under oath, says one thing, and then later they say something under oath and it is very different, that could be what they call perjury, which is a crime. Do you understand that concept? Do you understand what I'm talking about?
>
> **T. Jordan**: What, I can go back to jail?
>
> **The Court**: Possibly, if you commit a crime. And if the crime is perjury, perjury is punishable by jail.
>
> (PC-R 3788.)

Tammy Jordan then met with counsel and invoked the Fifth Amendment and withheld her exculpatory testimony.

2. Michael Moody

Michael Moody likewise arrived to the evidentiary hearing ready to testify in accordance with his recent April 28, 2004 affidavit. In his affidavit Moody revealed that his trial testimony was influenced by the prosecutor's promise of a good deal, saying "I told the judge and jury that [Wickham] confessed to me but he never did. . . . It was made very clear to me that if I would testify that Wickham confessed to me that I would get a good deal on my cases." (PC-R 7372.)

Confronted with Moody's affidavit, the State asked that he be warned as it did with Jordan, and for the same reasons, even though, as will be outlined in greater detail below, Moody's testimony posed no risk of perjury. A lawyer was assigned, and Moody promptly refused to testify. (PC-R 3747-50.) Wickham was again deprived of a witness for his defense.

3. Jimmy Jordan

Jimmy Jordan was also prepared to testify at a deposition in Georgia, and later at the hearing in line with his May 17, 1995 affidavit in which he stated:

> [T]here was never any talk about killing or hurting anybody [. . .] After I was arrested, the prosecutor threatened me. He told me that if I didn't cooperate and testify against Jerry, he would seek the death penalty. I was really scared and I did what they told me to do. (PC-R 7355.)

This affidavit did not result in perjury charges in 1995. Moreover, the State has not argued and cannot argue that the affidavit specifically contradicts any of his trial testimony; it merely corroborates the State's use of coercive tactics.

Yet, when the prosecutor and counsel for Jerry Wickham deposed Jimmy Jordan in Georgia, the prosecutor over the objections of Wickham's counsel, badgered the witness into silence. The prosecutor presented the witness – a man with an eighth-grade education – with a copy of the Florida appellate decision, *Hill v. State*, 847 So. 2d 518 (Fla. 5th DCA 2003), for his review. The prosecutor proceeded to confuse and intimidate Jordan, including reading him his rights *Miranda*-style, causing Jordan eventually to withhold critical testimony. (PC-R 4356-70.) Before the deposition Jordan was willing to testify, and had spoken openly with counsel. (PC-R 4351.) Jordan explained how the prosecutor's conduct directly caused him to withhold his testimony.

> **Mr. Davis**: Mr. Jordan, let me put it this way: Until you received the two documents that Exhibit 1 and Exhibit 2 that [the prosecutor] put in front of you, you were willing to appear and testify, is that right?
>
> **The Witness**: (Witness shakes head indicating positively.)
>
> **Mr. Davis:** Yes?
>
> **The Witness**: Yes, sir. (PC-R 4370.)

On June 4, 2004 Jimmy Jordan appeared at the evidentiary hearing. Without demonstrating any risk of perjury, the prosecutor requested that the Court caution Jordan about perjury by contradictory statements. The Court proceeded as follows:

> **The Court**: I'm given to understand that you were a witness at a trial in this case that took place many years ago.
>
> **J. Jordan**: Yes, ma'am.
>
> **The Court**: After that, you may have -- and that testimony would be what they call under oath.
>
> **J. Jordan**: Yes, ma'am.

The Court: Sworn to. And that later you may have given sworn testimony.

J. Jordan: Yes, ma'am.

The Court: Maybe saying the same thing, maybe saying something different or maybe saying something a little different but not too different. I don't know. And you have also been asked to testify here today.

J. Jordan: Yes, ma'am.

The Court: I have no idea what your anticipated testimony is. But there is the possibility that if you tell something completely different, that may as a matter of law constitute a crime of perjury. (PC-R 3790-91.)

Jimmy Jordan consulted with counsel and invoked the Fifth Amendment and withheld his exculpatory testimony. (PC-R 3869.)

4. Larry Schrader

Schrader appeared at the evidentiary hearing ready to testify in accordance with his a sworn affidavit. Schrader testified at trial that Wickham admitted to him that the reason Wickham killed the victim was to eliminate a witness. (R at 1089.) Yet in 1995 he revisited his testimony as follows:

"When we got to the Tallahassee area, we were out of gas and money. Let me make it clear that there was never a plan to kill anybody, not by Jerry or anybody else. I don't remember how it came up, but we all ended up talking about and agreeing to rob someone. It was as much my idea as it was anybody else's. Despite what others may have said, I never heard Jerry say that there might be a killing. No one knew that the guy was gonna get shot, and we hadn't discussed it at all . . .

"There was no discussion about what happened, and Jerry never said why he shot the guy. I don't think even Jerry knows why it happened. He never said he did it to get rid of a witness, and besides, there was nothing to witness; nothing had happened. It just came out of nowhere." (PC-R 7363-64.)

> "They were telling me I was gonna get the electric chair, so when the State offered me a deal, I jumped at it. I did what I had to do." (PC-R 7365.)

When it came time to testify at the evidentiary hearing, however, the prosecutor requested that the Court warn Schrader about the risks of deviating from his trial testimony. The Court did so, and suggested that Schrader consult an attorney. (PC-R 3578-79.) After consulting an attorney, Schrader invoked the Fifth Amendment and withheld his exculpatory testimony. (PC-R 3641.)

B. The Prosecutor Improperly Interfered With Wickham's Right To Put On Evidence In His Defense By Threatening The Witnesses

The perjury warnings were improper for five reasons. First, there is no Fifth Amendment right against committing perjury. The Fifth Amendment protects a witness from being compelled to incriminating himself or herself as to past conduct. The Amendment is not a proper basis to avoid the stand simply because the State believed that a witness' prospective testimony would be a lie. If the trial testimony given against Wickham in 1988 were true, as the State contends it is, then there is no past perjury as to which the witnesses could incriminate themselves by testifying. Thus, if the 1988 statements at trial were true and the prosecution sought perjury warnings because the anticipated statements would be perjurous, the Fifth Amendment provides no basis for the witnesses' silence as such perjury would constitute a crime in the future. If, on the other hand, these witnesses gave false testimony at the 1988 trial – false testimony that condemned Wickham to death – then the witnesses could invoke the Fifth Amendment only to the extent they would admit that they committed perjury at Wickham's trial. The only way the witnesses could properly have standing to assert the Fifth Amendment is if they lied at Wickham's trial. In that event the conviction cannot stand.

Second, the witnesses' testimony was immunized and so could not have been used against them to allege perjury by contradictory statements. Under Florida Statute § 914.04, a witness who is duly subpoenaed and gives testimony is automatically granted use immunity as to that testimony. *See Grant v. State*, 832 So. 2d 770, 772 (Fla. 5th DCA 2002) ("Section 914.04 automatically grants use immunity to one who testifies under the circumstances delineated therein."); *see also Jenny v. State*, 447 So. 2d 1351, 1352-53 (Fla. 1984). Tammy Jordan, Michael Moody, Jimmy Jordan, and Larry Schrader were each duly subpoenaed to appear at the evidentiary hearing and therefore automatically granted immunity.[25] Had their 2004 subpoenaed testimony contradicted their prior testimony, it could not be used against them in a subsequent prosecution for perjury by contradictory statements. Therefore there was no risk that contradictory statements could expose them to perjury.

Third, as this Court recognized in *Roberts v. State*, 678 So. 2d 1232 (Fla. 1996), the statute of limitations barred any prosecution for perjury premised on contradictions

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[25] While there is some disagreement as to whether immunity attaches automatically where a defendant and not a prosecutor subpoenas a witness, here the State compelled the attendance of Tammy Jordan and Jimmy Jordan at the hearing. *See, e.g.*, *Fountaine v. State*, 460 So. 2d 553, 554-55 (Fla. 2d DCA 1984). Once immunized, that immunity fills the scope of the Fifth Amendment privilege against self-incrimination, allowing the testimony to be compelled over any assertion of the Fifth Amendment. *See Kastigar v. United States*, 406 U.S. 441, 453 (1972) ("We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.").

between hearing and trial testimony.[26] Any contradiction between the anticipated hearing testimony and the trial testimony cannot form the basis for an allegation of perjury by contradictory statements as the statute of limitations has long since expired as to the 1988 statements.[27] Thus the prosecution overstated the risk of perjury as a pretext to intimidate Wickham's witnesses and induce them to withhold testimony.

Fourth, only the prosecution can threaten a witness with perjury. The defense does not have such power. To permit the State to use that power to silence defense witnesses, results in an unlevel playing field. Such an unlevel playing field offends the constitutional guarantee of fundamental fairness.

Lastly, the State engaged in arbitrary and selective conduct that undermines the propriety of its actions. The prospective testimony of each witness at the evidentiary hearing would have been substantially similar to the previous affidavits and depositions. Each of the three witnesses qualified his 1988 testimony in those sworn statements. Had the State truly meant to punish perjury rather than merely silence witnesses coming forward to correct false testimony, it could have charged the witnesses with perjury in 1995 or at some point during the nine years since. The fact that the State showed no interest in prosecuting the testimony given in those sworn statements under § 837.021 suggests an ulterior motive to suppress evidence, not to root out and punish perjury.

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[26] The statute was thereafter amended to extend the limitations period indefinitely in capital cases. The 1997 amendment did not, of course, revive expired perjury charges in connection statements made in 1988.

[27] Moreover, to the extent the expected testimony would merely verify statements made in 1995, the statute of limitations had expired as to those statements.

Additional damning evidence of the State's true intention comes from the State's treatment of two other witnesses: Darnell Page and John Hanvey. Page shared a cell with Jerry Wickham, Michael Moody, and John Hanvey at the time the prosecution was preparing for Wickham's trial. He was deposed in advance of the evidentiary hearing on May 27, 2004. Page, who never testified previously, was not vulnerable to the State's perjury threats. With no basis to deter Page from testifying, the prosecution could only listen as Page described how the State had attempted to pressure him, Moody and others to provide false trial testimony incriminating Wickham. Page's testimony therefore corroborated the pattern of pressure already evident from the other witnesses.

John Hanvey's testimony gives another example of what the prosecution intended to achieve by intimidating the defense witnesses. John Hanvey testified at trial that Wickham had confessed to Hanvey that Wickham planned to kill whomever they robbed on the highway that day. (R 1324.) In his 1995 affidavit, once free from prosecutorial coercion, Hanvey swore that "Jerry never told me he had intended to kill that man on Thomasville Road, and I don't believe that he did." (PC-R 7370.) He attributed his trial testimony to the prosecutor's pressure.

By the time of the hearing, however, the prosecution had pulled Hanvey back into its tent. On May 28, 2004, the State held a meeting with Hanvey and took a sworn statement from him that was tape recorded and transcribed. During that meeting, the prosecution walked Hanvey through his 1995 affidavit. The State then suggested "[a]h, did they inform you that, uh, signing this affidavit under oath, uh, could . . . could constitute perjury under the laws of the State of Florida?" (PC-R 6910 (ellipsis in original).) Hanvey retreated from his affidavit and ultimately denied its truth.

C. Due Process Demands That The Witnesses Be Heard

The law is clear that neither the court nor the prosecutors may misuse a supposed ethical mandate in a way that is oppressive towards the defendant and serves to drive witnesses off the stand. *See Webb v. Texas*, 409 U.S. 95 (1972). "If such a due process violation occurs, the court must reverse without regard to prejudice to the defendants." *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980); *Reese v. State*, 382 So. 2d 141, 144 (Fla. 4th DCA 1980) (finding a deprivation of due process because the witness "believed that if she continued to testify contrary to her deposition testimony, she was going to be sent to jail."); *see also United States v. Heller*, 830 F.2d 150, 152-54 (11th Cir. 1987) (applying *Webb* to similar conduct by prosecutors); *United States v. Morrison*, 535 F.2d 223, 227-31 (3d Cir. 1976) (same).

By permitting witnesses to assert inapplicable privileges, and by allowing the State to use impermissible tactics to scare the witnesses off the stand, the Court violated Wickham's rights under the Sixth Amendment. The Sixth Amendment guarantees a defendant the right to compel the attendance of witnesses at trial. U.S. Const., amend. VI. The Supreme Court has defined this right as "the most basic ingredients of due process of law" that is incorporated in the due process clause of the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 18-19 (1969). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Id.*[28]

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[28] The Florida constitution guarantees this same right and so is implicated here. *See* Art. I §§ 9 & 16; *see also State v. Montgomery*, 467 So. 2d 387, 392 (Fla. 1985).

Jerry Wickham respectfully requests the following relief:

First, that Tammy Jordan, Michael Moody, Jimmy Jordan, and Larry Schrader be compelled to testify over any claim of privilege against self-incrimination as their testimony is duly subpoenaed and immunized by statute; and

Second, that when Tammy Jordan, Michael Moody, Jimmy Jordan, and Larry Schrader are compelled to testify, the Court instruct the witnesses as to their immunity from their testimony being used against them.

D. Even Absent Testimony At The Hearing, The Circuit Court Should Have Weighed The Admissible Newly Discovered Evidence

Even if the Court and the State had acted properly in warning the witnesses, the Circuit Court erred in concluding that there was "legally insufficient" newly discovered evidence. Even the State recognized this fact in its unusual Motion for a Rehearing/Clarification on the Circuit Court's ruling in its favor on this claim (PC-R 7917-27). Whether at the end of the day the Court would have found the accumulated weight of the evidence sufficient to disturb Wickham's sentence is beside the point – the Court was required to weigh the evidence and make "detailed findings of fact," which it never did. *Mendoza v. State*, 2007 Fla. LEXIS 952, at *12 (Fla. 2007).

First, all the witnesses who asserted the Fifth Amendment were "unavailable" under Florida Statute §90.804(1). Therefore, the perpetuated testimony given by some of them (Jimmy and Tammy Jordan) and the sworn affidavits of all of them are admissible for the truth of the matter asserted in them if they fall under one of the hearsay exceptions stated in Florida Statute §90.804(2). The perpetuated testimony of Jimmy Jordan and Tammy Jordan falls under §90.804(2)(a) "former testimony." Additionally, the State cannot have

it both ways – if the Court was correct in warning the witnesses about the risk in contradicting their trial testimony, then a sworn affidavit inconsistent with a witness's trial testimony exposed the witness to a serious risk of a perjury charge and revocation of the witness's plea agreement, which in the cases of Larry Schrader, Tammy Jordan and Jimmy Jordan could mean the death penalty. It is hard to think of a stronger case for the application of §90.804(2)(c) – Statements against interest.

Second, even if the affidavits of Larry Schrader, Jimmy Jordan, Tammy Jordan, John Hanvey, and Michael Moody in which they corrected their trial testimony are hearsay they are admissible for the purpose of deciding whether Wickham's death sentence was properly imposed. As the Florida Supreme Court stated in *Garcia v. State*, 622 So. 2d 1325, 1329 (Fla. 1993), "the exclusionary rules of evidence, including the rule barring use of hearsay statements, are inapplicable in the penalty phase of a capital trial." (citing §921.141(1), Fla. Stat. (1979)).

Third, these affidavits were at the very least admissible for the purpose of impeaching the witnesses' trial testimony. *McCray v. State*, 933 So. 2d 1226, 1227 (Fla. 1st DCA 2006). This in and of itself was enough to require the Circuit Court to weigh whether the trial court's Findings in Support of the Sentence of Death withstand the impeaching evidence regarding some of the central evidence on which it relied.

Therefore, in the alternative, Wickham requests that this Court remand the case to the Circuit Court so that it can make factual findings after weighing the prior affidavits and depositions of Moody, Hanvey, Schrader, and Tammy and Jimmy Jordan.

VII. THE TRIAL COURT IMPROPERLY DELEGATED DETERMINATION OF AGGRAVATORS AND MITIGATORS TO THE PROSECUTION AFTER IT ALREADY IMPOSED THE DEATH SENTENCE

At the sentencing portion of Wickham's trial, after the jury gave its divided recommendation, the prosecutor offered to submit to the Court a memorandum of law in support of the jury's death recommendation. (R 2045.) The Court accepted the offer (*Id.*) Shortly thereafter, the Court summarily sentenced Wickham to death. (*Id.* at 2046.) No pause or recess is reflected in the record prior to the oral pronouncement, nor did the judge articulate any specific findings regarding aggravating and mitigating factors. (R 2045-46.) The Court stated it would "entertain" the memorandum offered by the State, and would provide a written sentencing order within a week. (R 2047.)

The State submitted its memorandum on December 14, 1988. (R 228-35.) Six days later, and almost two weeks from the day Wickham was sentenced, the Court filed its written Findings In Support Of The Sentence Of Death. (R 246-53.) These findings are nearly a verbatim copy of the memorandum submitted by the State, and there is nothing in the record to suggest that the judge conducted any independent weighing of aggravating and mitigating factors whatsoever. Indeed, the judge had already orally sentenced Wickham to death without any weighing. (R 2045-46.)

Florida places ultimate capital sentencing responsibility on its trial courts, mandating that "[t]he court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." § 921.141(3), Fla. Stat. It is up to the judge to independently assess the case and determine the appropriate punishment. *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973). This independent weighing of aggravating and mitigating circumstances is necessary to provide the individualized sentencing determination

required by the Eighth Amendment. This Court adopted certain procedural safeguards in order to protect a capital defendant's rights and ensure meaningful appellate review. Foremost among these is that a trial court is required to state its findings on aggravating and mitigating factors on the record before imposing sentence. *Patterson v. State*, 513 So. 2d 1257, 1262-1263 (Fla. 1987) (vacating death sentence where the judge didn't "articulate[] specific aggravating and mitigating circumstances."); *Van Royal v. State*, 497 So. 2d 626, 628 (Fla. 1986) (same).

Further, a court is required to enter written findings explaining the decision prior to sentencing. *Grossman v. State*, 525 So. 2d 833, 841 (Fla. 1988), *overruled on other grounds by Franqui v. State*, 699 So. 2d 1312 (Fl. 1997). The Florida Supreme Court's motivation in *Grossman* to require judges to prepare written orders prior to oral sentencing stemmed from the vital significance of written justification for a death sentence. *See, e.g., Van Royal*, 497 So. 2d at 628 ("A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it."); *Patterson*, 513 So. 2d at 1261 (Ehrlich, J., concurring) ("[A] trial court's written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty. It is inconceivable . . . that any meaningful weighing process can take place otherwise." (quoting *Van Royal*, 497 So. 2d at 630)).

The court must prepare the written findings itself, and not delegate that statutory obligation to the State. *State v. Riechmann*, 777 So. 2d 342, 352 (Fla. 2000) (stating that "confidence in the outcome of the Defendant's penalty phase has been undermined" where judge asked State to prepare sentencing order and "the draft order and the

subsequent final order . . . were virtually identical"); *Patterson*, 513 So. 2d at 1261 (improper delegation of written findings to State where the "judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating factors that applied in the case.")

None of these safeguards was followed in sentencing Wickham. The judge did not state his findings on the record before imposing the death penalty, as required by *Patterson*. In vacating a death sentence and imposing life imprisonment in a case where there was neither a contemporaneous written order nor an oral recitation of findings, the Florida Supreme Court noted that "without these findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6)," and that as a result the sentencing process was "inadequate and not merely incomplete." *Van Royal*, 497 So. 2d at 628.

Padovano purportedly waived the requirement that the Court prepare a written order setting forth its findings prior to sentencing. (R 2044-45.) Although Padovano indicated on the record that he had discussed the issue with Wickham and that the Court could proceed without written findings on aggravating and mitigating factors (*id.*) she could not have foreseen that the judge would pass sentence without at least orally stating findings on the record as required under *Patterson*. Assuming, *arguendo*, that Padovano did waive the requirement for written findings, there is no suggestion that he waived the requirement that the judge engage in weighing analysis of the mitigating and aggravating factors, or even that he could have waived that obligation of the sentencing judge under the Eighth Amendment and Florida's capital sentencing procedures.

Similarly, by asking the State to submit a memorandum detailing the applicable aggravating and mitigating factors, the trial judge abdicated a key judicial function. The Written Findings In Support Of The Sentence Of Death are almost an identical copy of the prosecution's memorandum. (R 246-53.) Each finding "proposed" by the State was entirely adopted by the Court. *Id.* The Court cannot shift its obligation of determining the presence of mitigating and aggravating factors to the prosecution – the judge must not "merely rubber stamp the state's position." *Robinson v. State*, 684 So. 2d 175, 177 (Fla. 1996) (quoting *Hamblin v. State*, 527 So. 2d 800, 804 (Fla. 1988). Yet that is precisely what appears to have happened to Wickham.

The Court's failures in passing sentence on Wickham constitute reversible error that merit vacating the death sentence. *See Layman v. State*, 652 So. 2d 373, 375-76 (Fla. 1995). An error so fundamental should be considered on post-conviction review, even if not properly presented below, as it constitutes a denial of due process. *Ray v. State*, 403 So. 2d 956 (Fla. 1981). The proper remedy in this case is to vacate the sentence and to impose a sentence of life in prison. *Layman*, 652 So. 2d 373 at 376; *Van Royal*, 497 So. 2d at 628.

VIII. THE TRIAL COURT CONSIDERED STATEMENTS BY THE VICTIM'S FATHER IN DETERMINING THE SENTENCE

On June 23, 1988, Larry Schrader, Wickham's codefendant, was sentenced by Circuit Judge Charles McClure (the same judge who later presided over Wickham's trial). At Schrader's sentencing hearing, the State indicated that it was accepting a lesser plea for Schrader with the understanding between the prosecutor and the victim's father that the death penalty would be pursued against Wickham. (PC-R 4439.) The victim's father

addressed the Court, stating that he only accepted the fact that Schrader entered a plea deal with "the plea bargaining gets to one point only, and that is to impose capital punishment on [Wickham]." (PC-R 4450.)

In considering the admissibility of statements by victim family members, the United States Supreme Court has held that the "admission of emotionally charged opinions" by family members concerning the crime and the defendant violate the Eighth Amendment. *Booth v. Maryland*, 482 U.S. 496, 508-09 (1987). Furthermore, "[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence." § 921.141(7), Fla. Stat.; *see Hodges v. Florida*, 595 So. 2d 929, 933 (Fla. 1992). Fleming's statements were made directly to Wickham's sentencer, and constituted his opinion about Wickham's guilt and appropriate sentence. They are the exact sort of material that is barred by *Booth* and Florida law.

The Circuit Court found that Fleming's statements did not constitute new evidence as Larry Schrader's plea hearing occurred several months prior to Wickham's sentencing and could have been discovered by Wickham's counsel through diligence. (PC-R 3118 (citing *Jones v. State*, 591 So. 2d 911 (Fla. 1991).) If the Court's own analysis is correct, however, it proves that counsel was ineffective in failing to uncover and object to Fleming's statements. Either reasonable diligence did not require counsel's presence at Schrader's hearing and the transcript is newly discovered evidence, or counsel was ineffective in not attending the hearing.

IX. WICKHAM IS EXEMPT FROM EXECUTION UNDER THE EIGHTH AMENDMENT

Wickham is mentally disabled and suffers from a number of mental impairments and injuries which significantly diminish his intellectual functioning. He has extensive organic brain damage, and since early childhood has suffered from mental problems including residual schizophrenia, and organic personality disorders. (R 1408-10, 1473, 1477-85, 1508). These disabilities directly reduce Wickham's ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control his impulses.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the imposition of the death penalty on mentally retarded individuals constitutes cruel and unusual punishment in violation of the Eighth Amendment, due to the fact that the mentally retarded are considered to be less culpable for their actions, are less likely to be deterred by the death penalty, and face an increased risk of being sentenced to death. *Id*. at 318-20. Although Wickham does not meet the current standards for mental retardation under § 921.137(1), Fla. Stat., the same concerns delineated in *Atkins* preclude imposition of the death penalty on Wickham.

The Eighth Amendment of the United States Constitution requires a meaningful basis for distinguishing "between those individuals for whom death is an appropriate sanction and those for whom it is not." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). A death sentence for an individual with limited mental capacity is inconsistent with its "two principal social purposes: retribution and deterrence of capital crimes by prospective

offenders." *Thompson v. Oklahoma*, 487 U.S. 815, 836 (1988) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

The goal of retribution will not be served by executing Wickham. As the Court noted in *Atkins*, "the severity of the appropriate punishment necessarily depends on the offender's culpability." *See Atkins*, 536 U.S. at 319. Given Wickham's substantial mental impairments and deficiencies, he should be accorded the same recognition of lessened culpability.

As for any deterrent effect, the *Atkins* Court reasoned that as persons with mental retardation are limited in their capacity to reason and control themselves, the death penalty is not an effective deterrent. *Id*. at 319-20.

The Supreme Court further determined that the mentally retarded face an increased risk of being wrongfully sentenced to death, due to diminished ability to provide meaningful assistance to counsel, a lesser ability to put on an effective presentation of mitigating evidence, and a tendency to make poor witnesses and appear to a jury to feel no remorse for their crimes. *Id*. at 320-21. All of these characterizations apply to Wickham with equal force.

CONCLUSION

For the reasons set forth above, Wickham respectfully urges this Court to vacate his convictions and death sentence or to order other relief as set forth in this brief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Meredith Charbula, Assistant Attorney General, Pl-01, The Capitol, Tallahassee, FL 32399-1050 by mail on June 18, 2007.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

Respectfully submitted,

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