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

REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

Wickham appeals the circuit court's denial of relief on his Rule 3.850 motion following an evidentiary hearing. The following abbreviations will be utilized to cite to the record in this cause, with appropriate page numbers following the abbreviations:

"R" followed by the page number (record from Wickham's trial)
"PC-R" followed by the page number (post-conviction record on appeal)
"IB" followed by the page number (Initial Brief of Appellant)
"AB" followed by the page number (Answer Brief of Appellee)
"HP" followed by the page number (Habeas Petition of Appellant)
"HR" followed by the page number (Habeas Response of Appellee)

## REQUEST FOR ORAL ARGUMENT

Wickham, through counsel, respectfully requests that the Court permit oral argument.

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## INTRODUCTION

None of Wickham's arguments in the Initial Brief should have surprised the State; all were raised and properly preserved in the Circuit Court. In this context, it is nothing short of astonishing that the State, with respect to many of the issues on this appeal, does not even attempt to address the legal reasoning and precedent upon which Wickham relies. The State fails to address or distinguish a number of decisions compelling disqualification of the judge who heard this 3.850 motion; the State neither addresses most of the specific demonstrations of *Brady* and *Giglio* violations that Wickham has itemized, nor defends the erroneous legal reasoning adopted by the Circuit Court; the State does not even attempt to analyze or refute the several reasons why it was completely inappropriate to induce several witnesses who were ready to testify at the 3.850 hearing to assert the Fifth Amendment, or offer any reason why such a witness could legitimately take the Fifth when the conduct forming the predicate for possible incrimination is so remote as to be barred by the Statute of Limitations. Since these issues go to the core of Wickham's appeal, the State's default can have only one reason: the State is aware of no precedent to rebut these and other appellate claims. Even in the very few areas where the State attempts to address Wickham's arguments in any detail, such as the ineffectiveness of trial counsel's performance, the State spends many pages but fails to refute the devastating demonstration of ineffectiveness – nor address the obvious reason for this ineffectiveness, which was that after agreeing to represent Wickham trial counsel decided to run for election rather than prepare his defense.

The decision of the Circuit Court should be reversed.

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

As Wickham's Initial Brief demonstrated, and the State did not contest, Judge Dekker's factual conclusions depended heavily on crediting the testimony of two witnesses – former prosecutor Hankinson and former defense counsel Padovano – even though their testimony was dramatically inconsistent with other proof and with ample written evidence.[1] At the time of their contested testimony, both witnesses were judges: Judge Hankinson was (and is) a colleague of Judge Dekker's on the Circuit Court, and Judge Padovano was also a colleague on the Circuit Court before his elevation to the District Court, where he regularly reviews decisions by Judge Dekker.[2] Wickham pointed out that in an unbroken line of decisions addressing precisely this problem, courts in this state have wisely acted to protect the independence and reputation of the judiciary and have, under precisely these circumstances, directed that claims for post-conviction relief be heard by a judge in a different circuit. *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)

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[1] IB 13-15.

[2] A quick LEXIS search shows no fewer than 79 opinions in which Judge Padovano reviewed Judge Dekker's decisions.

(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.").

The State makes no effort to show that Judge Dekker could possibly have reached her decision without making a crucial (albeit implicit) credibility finding in favor of Judges Hankinson and Padovano and rejecting all contrary evidence; nor does it attempt to distinguish the decisions cited above. Instead it argues that Wickham's motion was moot, untimely, and without facial merit. These arguments are wrong on the facts as well as the law.

Wickham's motion is not moot and, directly contrary to the State's representations, was made time and again as his case wended its way through the court. Wickham first moved for disqualification in 1995, on his first appearance before the Second Judicial Circuit following his sentencing in 1988 (PC-R 1455-70). That motion, as indicated by its title, sought to disqualify not only Judge McClure, but "All Circuit Judges in and for The Second Judicial Circuit," making it exceedingly clear that Wickham's fear of bias was not limited to any individual Second Judicial Circuit Judge. As Wickham's case was assigned and reassigned to no fewer than five Circuit Court judges (Judges McClure, Ferris, Hall, Francis and finally Dekker) Wickham reiterated his request. He did so in a September 26, 2000 status conference in front of Judge Hall (PC-R 1508-65), in a follow-up letter to Judge Hall on September 29, 2000 and a letter to Judge Francis in September 25, 2001. *See* Exhibits A and B, Motion to Supplement the Record. After Judge Francis denied Wickham's original motion on October 2, 2001

(PC-R 1681), Wickham moved orally for a rehearing of his motion to disqualify (PC-R 1842-43), and, as instructed by the Court, filed a supporting memorandum on November 5, 2001, this time seeking to disqualify Honorable Charles A. Francis and All Other Judges In And For The Second Judicial Circuit (PC-R 1970-89). In the interim, Padovano was appointed to the First District Court of Appeals hearing appeals from the Second Circuit, and Padovano's wife was appointed to the Second Judicial Circuit. Wickham's 2001 Memorandum incorporated these changes. On November 20, 2001, Judge Francis denied rehearing (PC-R 2549). Wickham raised the disqualification claim once again in his March 23, 2003, Motion to Vacate Judgment of Conviction (PC-R 2779-80) before Judge Dekker, and in his January 28, 2005, Motion for Rehearing of the Court's June 13, 2005, Order denying Wickham's claims for post-conviction relief (PC-R 7928-33). This record clearly refutes any claim that the retirement of Judge McClure renders Wickham's disqualification motions moot, or that Wickham sat on his rights.

The State's claim that Wickham was years late when he first moved for disqualification is even more absurd. To begin, it simply makes no sense – and would be a fundamental denial of justice – to hold that Wickham was obligated to make a disqualification motion as soon as Padovano went on the bench when a) Wickham had no substantive motion pending from which any judge could in fact be disqualified and b) during much of the time Wickham was not even represented by counsel. For this extraordinary proposition, the State cites to *Asay v. State*, 769 So.2d 974, 980 (Fla. 2000) (AB 10, 12). *Asay*, however, stands for precisely the opposite rule:

> Of course, if the conduct or statements occur after the trial, then the post-conviction proceeding may be the first time the defendant can raise them in a motion to recuse.

*Asay*, 769 So.2d at 981 (citing cases). *See also Corey St. Pierre v. State*, 2007 Fla. App. LEXIS 4862 at *4 (Fla. 2d Dist. April 4, 2007) ("When the basis for a judge's disqualification arises after the trial in a criminal case, the defendant's subsequent motion for disqualification may be deemed untimely or waived only if the defendant forewent filing the motion at his first opportunity to do so in a proceeding before that judge."). *Waterhouse v. State*, 792 So. 2d 1176, 1193 (Fla. 2001) (a post-conviction relief proceeding may be the first time a defendant can seek to disqualify a judge based on conduct occurring after a trial).

When the State finally gets to the merits of Wickham's motion, it misconstrues the bases for disqualification in Wickham's case and sets a false choice before this Court: contrary to the State's argument, this Court need not necessarily embrace a broad "*per se* rule of disqualification." Rather, Wickham's circumstances are unique and powerful to a degree not present even in those cases where the courts have wisely granted disqualification motions, as the credibility of the key witnesses upon whom Judge Dekker relied was both hotly contested, and key to Judge Dekker's decision.

While the State studiously ignores addressing that precedent which would require a disqualification, its reference to other – sometimes out-of-state – precedent is flawed. *Mackenzie v. Super Kids Bargain Store*, 565 So. 2d 1332 (Fla. 1990), to which the State dedicated a full page of its brief, is a case in which the Court eventually found that the judge <u>should</u> be disqualified (albeit on different grounds). The *Mackenzie*

Court also made clear that the campaign contribution at issue "does not tend to indicate any closer relation between the contributor and the recipient than would ordinarily exist between members of the same local bar," and that "it may well be that such a contribution, in conjunction with some additional factor, would constitute legally sufficient grounds for disqualification upon motion." Therefore, the *Mackenzie* holding is consistent with disqualification where the potential for bias stems from serving in the same small circuit (rather than mere bar membership) and where the accumulated fear of bias was based on one not but three potential connections to the judge.

*United States v. Harrelson*, 754 F.2d 1153, 1166 (5th Cir. 1985) is also inapposite.[3] In *Harrelson*, the Fifth Circuit affirmed the trial judge's denial of a motion

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[3] Additionally, *Harrelson*, as well as the other Federal cases cited by the State are completely inapposite because the federal standard for disqualification is entirely different from the Florida standard and requires the appellant to meet a much higher burden – abuse of discretion (*e.g.*, *Harrelson*, 1165). Under Florida law (as acknowledged in AB 13 n.5), in a party's first motion for disqualification the facts pled in the motion are accepted as true. The only issue then is whether accepting those facts the party has a reasonable basis to fear that he will not be heard by an impartial tribunal. *Suarez v. Dugger*, 527 So. 2d 190, 192 (Fla. 1988). *See also Smith v. State*, 708 So. 2d 253, 255 (Fla. 1998); *Roberts v. State*, 840 So. 2d 962, 969 (Fla. 2002). As the State concedes, Judge McClure did not recuse himself on the basis of the motion to disqualify – he retired from the bench. (AB 7.) Accordingly, Wickham's motion to disqualify the entire circuit was and is his first motion to disqualify. Since the motion was not granted, the issue on appeal is whether accepting the factual allegations as true, these provide Wickham a reasonable basis for fearing that the judge will not impartially evaluate his evidence which conflicts with the testimony of Judge Padovano and Judge Hankinson and the standard of review is *de novo*. *Barnhill v. State*, 834 So. 2d 836, 843 (Fla. 2002).

to disqualify based on the fact that defendants were charged with murdering a judge who served in the same district as the trial judge. The Court explained:

> Finally, appellants' contention incorporates a fundamental logical flaw: whatever the relationship between the two judges was, it can at most have served to create a degree of hostility toward the actual killers. As such, it is entirely consistent both with a desire that those not guilty be acquitted and with one that the guilty be convicted. (*Harrelson*, 754 F.2d at 1166.)

Here, of course, the apparent bias and unfairness was not based upon a perception that Judge Dekker might have a general hostility toward Wickham because of unrelated experiences she may have had, but rather on a very fundamental and understandable belief that any judge is highly unlikely to give a dispassionate, open-minded evaluation of the credibility of a colleague, peer, or direct superior. *O'Connor v. Reed*, 1993 U.S. App. LEXIS 21741 (9th Cir. 1993), an unpublished terse decision by the Ninth Circuit to deny a bogus claim by a *pro se* litigant that the trial judge did not recuse himself *sua sponte*, is also inapposite.

## II. WICKHAM WAS DENIED DUE PROCESS OF LAW BECAUSE THE STATE DROVE WITNESSES OFF THE STAND AND THE COURT DID NOT CONSIDER ADMISSIBLE EVIDENCE

In Point VI of his Initial Brief, Wickham demonstrated that every one of the witnesses whose testimony was necessary to sustain the trial court's death findings offered testimony that their trial evidence had been manufactured or exaggerated under pressure from the State. Wickham also offered testimony – from a witness whom the State did NOT call – strongly corroborating that the State had in fact made efforts to pressure witnesses with respect to their testimony. (IB 89.) All but one of the trial

witnesses were induced to silence at the 3.850 hearing by suggestions from the State that they plead the Fifth Amendment; the remaining witness changed his testimony yet again after being threatened by prosecutors with perjury.

The State's only response to this important point is to repeat – but not analyze – its assertion that the witnesses in question needed to be "protected" from the risk of a perjury prosecution (by the State) and thus that their silencing was appropriate. This defense is simply wrong because the witnesses in question had no basis upon which to plead the Fifth Amendment and should not have been induced or allowed to do so. This conclusion follows from the following principles, not one of which is addressed let alone refuted by the State.

- A witness has no privilege not to commit perjury in future testimony, any more than immunity would protect a witness against perjury. Thus, if the State was suggesting that the witnesses in question were about to perjure themselves at the 3.850 hearing by falsely denying the truth of their 1988 trial testimony, the Fifth Amendment was no shield because it is never a shield against prospective perjury.

- If the State is arguing that the witnesses should have been protected from admitting at the 3.850 hearing that their 1988 testimony had been perjurious, this argument not only falls afoul of the Statute of Limitations (as reiterated below), but is unconscionable, since it would permit the State to continue to rely on perjured testimony in sustaining a conviction.[4]

- If the State is arguing that it need not take a position on whether the 1988 testimony was perjurious or not because of the applicability of the

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[4] In addition, Wickham demonstrated that witnesses Tammy Jordan, Jimmy Jordan, Michael Moody and Larry Schraeder would have been protected by the use immunity automatically granted to subpoenaed witnesses. (*See* IB 87.) Here again, the State does not respond.

"inconsistent testimony" statute, it must address the fact that the Statute of Limitations not only for pure perjury but for "inconsistent statements" had run before the limitations period on the latter was extended. This was demonstrated in the Initial Brief at 87-88 and is not contested by the State.

These legal issues were amply addressed in Wickham's Initial Brief at 86-89. The State ignores them, and apparently hopes that this Court will simply overlook the issue.

Wickham is entitled to a new 3.850 hearing at which each of these witnesses should be directed to testify on the ground that they do not have a Fifth Amendment privilege against any alleged future perjury, and that any use of their testimony to prosecute them for past perjury (i.e., at the trial at which Wickham was convicted and sentenced) or for inconsistent testimony is barred by the Statute of Limitations. In the alternative, and at a minimum, the Circuit Court should be directed to accept as evidence the proffered declarations and perpetuated deposition testimony of these witnesses. As explained more fully in the Initial Brief (IB 91), the invocation of the Fifth Amendment rendered the witnesses unavailable, and their affidavits should have been admissible either substantively under *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993), or as impeachment evidence. The State did even try to defend the Circuit Court's action in refusing to admit the affidavits, because the law is clear that the Court's refusal to admit the affidavits was error.

Finally, if this Court determines that a witness did not, in fact, have a legal basis upon which to refuse to testify, or that the affidavits and deposition testimony were admissible, it should order a new hearing at which the witnesses can be heard and in

which the Circuit Court can weigh the evidence, since Judge Dekker has already indicated that had the witnesses testified in accordance with their affidavits their testimony would have raised a material issue of fact.[5]

## III. THE STATE PRESENTED FALSE AND MISLEADING EVIDENCE AND WITHHELD EXCULPATORY EVIDENCE

In his Initial Brief, Wickham showed that the testimony of every single one of the four witnesses upon whom the trial court relied in his death findings would have been significantly impeached if information available to the State had been timely shared with the defense, and if the State had fulfilled its obligation to correct misleading testimony of which it demonstrably had knowledge. This is an important issue that cries out for rectification by means of a new trial. Yet in its response the State does the

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[5] After Judge Dekker issued her decision denying Wickham postconviction relief, the State moved for "Rehearing / Clarification" attempting to get Judge Dekker to rule that she would have denied relief even if the witnesses had not refused to testify. The Court squarely rejected this application:

> Initially [*i.e.*, after the *Huff* hearing, on the basis of the proffered affidavits of the witnesses] the Court found claim eight, as pled by the defendant, to be facially sufficient and set it for evidentairy hearing. At the evidentiary hearing, the defendant failed to present any evidence to support his allegation of newly discovered evidence [*i.e.*, the witnesses refused to testify] nor how the alleged newly discovered evidence would have changed the outcome of the trial. Being that the proof was legally insufficient, the Court denied the claim as legally insufficient. (PC-R 7959; emphasis added)

In short, Judge Dekker ruled that the difference between a "facially sufficient" record and a record where "the proof was legally insufficient" was the unavailability of these witnesses.

following: (1) to a remarkable degree, it simply ignores those issues where it has no response, which under the circumstances must be viewed as a confession of error, (2) it adopts without discussion Judge Dekker's reasoning, without disputing Wickham's demonstration that her conclusions were based upon bad law, and (3) it either misstates the record, or jumbles the record into meaningless conclusory statements. A rigorous review of the *Brady/Giglio* issues confirms Wickham's entitlement to a new trial on sentencing.

### A. *Brady* obligation to disclose favorable information.

In its Answer Brief, the State quotes from this Court's recent opinion in *Riechmann v. State*, 32 Fla. L. Weekly S135, 2007 Fla. LEXIS 664 (Fla. April 12, 2007), reciting the three-part test for determination of whether a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), has been established. (AB 75.) This test requires a determination as to whether 1) the State was in possession of information favorable to the defense, 2) the favorable information was not disclosed to the defense, and 3) the favorable information was material, *i.e.*, the failure to disclose it was prejudicial to the defense. After quoting the test, the State promptly misapplies it just as the Circuit Court did in its decision.

Judge Dekker clearly misapplied the law when she required a showing that the State "willfully" withheld *Brady* evidence. As Wickham demonstrated, the law contains no such requirement; *Brady* is violated even if the evidence is "inadvertently" withheld. (*See* IB 70 *et seq.*); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The

State's failure to defend Judge Dekker on this critical point can only be taken as a confession of this error.

Judge Dekker compounded her error by holding that that unless the undisclosed favorable information establishes "that the State failed to disclose a deal" with a witness, a *Brady* violation could not be established. (PC-R 7741.) Wickham demonstrated that the test is not whether a "deal" per se had been reached, but whether the withheld evidence would have supported the defense or impeached the State's witnesses. (IB 74.) The State does not even attempt to refute this, but simply repeats Judge Dekker's conclusions. (AB 77.)

To establish a *Brady* violation, one does not have to first show that the withheld information concerned an undisclosed deal with a witness for the State, but only that the withheld information was "favorable" to the defense – that is, that it might have impeached a witness in any fashion. (*See* IB 74 *et seq.*) For example, in *Kyles v. Whitley*, 514 U.S. 419 (1995), much of the undisclosed information that was found to be improperly withheld *Brady* material concerned a confidential police informant named Beanie who did not testify at Kyles' trial. A number of statements made by Beanie were not disclosed to Kyles' attorney. The Supreme Court ruled that the failure to disclose Beanie's statements violated *Brady*:

> Contrary to what one might hope from such a source, however, Beanie's statements were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested

for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police. *Id.* at 445.[6]

Besides the undisclosed information concerning Beanie, the State had also not disclosed information that impeached two eyewitnesses who had testified for the State. The impeaching information consisted of prior inconsistent statements. Clearly, there was no requirement that in order to prove his *Brady* claim, Kyles had to show that the undisclosed evidence was a plea agreement with a State's witness.[7]

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[6] At one point in its analysis, the United States Supreme Court stated: "By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence." *Kyles*, 514 U.S. at 447.

[7] Similarly, this Court found a *Brady* violation warranting post-conviction relief where the State failed to disclose the prosecutor's handwritten notes of his interview of a State's witness's prior inconsistent statements. *Young v. State*, 739 So. 2d 553 (Fla. 1999). In *Gorham v. State*, 597 So. 2d 782 (Fla. 1992), a witness's undisclosed status as a confidential informant in other cases was held to violate *Brady* and warrant a new trial. In *Cardona v. State*, 826 So. 2d 968 (Fla. 2002), a *Brady* violation was found where it was shown that the State had withheld prior inconsistent statements from a State's witness. In *Floyd v. State*, 902 So. 2d 775 (Fla. 2005), this Court found a meritorious *Brady* claim premised upon the undisclosed statement of the victim's neighbor regarding her observations at approximately the time of the murder. The neighbor in *Floyd* was not called as a witness at trial. Yet, because the State was aware of her observations, and her observations could have been used by the defense at trial, the State's failure to disclose what the neighbor had reported observing warranted a new trial. In *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993), a *Brady* violation was found where the State withheld a statement from a witness who did not testify, but whose statement corroborated Garcia's statement and refuted the State's theory of the case.

In short, the State does not even attempt to show that Judge Dekker made her analysis within an appropriate legal framework.[8]

Finally, the State replicates Judge Dekker's error by picking and choosing only a few of the many pieces of information that Wickham demonstrated had been withheld. This information is systematically summarized in Wickham's Initial Brief at 76-81. Instead, the Circuit Court only discussed three specific portions of Wickham's claim: 1) information impeaching John Hanvey; 2) information impeaching Wallace Boudreaux;[9] and 3) notes from an interview of Matthew Norris. It then defends these carefully selected issues only by reference to the demonstrably incorrect legal standards already discussed. (PC-R 7741.) It does not even address the many other violations raised by Wickham.[10]

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[8] Because the Circuit Court required Wickham to prove that favorable information was willfully withheld and concerned an undisclosed plea agreement with a witness called by the State at trial, the Circuit Court did not engage in any kind of a materiality analysis. The State in its Answer Brief also does not address the materiality standard set forth in *Kyles*.

[9] The State follows the Circuit Court in erroneously referring to Boudreaux as "Bordeaux." (PC-R 7741.) For the correct spelling *see* PC-R 7801.

[10] The Circuit Court did not address the aspects of Wickham's *Brady* claim that concerned undisclosed information impeaching Michael Moody, Tammy Jordan, Jimmy Jordan, Larry Schrader, and Sylvia Wickham. (PC-R 7663.) In its Answer Brief, the State limits "its comments to CLAIM IX and the trial court's discussion of it." (AB 74.) Neither the Circuit Court nor the State have offered any explanation as to why there is no analysis of Wickham's *Brady* claim concerning these above-referenced witnesses.

## B. *Giglio* obligation to correct false testimony.

As Wickham explained in his Initial Brief, the Circuit Court did not specifically address his argument that the prosecutor violated *Giglio v. United States*, 405 U.S. 150 (1972), when he failed to correct false or misleading testimony. (IB 79-81.) The closest the Court came to addressing this matter was in its assertion that because Wickham failed to prove that State witnesses had "deals" for their testimony, he was not entitled to relief. (PC-R 7740-41.)

In his Initial Brief, Wickham pointed out that a *Giglio* claim is not dependent on a witness having an undisclosed deal. "The touchstone of a *Giglio* claim is whether or not the State failed to correct false or misleading testimony or evidence." (IB 75.) This means that false testimony that a witness had not made a deal with the State violates *Giglio* if the prosecutor fails to correct the testimony. But, false testimony need not be about whether the witness had a deal with the State for a *Giglio* violation to occur when a prosecutor fails to correct it.[11]

In his Initial Brief, Wickham set forth the uncorrected false testimony that was presented by the State through the testimony of Hanvey, Boudreaux, and Moody.[12] (IB 79-81.) Just as the circuit court refused to address Wickham's arguments in this regard,

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[11] This is much like the truism that a square is a rectangle, but not all rectangles are squares. Demonstrating that false testimony concerning a deal is one means of establishing a *Giglio* violation. However, it is not the only means.

[12] Wickham also detailed the false testimony from these witnesses in his written closing argument before the Circuit Court. (PC-R 7652-62.)



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so too the State in its Answer Brief ignores Wickham's arguments and the evidence on which they are based. Instead, the State in its Answer Brief simply accepts without any authority or argument the Court's analysis that the failure to prove an undisclosed deal was fatal to all of Wickham's arguments. (AB 76-77.) However, the Circuit Court's analysis is contrary to controlling constitutional law. *See Napue v. Illinois*, 360 U.S. 264 (1959); *Garcia v. State*, 622 So. 2d 1325, 1331-32 (Fla. 1993). As to the specifics of the uncorrected false testimony that the State presented at his trial, Wickham continues to rely upon the arguments made in his Initial Brief to which the State did not respond.

## IV. WICKHAM'S TRIAL COUNSEL WAS INEFFECTIVE

It is, of course, an unusual situation when the trial counsel whose effectiveness is in question is now a sitting judge. The State tries to capitalize on this situation by constantly emphasizing Judge Padovano's capability as shown in <u>other</u> cases, in his pro bono activities, and in his career on the bench. However, Wickham never argued that Padovano was incapable of performing adequately had he put his mind to it, but rather that he put himself in a position where he ultimately had to choose between his personal ambition to run for election and his professional responsibilities representing Wickham, and allowed himself to compromise the latter. This was clear first when, during his campaign, he spent so little time on Wickham's representation that he could not and did not properly investigate or prepare for trial; and at trial when Padovano never sought a continuance to do adequate preparation and took shortcut after shortcut, failing to request a competency hearing for his mentally ill client, failing to present adequate

mitigation evidence, failing to object to the prosecutor's inflammatory summation and failing to stand up for his client's right to be sentenced in accordance with Florida law. The State's submission does not even attempt to explain or excuse these embarrassing circumstances.

### A. Inadequate Investigation

The State tries to mask Padovano's inadequate investigation and preparation by emphasizing his career achievements (*see, e.g.*, AB 26), which were never in dispute, and by focusing on his overall pro bono record. Neither of these address the real issue – the miniscule amount of time Padovano committed to Wickham's representation.

The raw figures are striking. Padovano spent only about two weeks worth of work (65.8 hours) spread over the seven months from initiating representation in April to the day of the trial. If one deducts from this figure the 16.8 hours Padovano spent on motions such as two motions for continuance and the 5.5 hours Padovano spent administering a test to Wickham, one is left with about a week and a half of investigating and preparing the case of a mentally ill and uncooperative man who was on trial for his life. The inadequacy of Padovano's preparation is highlighted when considering the complexity of Wickham's case – his mental illness and brain damage that required retaining experts and gaining familiarity with a vast mental health record; the fact that Wickham spent most of his life outside the State of Florida and that his potential mitigation witnesses were spread far and wide; and the number of prosecution witnesses (21). Moreover, most of the work was crammed into the first few weeks (before Padovano essentially stopped working on the defense to run for election) and

the last few (after he was elected); little (other than the applications for extension) was done in between. The State tries to avoid the documentation of Padovano's minimal preparation by claiming that "Padovano was unable to re-construct the exact number of hours that he labored for Wickham" (AB 39), relying on Padovano's testimony that "there are countless hours that a lawyer spends at home – I don't know how you try cases, but I thought about his case non-stop. I would think about it when I was in the shower." (PC-R 3322.)

Padovano's post hoc, undocumented, and self-serving testimony about shower ruminations is, by definition, impossible to disprove. However, the record that does exist strongly suggests that Padovano billed every minute of his time.[13]

Investigator Harris, whom Padovano retained only months after his first investigator, Ms. Greenberg, resigned due to a "very deep conviction" that Padovano was not devoting the necessary time and attention to Wickham's case, and conducted only a cursory investigation. Despite the State's protestations to the contrary (AB 40-41), Padovano's testimony and Harris's and Padovano's billing logs clearly show that

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[13] One indicator is the detailed invoice, down to billing 0.1 of an hour for phone calls, that Padovano prepared in real time. (R 242-44.) Another is comparing Padovano's bill to the bill submitted by his investigator, Bill Harris. One would think that if Padovano indeed spent countless hours on the case for which he never bothered to bill, he would neglect to include some of the calls with Harris, calls that lasted only a few minutes. Not so: Padovano and Harris recorded the exact same time for each of their eight brief phone calls, except for a pair of phone calls that Padovano recorded as 0.3 hours and Harris as 0.25. (*Compare* PC-R 243 *with* PC-R 4397.)

Harris failed to properly investigate or visit Wickham's family, and received little guidance from Padovano. (*See, e.g.*, R 242-44, PC-R 3354-55, 3361, 4397.)

The State's entire response to Padovano's failure to interview or prepare lay witnesses is to attack the memory of Wickham's eldest sister, one of the two lay witnesses. (AB 42-43.) Yet Padovano himself conceded that he never spoke with Wickham's sisters, or with any other family member for that matter, prior to trial, aside from discussing travel arrangements.[14] The State also ignores the striking contrast between Padovano's meager efforts in this case and his conduct in his other capital case, in which this Court found that Padovano spoke with no fewer than *hundreds* of potential witnesses. *Smith v. State*, 457 So. 2d 1380, 1382 (Fla. 1984); (IB 21).

In the final analysis, if, as the State argues, Padovano really spent many unrecorded hours – whether in the shower or elsewhere – working on the case, what did he have to show for it? Virtually nothing. The State's empty statements that he "reviewed records," "directed" an investigator, "marshaled" witnesses, and "asserted Wickham's position to the judge and jury" (AB 61) cannot paper over the record. What

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[14] *See, e.g.*, PC-R 3346 ("The only one that I recall speaking to on this list is Alice Bird […] I think it would have been right before the trial. I'm sure it would have been right before the trial."); (PC-R 3352) ("Well, I talked to all of the people who were the principle [sic]witnesses in the case against Mr. Wickham […] I mean, I didn't interview them, I read their depositions."); (PC-R 3352-53) ("Q. […] Prior to their showing up very shortly prior to the trial, would it be fair to say that you never personally spoke to a single family member? A. I doubt seriously that I did."); (PC-R 3354) ("I may have spoken to Alice Bird and LaValley on the phone, but I don't think we talked about this very much. It was just mainly to make the arrangements to come down").



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the record shows is that Padovano did not guide his inexperienced investigator, never pursued lay witnesses, did not retain needed experts, and dedicated so little time to the case that it would have been impossible for him to have been adequately prepared. And in fact, he was not.

### B. Mitigation Evidence Not Discovered

As a result of Padovano's inadequate investigation, he did not discover crucial and readily available evidence about Wickham's horrific childhood and severe mental illnesses. Wickham respectfully refers the Court to IB 23-27 and 38-43 in which the mitigation facts that were presented at trial are compared with the facts that the Jury and the trial judge never learned about. In response, the State presents a checklist of evidence introduced by Padovano. The fact that Padovano presented some mitigation evidence does not render his representation effective when he failed to discover detailed, powerful, and specific mitigation evidence about Wickham's childhood and mental illnesses. *See, e.g.*, *Ragsdale v. State*, 798 So. 2d 713, 720 (Fla. 2001) (finding ineffective assistance of counsel because "when the evidence which was available is measured against the evidence presented at the penalty phase, there is a reasonable probability of a different result."); *State v. Lara*, 581 So. 2d 1288, 1290 (Fla. 1991) (finding ineffective assistance when "the background and mental health testimony presented at the 3.850 hearing was quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase.").[15]

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[15] The State urges this Court no less than 12 times to refrain from "hindsight" and to defer to trial counsel's "strategic considerations." Yet deference is not

The State cites *Routly v. State*, 590 So. 2d 397, 402 (Fla. 1991). However, in *Routly*, the court placed "considerable weight" on the fact that the same judge presided over sentencing and over the 3.850 motion and found that the evidence would have had no effect on the sentence. *Id.* Furthermore, Routly's counsel left out evidence that was ambiguous and potentially harmful to the defense. In contrast Wickham's sentencing and 3.850 motion were presided over by different judges, and there is nothing about Wickham's tragic childhood that was ambiguous, harmful to the defense or suggests "strategic decisions."

Similarly, *Asay v. State*, 769 So. 2d 974 (Fla. 2000), is not analogous. In *Asay*, counsel was faced with an initial unfavorable diagnosis by a mental health expert who was aware of most facts subsequently advanced by collateral counsel. *Id.* at 986. Post-conviction mental health experts presented speculative diagnoses. *Id.* at 986-87. Here, the three post-conviction experts diagnosed Wickham after personally interviewing him, testing him, and reviewing his records. (*See* PC-R 3593-94, 3665-66, 3730-31.)

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warranted because Padovano could not have made a "strategic" choice to omit evidence he did not even know existed. *See* IB 37; *see also Wiggins v. Smith*, 539 U.S. 510, 512 (2003) ("'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation'" (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)). Additionally, the State appears to have the misguided notion that Wickham has benefited from the lapse of time in this case (*see, e.g.*, AB 62.) The opposite is true: In his post-conviction motion and his appeal Wickham was hindered by the passage of time. For example, two important witnesses had died – Ed Wickham (Wickham's brother) and Harris (the investigator) and their valuable testimony is now forever lost (PC-R 4092-93, 7374-81).

Unlike Padovano, who interviewed no lay witnesses, Asay's trial counsel interviewed lay witnesses and was stymied in part by resistance from Asay's mother. *Id.* at 987-88. Finally, in contrast to Wickham, mitigation evidence presented by collateral counsel risked opening the door to Asay's violent past. *Id.* at 988; *see also Ragsdale*, 798 So. 2d at 719 (distinguishing *Asay*).

*Jones v. State*, 845 So. 2d 55, 68-70 (Fla. 2003), is also distinguishable. In *Jones*, the Court rejected the entirely different claim that counsel was ineffective for failing to provide the expert with necessary information resulting in a violation of Jones's rights under *Ake v. Oklahoma,* 470 U.S. 68 (1985). Unlike Wickham, however, who presented a full record of potential mitigation testimony that did not come to light at his trial, Jones merely asserted in an "entirely conclusory" manner that lay witnesses would have testified to mitigation. *See id.* at 70 n.30.

### C. Sentencing Findings

As shown in the Initial Brief (IB 36-37), Padovano was ineffective in not objecting to the trial judge's hasty imposition of the death sentence since the judge did not first find and weigh aggravators and mitigators, as required under Florida law. The Circuit Court erred in summarily denying this claim.[16]

As this Court explained, after a jury has recommended a death sentence, the proper sequence should be as follows:

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[16] *See* PC-R 7731-39 (denying Claim VII without discussing the merits of this claim).

> First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

*Spencer v. State,* 615 So. 2d 688, 690-91 (Fla. 1993) (applying *Grossman v. State,* 525 So. 2d 833 (Fla. 1988)).

Instead, the trial court shortcutted the sentencing process as follows:

> The Court: Okay, I am prepared to proceed to sentencing. Does the State have anything they wish to say before we proceed to sentencing?
>
> Mr. Hankinson [State]: Could we approach the bench?
>
> The Court: All right.
>
> (Thereupon, the following Proceedings were held at the bench and outside the hearing of the Jury:)
>
> Mr. Padovano: I think this is up to you, but I think it might be a good idea to excuse the jury.
>
> The Court: I think they might as well see it.
>
> . . .
>
> Mr. Marky [the State]: In that regard, we would like the written findings within a reasonable period of time and request permission to file a written memorandum in support of the jury's recommendation.

> The Court: That will be fine, setting forth the aggravating and mitigating circumstances.
>
> . . .
>
> The Court: Mr. Wickham, a jury of your peers has found you guilty of first degree murder and armed robbery. That same jury of your peers has recommended that the death sentence be imposed. I am going to follow that recommendation. I adjudicate you guilty of first degree murder. I hearby sentence you to die in the electric chair at a date certain, set by the superintendent of the state prison system, that you be placed in the electric chair and a current of electricity be run through your body until you are dead.
>
> . . .
>
> This court, will within a reasonable period of time, set forth the reasons, setting forth the aggravating and mitigating circumstances, and the Court will entertain a memorandum of law from the State to be submitted and the order will be set forth in writing no later than a week from tomorrow. (R 2044-47)

At that stage of his trial Wickham had nothing to gain and everything to lose from shortcuts in his sentencing process. Yet, quite possibly aware that any significant delay in his client's sentencing might postpone his own investiture scheduled for the end of the month, Padovano either consented or stood idly by as the trial judge subverted the elaborate and careful sentencing process required by Fla. Stat. §921.141 and compressed the process into a matter of minutes in which, without any discernible weighing of sentencing factors, he sentenced Wickham to death. The judge had not yet identified the sentencing factors because only <u>after</u> he imposed the death penalty did he say he would "entertain" the State's sentencing memorandum. It was hardly a surprise when, two weeks later, the judge copied, almost verbatim, the State's memorandum.

The judge's actions at sentencing and adoption of the State's memorandum clearly establish that the judge departed from the procedure required under Florida law.[17]

In its Answer Brief, the State argues that *Walton v. State*, 847 So. 2d 438 (Fla. 2003) bars the claim procedurally and argues on the merits that sentencing findings were unnecessary because the judge was 'saturated' with information about the case, and that Wickham waived his right to written sentencing findings. Both arguments are without merit.

It is the State's argument that the claim is procedurally barred. Even though now the State argues for a procedural bar, prior to the *Huff* hearing the State conceded, and the Circuit Court agreed, that Wickham is entitled to an evidentiary hearing with regard to this particular claim.[18] In addition, the cases on which the State relies contradict what the State seeks to prove. If indeed counsel in Wickham's direct appeal was barred from challenging the improper sentencing process because Padovano never objected to

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[17] The Court is respectfully referred to Chapter II of Wickham's Habeas Reply Brief for a discussion of Florida law.

[18] This claim forms part of Claim VII, for which the State had conceded, "I object to [a hearing on] the jury instructions and the prosecutor's comments, but I agree to the rest of [claim] seven." PC-R 3026. The Circuit Court then permitted an evidentiary hearing on the "ineffective assistance of counsel" claims in Claim VII. *See* PC-R 3114. It subsequently denied the mitigating evidence portion of Claim VII without addressing this claim. *See* PC-R 7731-39.

it, as the State maintains,[19] the post-conviction process is the only forum to challenge Padovano's ineffectiveness.

The State's 'saturation' argument, if accepted, would eviscerate Fla. Stat. §921.141: every trial judge is 'saturated' with the facts of the case he or she presided over by the end of the trial, yet the Florida legislature found that taking a man's life is important enough to make additional time to properly and systematically weigh aggravating and mitigating circumstances on the record prior to imposing the death penalty.

The substantive holding in *Walton*, on which the State heavily relies, is distinguishable: in *Walton*, the defendant's "only evidentiary support" was that the court had borrowed portions of the State's sentencing memoranda in its final sentencing order. 847 So. 2d at 447. Here, the record clearly shows the trial judge's lack of specific findings prior to the sentencing, and the judge's act of copying the State's memorandum is merely a symptom of the judge's sentencing Wickham without any deliberation or weighing whatsoever.

By the time of Wickham's trial, this Court had established that the trial court "must specifically identify and explain the applicable aggravating and mitigating circumstances" and "written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty." *See Patterson v. State*, 513 So. 2d 1257, 1261 (Fla. 1987) ("It is inconceivable . . . that any

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[19] *See* AB 60.



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meaningful weighing process can take place otherwise.") (citing *Van Royal v. State*, 497 So. 2d 625, 630 (Fla. 1986)).

Padovano's attempted waiver was effectively an attempt to override the mandate of the Florida courts and legislature. *See 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."). In addition, as discussed in Parts III and IV of the Initial Brief, there was reason to believe that Wickham was unable to provide a knowing voluntary and intelligent waiver of his rights. *See Porter v. Crosby*, Case No. 6:03-cv-1465-Orl-31KRS, at 4 (D.M.D. Fla. Oct. 31, 2007), attached as Appendix A (where there were reasonable grounds to believe defendant was incompetent, defendant could not provide a knowing, voluntary and intelligent waiver of counsel). Wickham's purported waiver was further invalid because the record does not show that Padovano advised Wickham, who had only a fourth grade education, of the implications of waiving written sentencing findings. *See United States ex rel. Williams v. Twomey*, 510 F.2d 634, 639 (7th Cir. 1975) (although petitioner told the court that he wished to proceed to trial, finding no waiver because petitioner was not shown to have been properly advised by counsel and "had only an eighth grade education").

Had Padovano objected to the trial court's actions at sentencing, Wickham would have been able to raise the issue on direct appeal, and a reasonable probability exists that the appellate court would have found reversible error under *Grossman, Van*

*Royal* and *Patterson*.[20] Instead, Padovano's purported waivers foreclosed Wickham from raising this meritorious claim on appeal.[21]

### D. Failure to Object to State's Inflammatory Language

In his summation, the prosecutor argued that if the jury did not recommend a death sentence, Wickham would be eligible for parole after 25 years and could potentially kill again ("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."). This inflammatory argument presented the jury with the coercive choice between condemning Wickham to death and taking responsibility for a future murder.[22] The State seeks to excuse this inflammatory language as a response to the defense summation. (AB 55, 57.) The glaring flaw in the State's argument is that the

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[20] *See also Layman v. State*, 652 So. 2d 373, 375-76 (Fla. 1995) (finding reversible error where trial judge failed to discuss aggravators and mitigators prior to sentencing and evidenced a "willingness to abdicate a key judicial function in the proceeding" by asking the prosecutor to prepare the written sentencing findings).

[21] To the extent that this Court finds that the underlying claim of the trial court's error was procedurally barred on appeal, Padovano's failure to object was ineffective assistance of counsel. Alternatively, if this Court finds that the claim was procedurally barred because it should have been raised on direct appeal, appellate counsel's failure to raise the issue was ineffective assistance of appellate counsel. *See* Habeas Reply 8-13.

[22] The prosecutor argued that Wickham could be released and kill again before 25 years. (R 2016-17) ("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.").

prosecution's summation came before the defense's summation. Defense counsel did argue against the 25-year argument, but only in direct response to the prosecutor's summation. (R 2032) ("Now, Mr. Hankinson says this is the only effective remedy. And 25 years in prison [...]").

Additionally, the State has no basis for distinguishing *Teffeteller v. State*, 439 So. 2d 840 (Fla. 1983) as involving "more explicit" language. However, *Teffeteller* held that the prosecutor's instruction was unconstitutional because the substance of the argument sent a clear message that a vote against death would result in parole and a future murder. 439 So. 2d at 845 regardless of the prosecutor's colorful language; *see also Parker v. State*, 456 So. 2d 436, 443 (Fla. 1984) ("The prosecutor did not predict that the defendant would murder again if sentenced to life imprisonment and paroled after twenty-five years. This latter argument we have condemned in *Teffeteller*"). The prosecutor's argument in Wickham's trial was intended to send the same inflammatory message to the jury deciding Wickham's fate. *Cf. People v. LaValle*, 817 N.E.2d 341, 358 (N.Y. 2004) (holding unconstitutional a deadlock jury instruction that the court would sentence defendant to life with parole eligibility because "the deadlock instruction gives rise to an unconstitutionally palpable risk that one or more jurors who cannot bear the thought that a defendant may walk the streets again after serving 20 to 25 years will join jurors favoring death"); *People v. Ramos*, 689 P.2d 430, 441 (Cal. 1984) (holding unconstitutional a jury instruction referencing the possibility of commutation by the governor because it "invites the jury to consider matters that are

both totally speculative and that should not, in any event, influence the jury's determination.").

### E. Competency

As Wickham demonstrated in his Initial Brief, the Circuit Court erred in denying Wickham's claim that Padovano was ineffective for failing to request a competency hearing for his insane, mentally ill and brain damaged client who clearly decompensated further during trial. (IB 43.) That is, the Circuit Court relied exclusively on testimony by Wickham's trial counsel[23] and on unreliable statements made by two experts without addressing objective evidence showing reason to believe Wickham's incompetence at the time of trial.

The State has not rebutted the Circuit Court's legal and factual errors or Wickham's point that Padovano neglected his duties to inform mental health experts of Wickham's deteriorating mental condition. Instead, the State asserts that "competent, substantial evidence," consisting mainly of Padovano's testimony that he believed his

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[23] To emphasize the point made in Part I, *infra*, Judge Dekker's conclusions here in particular crucially depended on wholly crediting Padovano's testimony, and disregarding the extensive written evidence that contradicted it. As noted, in a 1995 interview with two interviewers who separately recorded the event, Padovano painted an entirely different picture of his former client's ability to participate in the defense. At the 3.850 hearing he first claimed, under oath, that the interview had never taken place and that he had never met the interviewers, and then a day later was forced to admit that the interview had occurred when it turned out there was an explicit reference to it in his calendar. (*See* IB 13-15.)

client was competent, supported the Circuit Court's conclusion. To bolster its position, the State emphasizes that Padovano was "a very experienced attorney" (AB 71-72).

Like the Circuit Court, the State premises its argument upon the mistaken belief that testimony about a defendant's competence can erase objective evidence showing incompetence. But as discussed in the Initial Brief, "the question before the court is whether there is reasonable ground to believe the defendant *may* be incompetent, not whether he *is* incompetent." *Tingle v. State*, 536 So. 2d 202, 203 (Fla. 1988) (emphasis in original). Thus, an inquiry into and a hearing on the competency of a defendant are required when "there is evidence that raises questions as to that competency," and "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 v. State*, 473 So. 2d 1253, 1257-59 (Fla. 1985) (defense attorney's "judgment call," police officers' testimony that "they had no problem communicating with Hill," and a prison psychologist's report were insufficient to dispose of competency hearing).[24]

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[24] *See also Pate v. Robinson*, 383 U.S. 375, 385-86 (1966) (competency hearing was necessary because the "mental alertness and understanding displayed in Robinson's 'colloquies' with the trial judge" "offers no justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior"); *Drope*, 420 U.S. at 175 (competency hearing was necessary because court could not rely on aspects of a psychiatric report suggesting competence (including notations of the defendant's being "well oriented in all spheres" and being "able, without trouble, to answer questions testing judgement") as well as its belief that Drope was voluntarily avoiding attendance in court, without considering "contrary data"); *Bishop v. United States*, 350 U.S. 961 (1956) (U.S. Supreme Court vacated and ordered a competency hearing and a new trial even though the Court of Appeals determined that Bishop testified coherently and was adroit in explaining eye-



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As for the State's argument regarding Wickham's "bizarre behavior": the State again ignores the wealth of evidence showing Wickham's incompetence. Viewed in context, bizarre behavior is precisely the kind of evidence that constitutes reasonable grounds for a competency hearing. *See Lane v. State*, 388 So. 2d 1022, 1025-26 (Fla. 1980) ("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."); *Drope v. Missouri*, 420 U.S. 162, 178-82 (1975) (holding that a trial court's determination that defendant shot himself to avoid court did not remove the need for a competency hearing). In fact, this Court has rejected the State's reasoning in *Tingle* where a trial court, in support of its denial of a competency hearing, held that a defendant's "bizarre behavior" does "not substantially establish" lack of the ability to assist defense counsel in preparing his defense. *See Tingle*, 536 So. 2d at 203. The Court observed that the trial court's reasoning was "contrary to the standard" for deciding whether a competency hearing is required: "*Under the circumstances present in this case*, there were reasonable grounds to believe Tingle may have been incompetent." *See id.* (emphasis added).

The State argues that the standard set forth in *Hill* is inapplicable because of certain factual differences between the defendant in *Hill* and Wickham, like Hill's IQ, grand mal epileptic seizures and belief that the "jury was laughing at him." (*See*

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witness testimony; that he withstood severe and long cross examination; and that approximately one month before the trial a psychiatric evaluation determined that Bishop had no mental disorder).

AB 69.) However, the kinds of differences that the State points to do not and cannot mean that the legal standard established by one case does not apply to other cases. Additionally, as the United States Supreme Court recognized in the context of competency, "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope*, 420 U.S. at 180.

The Circuit Court and the State's one-sided evaluation based upon opinion testimony is simply not the "objective evaluation of the facts" required under Florida law. *See Hill*, 473 So. 2d at 1259. Here, any objective evaluation of the facts establishes beyond question that reasonable grounds existed for Padovano to request a competency hearing for Wickham. In fact, neither the Circuit Court nor the State have addressed the fact that three experts testified that there was strong reason to believe Wickham was incompetent at the time of trial. (*See* IB 54-55.)

In failing to protect Wickham, who lacked the ability to protect himself, Padovano relinquished Wickham's right to a fair and correct competency hearing.

## V. THE TRIAL COURT WAS REQUIRED TO HOLD A COMPETENCY HEARING

The Circuit Court erred in summarily finding that because Wickham did not challenge his competency on direct appeal, the claim was procedurally barred. The State does not adequately address Wickham's argument that in the past this Court reviewed competency claims on collateral review, even though competency was not

challenged on direct appeal *See, e.g.*, *Hill*, 473 So. 2d 1253, 1260 (Fla. 1985); *Mason v. State*, 489 So.2d 734, 735-36 (Fla. 1986); *see also Pate v. Robinson*, 383 U.S. 375, 384-85 (1966) (stating that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial," and finding no waiver by defendant for not requesting competency hearing) (citing *Taylor v. United States*, 282 F.2d 16, 22 (8th Cir. 1960), where competency claim was heard for first time on collateral review).[25]

The State's argument that *Mason* is unauthoritative because "the opinion did not address procedural bar" is nonsensical: if the procedural bar were applicable, as the State suggests, the Court would not have ruled on the merits of Mason's claim.

The State relies on *Carroll v. State*, 815 So. 2d 601 (Fla. 2002), and on *Patton v. State*, 784 So. 2d 380 (Fla. 2000), but, as pointed out in Wickham's Initial Brief, the State and Circuit Court's reliance on these cases is misplaced. In both *Carroll* and *Patton*, this Court procedurally barred the defendant's competency claims because each defendant had a competency hearing and was attempting to attack on collateral review its outcome. Here, Wickham's claim rests on the trial court's failure to hold a competency hearing in the first place.

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[25] *See also Pennsylvania v. Santiago*, 855 A.2d 682, 691-92 (Pa. 2004) (finding no waiver of competency claims in postconviction proceeding because "it would be virtually an oxymoron to say that an individual may have been incompetent to stand trial, but nonetheless competently waived this issue").

The State additionally argues that the Circuit Court essentially ruled on the merits of Wickham's competency claims because it had heard Wickham's related ineffective assistance of counsel claim and found him "competent to stand trial." Aside from the fact that this claim involves the trial court's – not defense counsel's – duty to inquire into Wickham's competency, the Circuit Court misapplied the legal standard for determining whether reasonable grounds exist for a competency hearing. *See infra* Part IV. E.; IB 43-56; *Hill,* 473 So. 2d at 1257, 1259; *Drope*, 420 U.S. at 175; *Pate*, 383 U.S. at 385. Here, any objective evaluation of the facts establishes beyond question that the trial court violated Wickham's due process rights by failing to hold a competency hearing and trying Wickham while incompetent. *See* IB 58-60; HP 6-18. Since Wickham's due process rights would not be "adequately protected" by a retroactive competency hearing nineteen years after trial, this Court should vacate Wickham's conviction. *See Hill,* 473 So. 2d at 1258-59 (citing *Pate*, 383 U.S. at 386-87).

## CONCLUSION

For the reasons set forth above and in his Initial Brief, Wickham respectfully urges this Court to vacate his convictions and death sentence.

## CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by mail, on November 26, 2007 to:

Stephen R. White, Esq. Assistant Attorney General
Office of the Attorney General,
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## 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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# APPENDIX A

*Porter v. Crosby*, Case No. 6:03-cv-1465-Orl-31KRS, at 4 (D.M.D. Fla. Oct. 31, 2007)

# UNITED STATES DISTRICT COURT
## MIDDLE DISTRICT OF FLORIDA
### ORLANDO DIVISION

**GEORGE PORTER, JR.,**

**Petitioner,**

-vs- **Case No. 6:03-cv-1465-Orl-31KRS**

**JAMES CROSBY, JR., et al.,**

**Respondents.**

## ORDER

This matter comes before the Court on a Motion to Alter or Amend Judgment (Doc. 38) in which Petitioner George Porter, Jr. ("Porter") requests that this Court alter and/or amend its holdings with regard to Claims I, IV and V. After review of the motion and the record, this Court found that Porter's arguments with regard to Claims I and IV were without merit, however, his arguments convinced this Court that Claim V warranted further review. Therefore, Respondents were directed to respond to the motion with regard to Claim V only. (*See* this Court's Order at Doc. 39)[1]. Thus, Petitioner's motion will be denied with regard to Claims I and IV and the following discussion will address Claim V only.

In Claim Five of his Amended Petition for Writ of Habeas (Doc. 13), Porter alleges, *inter alia*, that he received ineffective assistance of counsel at his competency hearing.[2] In denying this

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[1]Respondents' filed a timely response at Doc. 40.

[2]This Court finds that, contrary to Respondents' argument that this claim is procedurally barred, Porter did in fact effectively raise this claim in his state court proceedings. *See* App. N at 52-76.

claim, the state trial court held that Porter could not claim ineffective assistance of counsel because he had previously waived his right to counsel. App. L-3 at 9-10. The state supreme court, however, did not address the merits of this claim. *See Porter v. State of Florida*, 788 So.2d 917, 926-27 (Fla. 2001).

It is well established that the Sixth Amendment entitles a defendant to the assistance of counsel at every critical stage of a criminal prosecution. *Kirby v. Illinois*, 406 U.S. 682, 690 (1972); *United States v. Gordon*, 4 F.3d 1567, 1571 (10th Cir. 1993). Furthermore, it is undisputed that a competency hearing is a critical stage of criminal prosecution. However,

> [u]nder the principles announced by the Supreme Court in *Faretta v. California*, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), a *competent* criminal defendant [also] has a Sixth Amendment right to represent himself at trial if he waives his right to counsel, and a trial court cannot deny the defendant's motion to proceed *pro se* on the ground that the defendant lacks sufficient knowledge or understanding of the law. The *Faretta* right is not, however, without limitation. The exercise of the right to self-representation is contingent on the defendant's knowing and intelligent waiver of the right to be represented by counsel. *See id.* at 835 n.5.

*Wood v. Quarterman*, 491 F.3d 196, 201-202 (5th Cir. 2007)(emphasis added). Federal courts have held that the right to counsel is preeminent to the right to self-representation and all doubts should be resolved in favor of appointing counsel. *See Marshall v. Dugger*, 925 F.2d 374, 376 (11th Cir. 1991).

Therefore, when a defendant seeks to waive his right to counsel, before permitting him to do so, *Faretta* requires the court to conduct an inquiry and determine whether his waiver is knowing, voluntary and intelligent. In making this inquiry, the court must necessarily determine

whether the defendant is competent.[3] However, it is well established that a defendant's competency is not an immutable characteristic. *See Drope v. Missouri*, 420 U.S. 162, 171 (1975). "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 competence to stand trial." *Id.* at 181. Thus, whenever the court has a reasonable doubt as to the competency of a criminal defendant, it has a *duty* to investigate further and may *sua sponte* hold a hearing to determine competency. *See Jordan v. Wainwright,* 457 F.2d 338, 339 (5th Cir. 1972).[4]

According to the record, after refusing to cooperate with at least two different attorneys, Porter began representing himself as early as June 4, 1987, with Mr. Bardwell acting as stand-by counsel.[5] App. M at 367-70. However, on November 6, 1987 the State requested a competency hearing to determine if Porter was competent to proceed to trial. (Doc. 1 at App. D). In response to this, the trial court appointed two psychiatrists to examine Porter and report back to the Court within ten days. App. A at 2662, 2671. Despite his competency being in question, Porter continued

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[3]In *Godinez v. Moran*, 509 U.S. 389 (1993), the Supreme Court held that the standard for determining competency to stand trial is the same as the standard for determining competency to waive counsel. "[T]he standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" *Id.* at 396.

[4]All decisions of the Fifth Circuit issued prior to October 1, 1981, are binding precedent on courts within the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[5]On June 22, 1987 a stipulation was entered into the record indicating that Bardwell was thereby appointed as Porter's "full counsel." App. A at 2661. This Court cannot decipher from the record what the context of this stipulation was, however, it is clear that at some point between June 22, 1987 and November 6, 1987 Porter again elected to discharge his counsel and proceed *pro se.*

to represent himself at hearings on November 20 and 24, 1987 where several motions in limine were addressed, and even at his own competency hearing on November 30, 1987. *See* App. M at 821.

Under federal constitutional law, a criminal defendant may not waive his right to counsel and proceed *pro se* unless his waiver is knowing, voluntary and intelligent, and a waiver cannot be knowing, voluntary and intelligent unless a defendant is competent. *See Pate v. Robinson*, 383 U.S. 375, 384 (1966). In *Pate,* the Supreme Court held that a criminal defendant cannot waive his right to a competency hearing because "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." "Likewise, [it would be] contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive [his] Sixth Amendment right to counsel." *United States v. Klat*, 156 F.3d 1258, 1263 (D.C. Cir. 1998). *See also United States v. Purnett*, 910 F.2d 51, 55 (2d Cir. 1990) ("Logically, the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel."). Therefore, it stands to reason that, under the Sixth Amendment, when a defendant's competency is reasonably in question, he may not appear *pro se* until the issue of competency has been resolved – regardless of whether he has been representing himself in the past. *But see Wise v. Bowersox*, 136 F.3d 1197, 1203 (8th Cir. 1998); *United States v. Morrison*, 153 F.3d 34, 47 (2d Cir. 1998) (holding that a court need not appoint counsel every time the issue of competency is raised).

In this case, it was the State, not the Defendant, that filed a motion for the appointment of psychiatrist(s) to examine Porter because "the Defendant's conduct in acquiring and waiving

counsel could be interpreted in such a way as to cast some doubt upon his present mental condition." Doc. 1 at App. D. Finding that this motion had merit, the trial judge immediately appointed two psychiatrists to examine Porter: Dr. Wilder and Dr. Greenblum. When Porter refused to meet with Dr. Greenblum, the trial judge appointed a third psychiatrist, Dr. Kay, to examine him. It appears, therefore, that Porter's competency was reasonably in question as of November 6, 1987, and, until his competency was adjudicated, Porter should have been represented by counsel.[6] However, as noted clearly in the transcript, Porter had no counsel for his competency hearing. Thus, the finding of the state trial court that Porter effectively waived his right to counsel at his competency hearing was clearly contrary to established federal law.

"The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 659 (1984). Therefore, because Porter did not have the benefit of counsel at his competency hearing, a critical stage of his criminal proceeding, prejudice is presumed. *See id.* at n.25 ("The [Supreme] Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.").

Having determined that Porter's Sixth Amendment right to counsel was violated, this Court must direct that the writ of habeas corpus issue and Porter be discharged, unless the State gives him a new trial within ninety (90) days. This disposition is in accordance with the Supreme Court's

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[6]Representation at the competency hearing alone would not have been sufficient. Porter was entitled to counsel prior to the hearing to investigate on his behalf and to prepare for the hearing. *See Estelle* v. *Smith*, 451 U.S. 454, 471 (1981).

holding that, due to "the difficulty of retrospectively determining an accused's competence to stand trial", it is inappropriate to simply order a re-hearing on the issue of competency. *Pate*, 383 U.S. at 386-87(holding that simply ordering a new hearing on the issue of competency, six years after the trial, is insufficient). Accordingly, it is

**ORDERED** that Petitioner's Motion to Amend or Alter Judgment (Doc. 38) is **GRANTED** in part and **DENIED** in part. The writ of habeas corpus shall issue and George Porter, Jr. shall be discharged, unless the State gives him a new trial within ninety (90) days.

**DONE** and **ORDERED** in Chambers, Orlando, Florida on October 31, 2007.

**GREGORY A. PRESNELL**
**UNITED STATES DISTRICT JUDGE**

Copies furnished to:

Counsel of Record
Unrepresented Party