IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11–1193

JERRY MICHAEL WICKHAM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_________________________________/

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

# INITIAL BRIEF OF APPELLANT


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## INTRODUCTION

Jerry Michael Wickham is a brain-damaged schizophrenic with an I.Q. of 85. He was convicted of murder and sentenced to death at a trial in 1988 at which medical evidence went unpresented that would have shown Wickham was incapable of planning the offense or premeditating the killing. The jury never learned that Wickham had frontal lobe brain damage or temporal lobe epilepsy, and never learned the depth of the devastating familial abuse he suffered as a child. The reason why this evidence was not presented is now clear: defense counsel simply never took the time to conduct an appropriate investigation into his client's background or circumstances.

Instead, the jury had before it the testimony of admitted accomplices and jailhouse informants who claimed that Wickham planned the offense, expressed an intent to eliminate witnesses, and showed lack of remorse. As this brief will demonstrate, with respect to every single one of the witnesses whose testimony was critical to the State's argument that Wickham masterminded a cold-blooded killing—and critical to the imposition of the death penalty—subsequent investigation has shown that the State had, but failed to communicate to defense counsel, specific and compelling evidence showing either that the trial testimony of these witnesses was false, that it was motivated by undisclosed bargains with the State, or both. The post-conviction evidence establishes an entirely different

picture of Wickham's culpability and the credibility of his accusers than was presented at trial—but that was a picture his jury and sentencing judge never saw.

The basic facts of the crime are simple and not in real dispute. On March 5, 1986, Wickham was part of a group traveling to Tampa in two cars from Gaylesville, Alabama. The group included Wickham's wife, Sylvia; her sons Jimmy Jordan and Mark and Matthew Norris; Jimmy's girlfriend, Tammy Jordan, and her newborn baby; and Tammy's cousin, Larry Schrader. Several members of the group, including Wickham, had consumed large quantities of alcohol and drugs. (R 1103, 1006, 1159, 1215–16.)[1] They stopped at a rest area near Tallahassee and discovered they had no money and were low on gas. (R 1078, 1081.) After entertaining the idea of asking for help at a church, they decided to rob someone. (R 1078–79, 1144–45, 1191, 1231.) From I–10, the group headed north, (R 1079), stopping just south of the Florida-Georgia border. (R 984.) It was there that Morris Fleming stopped his car and encountered this group.

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[1] Citations will be designated as follows:
"**R**" – record on direct review, as filed with this Court on March 13, 1989.
"**PCR**" – corrected post-conviction record on appeal until this Court's January 23, 2009 mandate, as filed with this Court on January 12, 2007.
"**2011 PCR**" – post-conviction record on appeal after this Court's January 23, 2009 mandate, as filed with this Court on June 27, 2011.
"**2011 SPCR**" – supplemental post-conviction record on appeal after this Court's January 23, 2009 mandate, as filed with this Court on August 25, 2011.

The group members had parked their two 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 feigned a mechanical problem, flagging down Fleming. (R 1195–97.) Fleming looked at the car's engine and said he did not see anything wrong. (R 1197.) Wickham then came out of the woods and Fleming started walking back to his car. (R 1197.) Without uttering a 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 then drove back to the murder scene to retrieve the other car. (R 1200–03.)

Ultimately, the issues presented during the guilt and penalty phases of Wickham's capital trial centered on his thought processes at the time he fired the shots. Just one week before trial, defense counsel informed the Court that Wickham would rely on an insanity defense. (PCR 4511.) But much of Wickham's mental health history, including multiple brain disorders and a savagely abusive childhood, were never discovered by his attorney and remained unknown by his jury. In addition, the State's failure to disclose critical impeachment evidence and to correct false and/or misleading testimony and

argument crippled the defense's ability to rebut a string of witnesses claiming Wickham took the lead in planning the robbery and premeditated the killing.

It is in this context that the claims in this appeal of multiple *Giglio/Brady* violations, ineffective assistance of trial counsel, and competency to stand trial arise. When analyzed properly, the record demonstrates conclusively that Rule 3.850 relief is warranted.[2]

## STATEMENT OF THE CASE AND OF THE FACTS

### I. PROCEDURAL HISTORY

On September 29, 1987, Wickham was arrested in connection with the 1986 shooting of Fleming. (R 1–2.) The arrest of Wickham and four others resulted from information provided by Larry Schrader. (R 6–7, 1063–64.) On October 22, 1987, Wickham, Schrader, Sylvia Wickham, and Jimmy and Tammy Jordan were indicted for first-degree murder, armed robbery, and weapons possession. (R 1–2.)

Wickham's trial ran from November 28 through December 7, 1988 before Judge Charles McClure. Wickham was represented by Philip Padovano, who is now a judge of the First District Court of Appeals. He had been appointed to represent Wickham on April 21, 1988, after three other attorneys had withdrawn in part due to the difficulty of representing a mentally ill defendant. (R 81, 83, 94–

[2] As Wickham filed his motion for post-conviction relief prior to October 1, 2001, it is governed by Fla. R. Crim. P. 3.850. *See* Fla. R. Crim. P. 3.851(a).

95, 97, 111–113; 2011 PCR, Vol. 11, Tr. 29–30.) Wickham's defense at trial was that he was insane and incapable of premeditating the crime. The only expert defense counsel consulted was a psychologist, Dr. Joyce Carbonell, who was deposed by the State on November 21, 1988. It was then, just *one week* before trial, that defense counsel first learned that Dr. Carbonell had concluded Wickham was insane at the time of the offense. (PCR 4595–4601; *cf.* PCR 4510–12.)

## A. Minimal Time Was Spent On Wickham's Defense

### 1. Defense Counsel Devoted Almost No Time to Wickham's Case Until After His Judicial Election, Just Before Trial

Soon after Mr. Padovano's appointment as counsel, he quickly concluded the focus of Wickham's defense would be on the penalty phase. (2011 PCR Vol. 11, Tr. 34–36.) As any death penalty lawyer knows, a penalty phase defense depends entirely on adequate, careful investigation conducted sufficiently in advance to permit time to pursue leads and evaluate strategy in light of a thorough understanding of the facts. And Padovano soon learned that, in fact, Wickham's life was marred by numerous events that merited investigation. Jennifer Greenberg, an experienced mitigation specialist engaged by defense counsel,[3] interviewed Wickham and obtained and reviewed his records from Northville

[3] By May 1988, Greenberg had worked as a mitigation specialist on 12–15 death penalty cases and had been trained by Scharlette Holdman, known as the "grandmother of modern mitigation." (2011 PCR Vol. 12, Tr. 205–06.)

Regional Psychiatric Hospital and Ionia State Hospital, institutions at which Wickham had been committed from ages 10 to 21. (2011 PCR Vol. 12, Tr. 215; see also R 1497.) The medical records suggested a history of brain damage, schizophrenia, and potentially epilepsy. (PCR 4844–4946.)

In mid-May 1988, Greenberg presented Padovano with a careful plan to investigate and develop penalty-phase mitigation, including a list of steps necessary to *begin* the critical background investigation. (PCR 4399–4403; *see also* 2011 PCR Vol. 11, Tr. 46–47.) This included interviews of medical personnel and fellow patients from Northville and Ionia hospitals, as well as experts who could discuss the notoriously substandard conditions at those facilities. The plan also included consultation with psychiatric and child development experts and interviews of Wickham's family and friends. (PCR 4401, 4403.) Yet defense counsel never investigated most of these items. (2011 PCR Vol. 11, Tr. 48–49.)

After accepting the Wickham appointment, Padovano decided to run for election to the Second Judicial Circuit. In May 1988, he sought and obtained the first of two continuances. (PCR 4404–07.) Clearly cognizant of the constitutional imperative to conduct a thorough investigation, he advised the court—consistent with Greenberg's plan—that it was necessary "to conduct a *much more detailed investigation of the defendant's background* . . . [which] will likely *support the mitigating circumstances* listed in . . . Florida Statute 921.141(6)." (PCR 4405,

¶ 4(a) (emphasis added).) This included further investigation into Wickham's involuntary confinement and history of schizophrenia, low IQ, and possible brain damage. (*Id.*) Counsel also emphasized the need to obtain additional psychological evaluation, including testing for brain damage. (PCR 4405, ¶ 4(b).) The court granted a continuance until September 12, 1988. (R 243.)

However, counsel took no steps to advance this investigation. Instead, in July 1988, he formally announced his judicial candidacy and began an active campaign. (2011 PCR Vol. 11, Tr. 95.) On August 9, 1988, a second motion for continuance was filed, (PCR 4408–11), in which counsel represented that he had been working "diligently." (*Id.* ¶ 3.) In fact, between filing the May 1988 Motion for Continuance and the August 1988 Motion for Continuance, defense counsel spent approximately 12 hours working on Wickham's case, none of which was spent developing Wickham's medical history and background. (R 242–44.) And between announcing his candidacy in July 1988 and his eventual election in early November 1988, counsel spent just 10.7 hours on Wickham's case, one-third of which was spent preparing for and attending the hearing on the second motion for continuance. (R 242–43.)

Defense counsel did not begin devoting any significant time to Wickham's case until two days after his November 8th election—just over two weeks before the start of Wickham's capital trial. (R 242–44.) His *only* preparation of *any*

defense witnesses, other than engaging psychologist Dr. Carbonell, with whom he had little contact, consisted of a brief encounter with two of Wickham's sisters in the courthouse just before they testified during the guilt phase portion of the trial. (PCR 3972 (Bird); 4001–02 (LaValley).)

### 2. Time Spent By Investigators and a Psychologist Also Was Negligible

Those assisting counsel with the case also spent very little time on it. Greenberg worked on the case for only a few weeks before she withdrew, after considerable personal anguish, due to what she perceived to be counsel's lack of commitment to investigating mitigation. (2011 PCR Vol. 12, Tr. 207–08.) A gap of nearly two months followed before another investigator, Bill Harris, was hired in July to replace Greenberg, and then another gap ensued before Harris began work in early August. (R 268.) Unlike Greenberg, Harris had no experience investigating mitigating facts in a capital case, (2011 PCR Vol. 12, Tr. 225–26), and he spent only 25 hours on Wickham's case. (R 268.) Harris had brief telephone conversations with six of Wickham's family members and "various agencies"; his only communication with defense counsel consisted of a few short phone calls. (R 266–68; *see also* R 242–44.) Even though Harris specifically asked Padovano for "the direction you think we should be going and the things you think we should be doing next" after providing an interim report, (2011 SPCR 16–

17 (10/10/88 report)), they spoke only briefly in late October and then had no further contact, (R 243, 268).

After meeting with Wickham briefly in May 1988, Dr. Carbonell did not conduct basic psychological testing until shortly before trial. (R 243 (tests administered on November 10 and 11, 1988; jury selection began on November 28, 1988).) The last screening tests for brain damage were given three days into the start of the guilt phase of the trial. (R 1472; *see also* R 265.) Although Wickham had told Dr. Carbonell about multiple injuries to his head and frequent black-outs, and screening tests had indicated the presence of brain damage, no further testing was conducted to determine the location, extent, and effect of the damage despite the fact that Dr. Carbonell informed defense counsel that she believed more conclusive psychological testing was warranted. (PCR 3554–55; *see also* PCR 4566.) Wickham also was not evaluated for epilepsy, despite the fact that his records contained an abnormal EEG indicating he had borderline "convulsive tendencies" and a "question of seizures." (R 1493–94, 1537–38; PCR 4936.) And defense counsel did not consult with *any* medical specialists with expertise in these specific disorders who could have appropriately diagnosed Wickham's conditions.

Defense counsel rarely communicated even with Dr. Carbonell. She testified that they did "not ha[ve] very many conversations about Jerry at any length . . . . We talked in May and then there was a long gap." (PCR 4597.) Time

records show that they did not speak by phone after May and only met for a total of eight hours—all after the November 8th election. (R 242–44; R 265.) Counsel's contact with Dr. Carbonell was so limited that it was not until her deposition on November 21, 1988, that he learned—to his considerable surprise, as vividly expressed on the deposition record—that she had concluded Wickham was insane at the time of the offense. (PCR 4595–4601; *cf.* PCR 4510–12.)

### B. Wickham Decompensated Greatly Before and During Trial

On the basis of brief meetings with Wickham in May 1988, Dr. Carbonell had opined that Wickham was competent to stand trial. (PCR 3543–45, 4510.) But Dr. Carbonell was not aware, because Padovano never informed her, that Wickham exhibited disturbed behavior that raised multiple red flags. For example:

- Wickham refused to be fingerprinted and "act[ed] out" in court. (PCR 4605–11; *see also* 2011 PCR Vol. 11, Tr. 124.)
- Jail guards reported that Wickham was "unkempt" and at times fell into what they described as a "frozen stare." (PCR 6823.)
- Defense counsel told the trial judge it took 45 minutes to explain a routine matter to Wickham, and asked to waive his consent. (R 1034–35.)
- Wickham refused to attend pretrial hearings, charge conferences, or the penalty phase, prompting the trial judge to order the use of all "reasonable force if necessary" and later "bodily" force. (R 80, 1873.)
- During a colloquy with the court about admission of testimony regarding a prior conviction, Wickham spoke nonsense and obscenities. (R 1914.)
- Wickham exhibited highly inappropriate behavior, such as "flipping the bird" at the prosecutor, (R 1888), media, and courtroom spectators, (2011

PCR Vol. 11, Tr. 124, 166–67), and made "inappropriate remarks" to the jury. (R 2048.)

Despite these red flags, Dr. Carbonell was not asked to revisit the issue of competency that she had addressed *six months* prior to trial. (PCR 3553–54.) The State's psychologist also never evaluated Wickham's competency. (PCR 4110.)

### 1. Defense Counsel Was Fully Aware of Wickham's Behavior

Prior to the filing of Wickham's original Rule 3.850 motion, two investigators met and interviewed Padovano to get his then-recent recollections of his ability to communicate with Wickham. Their notes demonstrate just how incompetent Wickham had become under the stress of the trial, and the startling degree of his counsel's awareness of this fact at the time, including his belief that Wickham "decompensated a lot during trial," (PCR 6826):

- "There were times in the trial where P[adovano] couldn't talk to JW[ickham]." (*Id.*)
- "He wasn't someone who could help himself in his defense. He had almost 'zero' ability to help with his defense." (*Id.*)
- "P said JW was totally unmanageable," and the trial court's insistence on getting "a personal waiver on everything from JW was absurd: JW is barely functioning and the Judge is asking waiver questions." (*Id.*)
- "He's 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." (*Id.*)
- "He 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." (*Id.*)[4]

The court below, which did not question these witnesses' credibility, did not address these crucial notes when denying Rule 3.850 relief.

**2. Counsel Did Not Advise His Psychologist Of Wickham's Disturbing Behavior**

Despite these warning signals, defense counsel did not advise the trial court of his observations, and, more importantly, failed to share this information with Dr. Carbonell. As a result, no competency hearing was requested. (*Cf.* PCR 3554.)

Although defense counsel understood that his client's competency was subject to change and needed to be constantly monitored, (2011 PCR Vol. 11, Tr. 109; *see also* PCR 3440–41), and although he recognized that Wickham's ability to cope with trial was not that of a normal person, (2011 PCR Vol. 11, Tr. 167), counsel said he relied on Dr. Carbonell to inform him of any competency issues. (2011 PCR Vol. 11, Tr. 109; PCR 3437.) But Dr. Carbonell was unaware of Wickham's behavior. (PCR 3561.) Counsel did not provide her with jail records for Wickham—indicating a history of impulsive and poorly planned actions, (PCR 4804–30)—despite her request for them (PCR 3551–52), nor did he inform her of his own interactions with Wickham or of Wickham's courtroom behavior, which Dr. Carbonell was not in the courtroom to observe. (PCR 3561–3567; *see also*

[4] These notes taken by Anne Jacobs O'Berry are corroborated by notes taken by Bonnie Forrest. (PCR 6833–41; *see also* 2011 PCR Vol. 12, Tr. 248–50).

PCR 3437–38.) She testified that, had she been aware of this behavior, she would have had concerns about Wickham's competency. (PCR 3561–62.)

### C. Trial

#### 1. Guilt Phase

At trial, the prosecutor presented the testimony of Wickham's four co-defendants—all of whom pleaded guilty to second-degree murder in exchange for their cooperation against Wickham—as well as Matthew Norris. The State also called jailhouse informants Wallace Boudreaux, John Hanvey, and Michael Moody—inmates who had been incarcerated with Wickham at the Leon County Jail—to testify to statements Wickham allegedly made. The State used these witnesses' testimony to argue that Wickham took the lead in planning the robbery and intended to kill the victim in order to avoid arrest. Their testimony also was used to impeach Dr. Carbonell's testimony about Wickham's mental incapacities.

Tammy Jordan testified that when discussing the potential robbery at a rest stop, Wickham said "there might be a killing involved in it," and when she and Sylvia Wickham suggested asking for help at a church, Wickham insisted "he was going to do it his way." (R 1191.)

Larry Schrader testified that Wickham had suggested the robbery, (R 1079, 1115), and he described hiding in the woods with Wickham and Jordan, watching Fleming pull up, and remaining hidden while Wickham walked to the car.

(R 1083.) He also testified that, after leaving the scene, Wickham said he killed the victim so "there wouldn't be no witnesses to testify against him." (R 1089.)

Sylvia Wickham and Jimmy Jordan testified that Wickham suggested that the group rob someone, but when specifically queried, both said that Wickham had said nothing about how to do it, nor did he indicate that violence might be involved. (R 1145, 1231, 1242.) Jimmy Jordan testified that he and Schrader hid in the woods with Wickham until Wickham walked out toward Fleming. (R 1236–37.) Sylvia Wickham testified that Wickham drank a case of beer a day and that he was drinking on the day of the offense. (R 1159.)

The prosecution presented jailhouse informant Wallace Boudreaux, who testified that Wickham admitted to him that the robbery had been his idea, that he had orchestrated the ploy of attracting a passing motorist, that he had shot Fleming, and that Fleming begged for his life. (R 1292–94.) Boudreaux also claimed that Wickham had been plotting an escape from the county jail while they were incarcerated together. (R 1290.) The prosecution also called John Hanvey, another inmate, who testified that Wickham told him and other inmates, including Darnell Page, that he had said prior to the shooting that he was going to kill whoever stopped because he did not want to leave any witnesses behind. (R 1327.) Defense counsel never interviewed Page, nor was he called by the State. Had defense counsel spoken with Page, he would have learned that Page disputed

Hanvey's account, and that Wickham did not talk about his case while in jail—in fact he "didn't talk very much to anybody really." (PCR 4218–19.)

Incredibly, with respect to each of these critical witnesses, the State was in possession of evidence—but never shared with the defense—strongly tending to show that the evidence summarized here was either false when given or was subject to impeachment, was preceded by an agreement with the State that gave the witnesses undisclosed motives to fabricate, or all of the above. The significance of these constitutional failures is discussed below. *See* Argument ("Arg.") § I.

In the guilt phase defense, defense counsel relied primarily on three witnesses: Dr. Carbonell and Wickham's sisters, Alice Bird and Marguerite "Sue" LaValley. Dr. Carbonell testified that she did not believe Wickham was mentally capable of planning the robbery or killing, and that, in her opinion, Wickham was legally insane at the time of the offense. (R 1505–07, 1511.) She testified that tests she gave Wickham showed he had organic brain damage, (R 1472–81), psychosis, (R 1484–85, 1500), residual schizophrenia, (R 1499–1500), and a full-scale I.Q. of 85, which placed him in the lower 16th percentile of the population. (R 1475.) Dr. Carbonell further testified that records indicated Wickham had "borderline convulsive tendencies," although defense counsel did not ask her to elaborate on the meaning and potential consequence of such a diagnosis. (R 1493–94, 1537–38.) When asked to define "organic brain damage," Dr. Carbonell—who

is neither a medical doctor nor a neurological specialist—testified that it meant something was physically wrong with Wickham's brain, (R 1474). She was unable to diagnose the location of the brain damage or its specific effects on Wickham's functioning. Dr. Carbonell also testified that there was evidence he was drinking on the day of the offense. (R 1548–49.)

In under four transcript pages, Dr. Carbonell was briefly questioned by defense counsel about phone conversations she had with four of Wickham's family members—none of whom Padovano had himself met or interviewed before trial began. (R 1489–93.) Counsel elicited cursory testimony from Dr. Carbonell about the history of mental illness in the Wickham family. (R 1491.) She also testified that Wickham was beaten as a child; that the abuse included being hit in the head; and that, at times, he was forced to remain at the table all night to finish his dinner and was repeatedly hit to stay awake. (R 1490–91.) Dr. Carbonell also testified that Wickham's parents were alcoholics. (R 1491.) Most of the testimony that defense counsel elicited about Wickham's abuse came from Dr. Carbonell, not Wickham's siblings who had witnessed the abuse first-hand. Testimony from Wickham's sisters about his abusive childhood occupied less than one transcript page each. (R 1386, 1396.)

In rebuttal, the State called a third jailhouse informant, Michael Moody, to corroborate Hanvey's testimony about Wickham's statements (*i.e.* Wickham

allegedly told them he had stated prior to the robbery that he was going to kill the victim because "he didn't want to leave a witness").[5] (R 1613.) Moody's testimony was used to impeach Dr. Carbonell concerning Wickham's inability to understand the consequences of his actions. The State also called a psychologist in rebuttal, Dr. McClaren. He acknowledged that Wickham suffered from brain damage, (R 1659), and abused alcohol. (R 1642.) Yet, Dr. McClaren described Wickham's schizophrenia to be "in remission," and opined that Wickham had an anti-social personality disorder.[6] (*Id.*) He further testified that he believed Wickham had the capacity to plan and understood what he was doing during the incident, as well as the consequences of his actions. (R 1646–58.)

On December 7, 1988, after deliberating for over three hours, the jury found Wickham guilty of first-degree murder and armed robbery. (R 1863–64.)

### 2. Penalty Phase

The penalty phase took place the next day. After the State presented evidence of Wickham's criminal history, including convictions for armed robbery

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[5] As with the other witnesses, the State failed to disclose impeaching information in its possession and permitted aspects of Moody's testimony known to be false and/or misleading to stand uncorrected. *See* Statement of the Case and of the Facts ("Facts") § II.C.

[6] During the post-conviction proceedings, Dr. McClaren acknowledged for the first time that a diagnosis of anti-social personality disorder, which he equated to mere rule-breaking, was improper unless brain damage and schizophrenia had both been ruled out, which they had not. (PCR 4138, 4147.)

and aggravated motor vehicle theft, the defense called only one witness: Dr. Carbonell. She testified that Wickham was mentally ill and that he "[did] much better in a[n] institution" because he was unable to cope with his illness. (R 1972–73.) She also testified that Wickham was under extreme emotional distress at the time of the killing and that he was unable to conform his conduct to the requirements of the law. (R 1976–77.) Her entire penalty phase testimony comprised nine transcript pages, (R 1969–77), and was dismissed by Judge McClure in his sentencing findings as "conclusory." (R 250.) Not one of Wickham's family members was called by defense counsel to describe the savage abuse Wickham suffered as a child. (R 1973, 1975.)

Dr. McClaren appeared on behalf of the State in rebuttal at the penalty phase and testified that he believed Wickham was able to conform his conduct to the requirements of the law because, in his opinion, Wickham knew what he did was wrong and had made a series of choices that led to the killing. (R 1979–80.) He also hypothesized that Wickham's prior conviction—in which a victim identified him—played a role in his decision to kill Fleming. (R 1980–81.)

During its penalty phase summation, the State argued to the jury that a death sentence was the only way to ensure Wickham was not released in 25 years to kill again. (R 2016–17.) After deliberating for two and a half hours, the jury recommended the death penalty by a vote of 11 to 1. (R 2043–44.) Defense

counsel then waived Wickham's right to written sentencing findings, and the trial court proceeded to immediately sentence Wickham to death. (R 2044–46.)

Eleven days later, after receiving the State's sentencing memorandum, Judge McClure issued findings citing six aggravating factors. (R 228–35, 246–53.) *First*, he found that the killing was "committed for the purpose of avoiding or preventing a lawful arrest," citing Tammy Jordan's testimony that Wickham indicated "there might be a killing"; Schrader's testimony that Wickham told him he killed Fleming "so there wouldn't be no witnesses" against him; and Hanvey's and Moody's testimony about Wickham's alleged statements in jail. (R 248.)

*Second*, Judge McClure found that the killing was "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," based, again, on the testimony from Tammy Jordan and the jailhouse informants, and testimony suggesting Wickham concealed himself in the woods before the killing and acted without displaying emotion. (R 249.)

Judge McClure identified four additional aggravators. He found that the killing was "especially heinous, atrocious or cruel," (R 249); that the killing was committed by a person under a sentence of imprisonment (Wickham was in violation of his parole at the time), (R 247); that Wickham had been previously convicted of a violent felony, (*id.*); and that the killing was committed during an armed robbery. (*Id.*)

Judge McClure further found that *no statutory mitigating factors* had been established, (R 250–51), and he outright *rejected the non-statutory mitigation* of institutionalization and familial abuse "given its remoteness" in time. (R 252.)

**D. Direct Appeal**

A divided Florida Supreme Court affirmed. In its December 12, 1991, ruling, the Court concluded that the trial court erred in finding that the killing was "heinous, atrocious, or cruel," and erred in failing to identify and weigh any mitigating evidence. *Wickham v. State*, 593 So. 2d 191, 193–94 (Fla. 1991). A majority found these errors "harmless beyond a reasonable doubt." *Id*. at 194.

**E. Post-Conviction Proceedings**

Wickham filed a Rule 3.850 motion on May 22, 1995, which was amended on March 31, 2003 ("3.850 motion"). (PCR 1–290; 2740–2878.) An evidentiary hearing was held on June 2–7, 2004, before Judge Kathleen Dekker (PCR 3271–4198), who denied the motion on January 19, 2005. This Court reversed and remanded for a new evidentiary hearing before a circuit judge outside the Second Judicial Circuit. *See Wickham v. State*, 998 So. 2d 593 (Fla. 2008).

A second evidentiary hearing on the 3.850 motion was held on April 19–20, 2010, before Judge Willard Pope of the Fifth Judicial Circuit. The parties stipulated to the admission of testimony of a number of witnesses from the previous hearing; Judge Pope thus heard live testimony from a limited number of

witnesses. (2011 SPCR 8–14, 77–79 (4/1/10 and 7/28/10 Stipulations); *see also* 2011 PCR 667 (4/8/10 Order Approving Stipulation.) Judge Pope subsequently denied each of Wickham's Rule 3.850 claims, and Wickham now appeals.

## II. EVIDENCE PRESENTED IN POST-CONVICTION PROCEEDINGS

Extensive evidence presented at the post-conviction hearings demonstrates that defense counsel rendered deficient performance at both the guilt and penalty phases. That evidence provided a full picture of Wickham's mental illness, brain disorders, institutionalization, and childhood abuse. Evidence of the State's multiple *Giglio/Brady* violations also was presented, including impeachment withheld from the defense, false and/or misleading testimony that stood uncorrected, and undisclosed pressure by the State to induce favorable testimony.

### A. The True Extent of Wickham's Mental Incapacities

The testimony of the three medical experts who had testified on behalf of Wickham at the 2004 proceeding was re-introduced before Judge Pope in 2010: a psychiatrist (Dr. Mark Mills), a neuropsychologist (Dr. Wilfried Van Gorp), and a forensic psychologist (Dr. William Riebsame). Each expert had examined Wickham and conducted rigorous testing. Each diagnosed Wickham with frontal lobe brain damage (a diagnosis not presented at trial), schizophrenia, and epilepsy (a diagnosis not presented at trial). Each testified that those disorders would have substantially impaired Wickham's ability to premeditate the offense or to conform

his conduct to the law. This evidence was never heard by the jury or sentencing judge because defense counsel failed to conduct a sufficient investigation.

### 1. Institutionalization and High-Dose Anti-Psychotic Medication

Wickham spent his much of his childhood and adolescence—from the ages of 10 to 21—in two of Michigan's notoriously substandard mental institutions: Northville Regional Psychiatric Hospital and Ionia State Hospital. (PCR 4844–4946; *see also* PCR 3766.) Based on an analysis of the documentary information that had been available to defense counsel before trial, the post-conviction experts testified that, almost from the time of his admission to Northville at age 10 following a court decision that he was mentally ill, (PCR 5447), Wickham was heavily medicated with powerful anti-psychotic drugs. (PCR 3739 (Mills).) Dr. Mills testified that these drugs—including Thorazine, Stelazine, and Mellaril—were of "significant importance," (PCR 3738–39; *see also* PCR 3602):

> [Wickham] was on either a little bit more than the maximum or significantly more than the maximum [appropriate dose of Thorazine] when he was a young man. . . . And that suggests that he had a bad disease.
>
> Were any of us in this courtroom even given . . . less than a tenth of the dosage he was on, we would probably sleep for 24 hours and feel miserable for the next three or four days. . . . It is a medication that, almost by definition, if you can tolerate it, underneath it all, you are fairly crazy.

(PCR 3739.) Indeed, Wickham needed a second group of medications to control the side-effects of the anti-psychotics. (*Id.*)

Although Wickham's institutionalization was mentioned at trial, the court and jury heard very little concerning its impact on Wickham's mental functioning––including his inability to cope with stress and his social isolation—or about his extremely high-dose medications. Although Dr. Carbonell testified about the drugs prescribed to Wickham, she said nothing about the extremely high dosages or what they meant with respect to the severity of his illness. (R 1496.)

### 2. Multiple Brain and Mental Disorders

Dr. Van Gorp, a neuropsychologist, conducted neurological assessments and diagnosed the extent and location of Wickham's brain damage and epilepsy. Dr. Mills, a psychiatrist, diagnosed Wickham's brain damage, schizophrenia, and epilepsy, and interpreted his psychiatric records. Dr. Riebsame, a forensic psychologist, pinpointed Wickham's brain damage to the frontal lobe and diagnosed residual schizophrenia and "significant neuropsychological impairment." (PCR 3599.)

#### (a) Frontal Lobe Brain Damage

At trial, Dr. Carbonell testified that tests she administered indicated the presence of organic brain damage, but she was unable to identify the type, extent, location, or impact of that damage. Dr. McClaren, the State's psychologist, also gave conclusory testimony that Wickham had some form of brain dysfunction, but could not identify the type of damage or testify as to its consequences. (R 1659–62.) Neither Dr. Carbonell nor Dr. McClaren is a neuropsychologist with training

in assessing brain impairment. (R 1467–81.) Had defense counsel engaged an appropriate expert, or even, as Dr. Carbonell had advised, arranged for the administration of additional testing, the jury would have heard specific evidence of Wickham's frontal lobe brain damage and how that condition would have impacted his every day functioning and his ability to plan or premeditate. Such evidence would have been particularly useful in rebutting the testimony from the jailhouse informants, particularly Boudreaux's testimony that Wickham had been plotting an escape from jail.

Dr. Van Gorp performed a battery of tests that could have been performed in 1988, but were not. (PCR 3690.) He concluded that Wickham suffers from a "longstanding disturbance of the central nervous system" focused in the frontal lobe. (PCR 3687–88.) This type of brain damage manifests itself as "[b]ehavioral inappropriateness, inability to effectively plan . . . acting before thinking; perseveration, where one persists on a problem-solving solution that is no longer effective. . . . Trouble anticipating consequences of actions, difficulty handling novel situations." (PCR 3689; *see also* PCR 3740–41.) Indeed, Wickham scored in the tenth percentile on an executive functions index, revealing him to be "an individual with severe impairment in terms of difficulty with planning, foresight, impulsivity." (PCR 3596.)

These deficiencies were exacerbated in Wickham by his undisputed history of alcohol abuse—the effect of which could have been further developed at trial, but was not. (PCR 3606 (Riebsame), 3689 (Van Gorp).)

**(b) Schizophrenia**

At trial, Dr. Carbonell, who is not a psychiatrist, diagnosed Wickham's schizophrenia as "residual," which she explained as merely "a lack of things rather than the presence of things." (R 1499–1500.) The State's psychologist, Dr. McClaren, also not a psychiatrist, described Wickham's schizophrenia as being "in remission." He stated: "I don't see any evidence of [the] illness today." (R 1643–44.) Instead, he attributed much of Wickham's behavior to "anti-social personality disorder," which he claimed is a disorder that afflicts many criminals and causes rule-breaking, but does not mitigate one's behavior. (*See, e.g.*, R 1642–46, 1695, 1702–03, 1982.)

The post-trial mental health experts all concluded that the testimony of Dr. Carbonell was inadequate to explain the significance of Wickham's mental illness,[7] and that Dr. McClaren's testimony was simply wrong. (PCR 4138, 4147.) They testified that in fact residual schizophrenia is "a serious mental condition"

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[7] Dr. Carbonell's testimony was deficient in part because she was not provided with the time or resources she needed to fully develop an accurate assessment of Wickham's mental health.

that leaves Wickham "with chronic deficits." (*See, e.g.*, PCR 3734–35.) It is *not* merely the absence of "positive" signs of the disease, such as delusions, hallucinations, and disorganized speech and behavior, but rather a suffering of "negative" symptoms, which are "the absence of what you would expect to see in a normal individual like emotional expressiveness, decision-making ability." (PCR 3599–3600; *see also* PCR 3736.) Dr. Mills explained that "particularly in the later stages, the brain generally is not working so well." (PCR 3738.) A lack of institutionalization with proper care and management exacerbates the illness. (PCR 3737–38.)

Dr. Mills further testified that, when presented with symptoms of schizophrenia and brain damage, "you cannot and should not and only incorrectly would diagnose an antisocial personality disorder," because such a diagnosis can *only* be made once those alternatives have been ruled out. (PCR 3760–62.) Indeed, in 2004, Dr. McClaren conceded that it had been inappropriate to diagnose antisocial personality disorder without having ruled out brain damage or schizophrenia, which he had not done. (PCR 4138, 4147.) At trial, defense counsel failed to cross-examine Dr. McClaren on his diagnosis and thus expose the error. (R 1658–94, 1705–08.) As a result, the incorrect diagnosis was relied upon by the State to rebut the existence of mitigating circumstances bearing on Wickham's ability to premeditate. (R 2012–13.)

#### (c) Epilepsy

At trial, Dr. Carbonell testified that records indicated Wickham had "borderline convulsive tendencies." (R 1493–94, 1537–38.) However, defense counsel did not engage an expert to determine the nature of this condition, nor did he present any testimony concerning the potential mitigating impact of such a diagnosis. Had he consulted an appropriate medical expert, he would have discovered that Wickham suffered from temporal lobe epilepsy. (PCR 3735.) A diagnosis of temporal lobe epilepsy is critical to a proper evaluation of Wickham's competency given the reports of his behavior at the time of trial. *See* Facts § I.B.

Temporal lobe epilepsy manifests itself as a person appearing to be not fully present or taking actions that seem pointless, autistic, or external to oneself. (PCR 3743.) In fact, epilepsy runs in Wickham's family, (PCR 4012–14), and several witnesses could have testified at trial as to its effects on Wickham. His older sister, Sue, testified in 2004 that she had frequently witnessed Wickham's seizures. (PCR 4000.) Edward Wickham recalled how his younger brother would "twitch and space out . . . [and] drift in and out of conversations, rather than follow one. His speech was sometimes nonsensical, unrelated to reality . . . . There were periods when he would sit tense and trembling, all balled up." (PCR 7375.) Wickham's wife, Sylvia, testified that Wickham often talked to himself and wandered away from home, failing to recognize her when she located him. (PCR 3944–45.)

Darnell Page, who was housed with Wickham in pretrial detention, did not testify at Wickham's trial and was never interviewed by defense counsel, even though John Hanvey, another inmate and a State witness, specifically referred to Page in his testimony as someone who was present when Wickham made his allegedly incriminating statements to Hanvey. (R 1327.) Had defense counsel interviewed Page, he would have learned that Page frequently witnessed Wickham in a daze, where he would drift off in the middle of a conversation and snap out just as suddenly, with no recollection of what had happened. (PCR 4218.) That 2004 testimony is corroborated by jail records reflecting Wickham's unusual behavior. (*See, e.g.*, PCR 6823 (describing Wickham's "frozen stare").)

Dr. Mills testified that if Wickham had suffered a seizure or been in the post-seizure phase at the time of the offense, he would not have been able to anticipate, control, or plan in the way an ordinary person could. (PCR 3746–47.) Cases have been documented in which epileptics have committed killings at such times. (PCR 3743.) Further, such seizures at the time of trial would have rendered Wickham incompetent for a period of time before, during, and after the seizure.

**3. Alcohol Abuse**

Although at trial the two psychologists testified that Wickham abused alcohol, (R 1548–49, 1642), both Drs. Riebsame and Van Gorp were able to testify about how Wickham's alcohol abuse specifically affected his brain functioning and

his ability to plan or think before acting. These experts explained that Wickham's daily consumption of alcohol would have increased the severity of his cognitive functioning impairment, resulting in an increase in impulsivity and a decrease in his ability to reason, (PCR 3606 (Riebsame)), or to anticipate the consequences of his actions. (PCR 3689 (Van Gorp).)

**B. The Full Extent of Wickham's Severe Deprivation and Abuse**

Wickham suffered shocking abuse and neglect as a child. Had defense counsel conducted a timely and adequate investigation—including, for example, simply *speaking* to more than a couple of Wickham's family members, or taking even this minimal step sooner than the morning of trial—he could have presented a history of deprivation and abuse far more detailed and compelling than that suggested in the cursory guilt phase testimony elicited from Wickham's two sisters and through conclusory, hearsay testimony by Dr. Carbonell. As a result, the non-statutory mitigation was *rejected* by the trial court in imposing a death sentence.

As a young child, Wickham lacked adequate shelter, and he and his siblings were often forced to search for their own food. (PCR 3963 (Bird testified that her father would often "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 brother Edward recalled that the Wickham children would be left for weeks at a time to fend for themselves, and he recounted

how "when there was no water around, we'd have to thaw ice and snow with our body heat for drinking water." (PCR 7376.)

The Wickham family often lacked medical care. (PCR 7376–77.) Shortly after his birth, Wickham became seriously ill with a very high fever. (PCR 3968.) Alice Bird testified that, after this illness, Wickham did not seem like a "normal" little boy; he would stare off into space, his eyes would twitch, and he would experience seizures. (PCR 3968–69.)

Wickham's father, Delbert Wickham, was an alcoholic who inflicted savage abuse on Wickham from the time he was born. For example, Delbert would beat Wickham with anything within his reach—"a board, a rock, his belt, his belt buckle," or his fist. (PCR 3964 (Bird); *see also* 3996 (LaValley).) Edward Wickham described his father's beatings as "just plain viciousness . . . he'd throw Jerry against the wall of the shack or beat him over the head with boards, clubs, or whatever he could get his hands on." (PCR 7377–78.) Wickham's mother, Anna, was often a victim of Delbert's violent rages, which Wickham and his siblings repeatedly witnessed. (PCR 3964, 3996, 7377–78.) Anna also was driven to extreme rage herself, even striking Wickham in the head with a hammer for refusing to eat his peas. (PCR 3997.)

Because he and his siblings slept in the same room, Wickham also witnessed the sexual abuse his father inflicted on his sisters—a fact that was, once again,

never presented at trial. (PCR 3964, 3997.) According to Edward, his father "raped all my sisters" at a young age. (PCR 7377.)

Although Anna eventually divorced Delbert and remarried, her second husband, Martin O'Dell, and his family further emotionally and physically abused young Wickham. According to Wickham's sisters, the O'Dells were "exceedingly cruel" to him. (PCR 3965, 3997–98.) For example, they would "beat [Jerry] with . . . fire pokers, pieces of firewood; they hit him in the head with these things." (PCR 7379.) Ultimately, the O'Dells had Wickham committed to a mental hospital. (PCR 7379; *see also* PCR 3999.)

### C. The State's Multiple *Giglio* And *Brady* Violations

Evidence presented at the post-trial proceedings showed that the State systematically failed to turn over material information that defense counsel could have used to impeach witness testimony crucial to the State's theory of premeditation and the sentencing Court's imposition of the death sentence. The undisclosed impeachment included substantial incentives given and pressure applied by the State to obtain unreliable testimony helpful to its case. Collateral evidence also showed that the prosecutor failed to correct false and/or misleading testimony, and in fact made false and/or misleading arguments to the jury. The withheld information prevented defense counsel from effectively challenging the witnesses' credibility, and was used to impeach and rebut Dr. Carbonell's testimony regarding

Wickham's mental state at the time of the offense and his inability to plan and understand consequences. Considered collectively, the *Giglio/Brady* violations substantially undermine the State's theory that Wickham premeditated the killing.

**1. Tammy Jordan**

Following her arrest, Tammy Jordan was interviewed by the police multiple times in the fall of 1987. In *none* of those interviews did she ever state that prior to the robbery Wickham had said "there might be a killing." (R 1213–14; PCR 4347.) The first reference to this alleged statement—upon which the State later critically relied in the penalty phase—appears in handwritten notes taken by the prosecutor on February 11, 1988. (PCR 4423.) He testified at the 2010 hearing that he "had entered into plea discussions" with Ms. Jordan's counsel, and believed the notes reflected counsel's proffer of what Ms. Jordan would say if called to testify at Wickham's trial. (2011 PCR Vol. 13, Tr. 378–82.) The timing of this statement—made during a meeting to discuss whether Ms. Jordan would be able to plead down to second degree murder—was impeaching information.[8] However, these notes were not disclosed to defense counsel.

In fact, in a 2004 deposition, Tammy Jordan admitted that her testimony at

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[8] One month after the February proffer, Jordan entered a plea to second-degree murder and armed robbery in lieu of a first-degree murder charge. In exchange, she agreed to "testify fully, completely and truthfully . . . against any and all parties involved in the murder of Morris Fleming." (PCR 4428.)

trial regarding Wickham's alleged statement was false, (PCR 4269), and that it resulted from pressure by law enforcement:

> [T]hey was asking me a bunch of questions about a plan. *I told them I didn't know anything about a plan, and I didn't*. But they wanted to hear it, you know, they wanted to hear it so bad that they threatened to put me in prison for the rest of my life.
> . . .
> They scared me to death. They also threatened me with life in prison if I didn't give them what they wanted.

(PCR 4276 (emphasis added), 4310.) Ms. Jordan's testimony corroborated an affidavit she executed in 1995 in connection with the 3.850 motion. (PCR 7357.)

Further, the prosecutor stated in his closing argument during the penalty phase that Ms. Jordan, unlike Wickham, had "never been in trouble." (R 2015.) However, evidence presented at the collateral proceedings reveals that this argument was false. Ms. Jordan was formally charged on May 21, 1985 with felony burglary committed in Tampa. (2011 SPCR 40–41.) A Pre-sentence Investigation report for Ms. Jordan, dated May 13, 1988, was sent on that day to Judge McClure and copied to Wickham's prosecutor, who admitted at the hearing below that his handwriting was on the document. (2011 SPCR 22–35; 2011 PCR Vol. 13, Tr. 382.) In July 1988—four months before her testimony at Wickham's trial, and over four months before the prosecutor argued to Wickham's jury that Ms. Jordan had never been in trouble—Ms. Jordan pled guilty in Hillsborough County to felony burglary and was sentenced to three years in jail. (2011 SPCR

54–61.) Because the State never disclosed these facts, its false argument regarding Ms. Jordan's purportedly innocent past went uncorrected before the jury.

### 2. Wallace Boudreaux

At trial, Wallace Boudreaux testified over objection that his first contact with Wickham was when Wickham approached him to "talk[] about the possibility of escape" from jail, purportedly in October 1987. (R 1267; *see also* PCR 7154.) Boudreaux further testified that Wickham confessed to him and explained how he planned the Fleming robbery. (R 1293–94.) In cross, Boudreaux denied that he was testifying in the hope of benefiting from cooperation with the State: "The possibility was there but that was not my intention, to receive a break." (R 1308.) When asked why he was testifying, 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.) During re-direct, Boudreaux testified that "the judge exceeded the guidelines in my sentence, and I did receive an extensive sentence." (R 1309.)

Boudreaux's testimony was false, or at best extremely misleading, but defense counsel was not provided with the information necessary to elicit this. In fact, in February 1987, while in jail on grand theft charges (the "grand theft case"),

(PCR 7010), Boudreaux attempted to escape from jail by conspiring with friends to kill a prison guard (the "attempted murder/escape case"). (PCR 7089.) In March 1987, Boudreaux was charged in the attempted murder/escape case with conspiracy to commit first degree murder, aiding an escape, conspiracy to commit an escape, attempted escape, possession of a firearm by a convicted felon and use of a firearm in commission of a felony. (PCR 7090–91.) A guideline score sheet showed a sentence of 12–17 years for the murder conspiracy charge. (PCR 7100.)

In November 1987, the State provided Boudreaux's name as a witness with relevant information in the Wickham case. (R 24.) Three months later, in February 1988, a confidential Pre-Plea Investigation report in Boudreaux's murder/escape case indicated that the State had agreed to drop the conspiracy to commit murder charge. (R 7098.) The Pre-Plea Investigation also contained these statements from law enforcement personnel:

> Captain Howard Schleich of the Leon County Jail . . . described the defendant as a very dangerous person in whom he would not trust. Lt. Lowell McDonald, of the Leon County Sheriff Office . . . stated that the subject is a dangerous person. Lt. McDonald recommends that the subject be given a lengthy prison sentence. (PCR 7098.)[9]

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[9] Captain Schleich was called as a State witness at Wickham's trial to corroborate Boudreaux's testimony that he had contacted Schleich in October 1987 about an escape attempt purportedly planned by Wickham. (R 1315.) Defense counsel conducted no cross of Captain Schleich. Had the Pre-Plea Investigation been disclosed, defense counsel could have put it to good use to cross-examine Captain Schleich about Boudreaux's credibility.

Four months later, in June 1988, Mr. Padovano deposed Boudreaux in the Wickham case. (PCR 6972–7009.) During the deposition, the prosecutor stated, "As far as I'm aware, there is no specific plea agreement relating to [Boudreaux's] testimony or not." (PCR 7002; *see also* PCR 4032.) The prosecutor also told defense counsel that Boudreaux was represented by an attorney who was not present for the deposition. (PCR 7002; *see also* PCR 4033.) As a result, Padovano did not question Boudreaux about his pending cases. (PCR 4034.)

In July 1988, Boudreaux once again attempted to escape from jail. (PCR 7150.) On October 20, 1988, judgment was entered in Boudreaux's cases, indicating he had entered a *nolo* plea in both the grand theft case, (PCR 7080, 7086), and in the attempted murder/escape case to the charges remaining after the attempted murder charge was dropped (notwithstanding that he had once again attempted escape in July 1988), (PCR 7111). Boudreaux was sentenced to a five-year term of incarceration for grand theft, concurrent with the sentence in his attempted murder/escape case, (PCR 7122–23), which included a term of five years' incarceration on the conspiracy to commit escape count, (PCR 7113), and another five years on the attempted escape count, (PCR 7114). This resulted in a sentence of no more than ten years. (PCR 7112.) The judgment included the recommendation that "defendant not be placed in an institution where there are people he testified against," including Wickham. (PCR 7115.)

None of this information was provided to Padovano: not the fact that a murder conspiracy charge pending against Boudreaux had been dropped after he was identified as a witness in the Wickham case, (PCR 4036), nor the fact that the Pre-Plea Investigation in Boudreaux's case indicated that law enforcement—including Captain Schleich, who was called by the State at Wickham's trial—believed him to be untrustworthy and dangerous, nor the fact that Boudreaux had tried *yet again* to escape in July 1988, even though this attempted escape, shortly before the Wickham trial, was utterly inconsistent with his unrebutted assertion that he wanted "to turn his life around." (PCR 4036.) Judge Padovano testified that he would not have had access to the confidential February 1988 Pre-Plea Investigation which revealed this information, (PCR 7089; *see also* PCR 3906–07), unless the State specially provided access. (PCR 4030–31.) As a result, although Boudreaux in fact had clear incentives to exaggerate or even concoct evidence against Wickham, the jury heard only his pious explanation for his motives.

Information about Boudreaux's multiple escape attempts—and evidence showing that Boudreaux was to be "housed in max custody and treated as an escape risk," (PCR 7150)—would have been particularly useful in challenging his testimony that Wickham approached him with an escape plan, which the State used to rebut Dr. Carbonell's (accurate, but unsupported) testimony that she believed the escape plan was "someone else's." (R 1558.)

### 3. John Hanvey

The jury also never heard that on May 25, 1988, six months before jailhouse informant John Hanvey testified against Wickham, Hanvey entered into a plea agreement in connection with an escape and felony battery charge, resulting in a conviction for escape, a lesser charge of misdemeanor battery, and no jail time. (PCR 4507–09; *see also* PCR 4479.) At the time of his plea, Hanvey had been identified by the State as a witness against Wickham. (R 99.) Yet, defense counsel was not advised that a plea agreement was entered allowing Hanvey to plead to a lesser charge and escape jail time.

Further, although Wickham's prosecutor was the prosecutor in Hanvey's case, (PCR 4479), he never corrected Hanvey's misleading trial testimony as to why he was in jail in the first place. Hanvey told Wickham's jury that he had merely "walked away from a work-release center." (R 1329.) However, as his prosecuting attorney (who was also Wickham's prosecutor) would have known, Hanvey in fact beat a work release monitor with an "iron skillet, a deadly weapon" and fled from the facility. (PCR 4479–80.) Reducing the charges against Hanvey to the point that he received no jail time was an excellent reason for Hanvey to want to please the State. The significance of the plea agreement is enhanced by the undisclosed fact that Hanvey had felony convictions for crimes of dishonesty which the jury also never heard about—because the State failed to disclose that

when Hanvey escaped, he was serving time for 24 forgery counts. (PCR 4480.)

#### 4. Michael Moody

Evidence presented below showed that the State likewise failed to disclose that jailhouse informant Michael Moody received a reduction in his sentence prior to testifying against Wickham. (R 1618.) 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, (R 1615), but said "[t]he State said they weren't going to buy a pig in a poke," (R 1616), and "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), and that he essentially received "a ten-year sentence."[10] (R 1619.) In re-cross, defense counsel asked what "the maximum penalty" was 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." (*Id.*)

However, the evidence presented below demonstrates that Moody's testimony was false or at least very misleading, as the State well knew. Moody

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[10] Moody subsequently acknowledged in his testimony that he had faced a separate charge of attempted escape, (R 1619), as to which he had received "either five or ten years on it." (R 1619.)

initially received two ten-year consecutive sentences, or a sentence of *20 years*. (PCR 7201.) On June 20, 1988, Moody wrote to the sentencing judge stating that his expectation, *based on negotiations with the State*, had been that his penalty would run concurrently, resulting in a sentence of ten years. (PCR 7203–04.) On June 22, 1988, Moody's attorney filed a Motion to Amend Sentences reflecting the same belief. (PCR 7201.) On June 23, 1988, well after he had been identified as a potential witness for the State, (R 101), Moody's sentence was amended so that the two 10–year sentences would be served concurrently, effectively cutting his sentence in half. (PCR 7200.)

Further, Moody testified at the 2010 hearing that he gave false testimony against Wickham, and that, in fact, Wickham *never told him* he killed Fleming to avoid leaving a witness. (2011 PCR Vol. 14, Tr. 418–19.) Moody explained that he would have given any testimony he thought prosecutors wanted because he was facing a lengthy jail sentence: "I was 21 years old. I think I would have said anything . . . ."[11] (2011 PCR Vol. 14, Tr. 422.)

Notably, the post-conviction testimony from Tammy Jordan and Michael Moody describing the State's pressure to exaggerate or fabricate testimony is cor-

[11] Moody's 2010 testimony corroborated an affidavit he executed in 2004, in which he admitted that he falsely testified about Wickham to save himself from a potential 70-year sentence. (PCR 7372–73.)

roborated by others. At the 2010 hearing, Larry Schrader testified that Wickham had *never mentioned* a desire to eliminate a witness or any other motive for the killing. (2011 PCR Vol. 14, Tr. 495–96.)[12] He said that he testified differently at trial because law enforcement threatened him with the death penalty. (PCR 7365.)

Darnell Page, another cellmate of Wickham, was not called at trial because defense counsel failed to interview him despite having notice that Page was housed in the same cell as Wickham and allegedly was present when Wickham made statements about his role in the Fleming offense. (R 1327.) Page testified in a 2004 deposition that he was contacted repeatedly by Leon County officials and asked to fabricate testimony against Wickham in exchange for leniency, as well as various other incentives. (PCR 4220–23, 4226–27, 4232.) Page further testified that in fact Wickham *did not* talk about his case while incarcerated; indeed he "didn't talk very much to anybody really." (PCR 4218–19.)

#### 5. Matthew Norris and Sylvia Wickham

It emerged in post-conviction proceedings that in the weeks after Wickham's arrest, Matthew Norris made a taped statement to police that was never produced

[12] Although visibly confused during cross, Schrader maintained that he never heard Wickham say anything about killing the victim in the Fleming case. (2011 PCR Vol. 14, Tr. 501, 522.) Schrader reiterated this testimony on redirect, adding: "I didn't never have a conversation with him period about why he done it." (2011 PCR Vol. 14, Tr. 520.) Schrader's testimony was consistent with an affidavit he executed in 1995. (PCR 7363–64.)

to defense counsel. (2011 SPCR 121–22.) The State asserted that the prosecutor's undisclosed notes are the "only thing close" to a record of Norris's statement. (2011 PCR 663.) The notes include the statements: "Larry [Schrader] asked them to flag someone down" and "D [Wickham], Larry [Schrader] + Jimmy [Jordan] came out [of the woods]." (PCR 4415.) The prosecutor's pretrial notes also indicate that he expected Sylvia Wickham to testify that "D [Wickham] + Larry [Schrader] said something about robbing someone." (PCR 4418; 2011 PCR Vol. 13, Tr. 372–73.) These notes contradict the later testimony of Sylvia Wickham, Schrader, and Jimmy Jordan, who each asserted that it was Wickham's idea to rob someone and that he emerged from the woods alone. (R 1083, 1085, 1145, 1149, 1231, 1236–37.) These notes were never disclosed. (2011 PCR Vol. 13, Tr. 366.)

### D. April 7, 2011 Order

The court below denied each of the 3.850 claims. (2011 PCR 822–86 (Order Denying Motion to Vacate Judgment of Conviction and Sentence (After Remand) ("Order"), *Wickham v. State,* No. 1987–3970–CF (Fla. 2d Cir. Ct. Apr. 7, 2011)).)

## STANDARD OF REVIEW

These claims raise constitutional issues involving mixed questions of law and fact, and are reviewed *de novo,* giving deference only to the trial court's findings of historical fact. *Ross v. State,* 45 So. 3d 403, 414 (Fla. 2010); *Lynch v. State,* 2 So. 3d 47, 56 (Fla. 2008). As to the *Giglio/Brady* and ineffective assist-

ance of counsel claims, no deference is given on the prejudice or materiality prongs of the analysis. *See Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) (IAC); *Barwick v. State*, 2011 Fla. LEXIS 1518, at *40 (Fla. June 30, 2011) (*Giglio/Brady*).

## SUMMARY OF THE ARGUMENT

The post-conviction proceedings establish that Wickham's conviction, and in particular the sentence of death imposed on him in 1988, were based on multiple and prejudicial constitutional errors.

*First*, the State violated *Giglio* and *Brady* in numerous instances by failing to disclose favorable information and/or evidence and by allowing false and/or misleading testimony to stand uncorrected. As to the *Giglio* violations, the constitutional error is not harmless beyond a reasonable doubt, particularly as to the penalty phase. As to the *Brady* violations, confidence is undermined in the reliability of the outcome, particularly as to the penalty phase.

*Second*, Wickham's counsel rendered deficient performance at the guilt and penalty phases of Wickham's trial because he failed to conduct an adequate investigation, which substantially prejudiced Wickham. Favorable evidence was available that went un-presented or was inadequately presented. Defense counsel also failed to object to the trial court's failure to weigh any aggravators and mitigators prior to sentencing, or to the State's inflammatory language regarding

the death penalty. As a result, confidence is undermined in the outcome of the trial, particularly as to the penalty phase portion and the resulting death sentence.

*Third,* testimony at the 2004 hearing demonstrated the existence of multiple red flags concerning Wickham's competency to stand trial, which required that a competency determination be made. Trial counsel's failure to request such a determination was deficient. As a result, Wickham was tried while incompetent.

*Fourth*, the accumulation of these errors and others underscores that Wickham beyond a doubt was deprived of Due Process and his right to a fair trial.

*Finally*, the U.S. Supreme Court's ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), prohibiting execution of the mentally ill, requires re-sentencing.

## ARGUMENT

### I. POST-CONVICTION EVIDENCE OF MULTIPLE *GIGLIO* AND *BRADY* VIOLATIONS REQUIRES RULE 3.850 RELIEF

At trial, the State presented the testimony of a string of witnesses that it used to argue that Wickham committed a cold, calculated, and premeditated execution with the aim of eliminating a witness and avoiding arrest. The State also used this testimony to impeach Dr. Carbonell's testimony relating to the insanity defense at the guilt phase and mental health mitigation at the penalty phase. *See* Facts § I.C. But the State failed to produce material exculpatory and impeachment evidence that critically undermined the testimony and credibility of those very witnesses. The State also made materially misleading arguments and allowed materially false

and misleading testimony to stand uncorrected before the jury. Had the defense been able to respond to and rebut this testimony, it is impossible to conceive of how a sentence of death could have been imposed or upheld.

The State was obligated to disclose all evidence "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 also Mordenti v. State*, 894 So. 2d 161, 174 (Fla. 2004). Failure to do so violated Wickham's right to due process. *Cone v. Bell*, 129 S. Ct. 1769, 1783 (2009). Evidence is material, and prejudice has ensued, if in its absence the defendant did not receive a fair trial or penalty phase, "resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Banks v. Dretke*, 540 U.S. 668, 702 (2004) (finding lack of confidence "[a]t least as to the penalty phase . . . given the jury's ignorance" of exculpatory and impeachment evidence).

The State also was obligated to correct false or misleading testimony if there was "any reasonable likelihood" it affected the jury's judgment. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). "The could have standard requires a new trial unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt." *Smith v. Sec'y, Dep't of Corr.,* 572 F.3d 1327, 1333–34 (11th Cir. 2009); *see also Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011).

The court below considered the *Giglio* and *Brady* violations piecemeal and in isolation, deeming many of them non-prejudicial because defense counsel had the opportunity to cross-examine the witnesses on other issues. That analysis was fundamentally flawed. *First*, the court failed to consider that cross is not constitutionally adequate when the information withheld infringes upon a criminal defendant's "absolute right" to bring forth evidence of anything that would give the witness a motive for currying favor with the State. *Davis v. Alaska*, 415 U.S 308 (1974). *Second*, the court failed to consider the alleged violations cumulatively, which is critical to determining whether confidence in the outcome has been compromised. *Guzman*, 663 F.3d at 1351; *Smith*, 527 F.3d at 1334.

When a proper analysis is conducted, Rule 3.850 relief is plainly warranted. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). When considered cumulatively with defense counsel's deficient performance in discovering mitigation, the prejudice to Wickham is overwhelming. *See State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996) (granting new trial given cumulative effect of newly discovered evidence, *Brady* violations, and IAC).

**A. Tammy Jordan**

Co-defendant Tammy Jordan testified at trial that Wickham had said before the robbery, "there might be a killing involved in it." (R 1191.) Notes of extensive questioning by police following Ms. Jordan's arrest in September 1987 show no

evidence of such a statement until it appears in the prosecutor's handwritten notes dated February 1988, made during a meeting with Ms. Jordan and her counsel. These notes were not turned over to Wickham's counsel. *See* Facts § II.C.1.

The court below implicitly suggested that defense counsel's cross of Ms. Jordan regarding whether she had recently fabricated the operative language negated any positive effect the withheld notes might have had.[13] Order at 48. But clearly it is one thing to speculate that a witness recently invented a statement; it is something quite different to have *proof* of this. Had counsel been able to use the notes as evidence that the first time Ms. Jordan made the allegation was in the midst of a plea negotiation, the jury would have received a very different picture of her credibility than was otherwise portrayed. *See Smith v. Cain*, 132 S. Ct. 627, 630 (2012). Indeed, at her 2004 deposition, Ms. Jordan stated at least eight times that Wickham had made *no mention* of a killing and that she had lied at trial under pressure from the State.[14] (PCR 4269, 4276, 4276–77, 4277 (direct); 4291, 4315,

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[13] The court below also suggested that any favorable impact of the notes was negated by the prosecutor's testimony that he did not "suggest or condition" any plea agreement with Ms. Jordan on her "testifying in a manner directed by him." Order at 49. But that is irrelevant—a witness can be impeached merely by showing she had reason to curry favor with the State.

[14] Judge Pope's determination of Jordan's credibility is not entitled to deference because he did not observe her demeanor in person. *Cf. Archer v. State,* 934 So. 2d 1187, 1198 n. 6 (Fla. 2006). Jordan had nothing to gain from testifying truthfully during the post-conviction proceedings—to the contrary, she was

4316 (cross); 4330 (re-direct).) *See also* Facts § II.C.1.

The State also failed to disclose Ms. Jordan's July 1988 guilty plea to felony burglary, falsely arguing to the jury that she had "never been in trouble before." *See* Facts § II.C.1. The court below dismissed this claim on the ground that "it was not proven that the prosecutor knew of the charge against Ms. Jordan." Order at 46–47. However, the May 13, 1988, Pre-Sentence Investigation for Ms. Jordan was copied to Wickham's prosecutor, who admitted at the 2010 hearing that *his handwriting was on that document*. (2011 SPCR 22–35; 2011 PCR, Vol. 13, Tr. 382.) The court below also found that the prosecutor should not be charged with constructive knowledge of the plea, Order at 47–48, even though Ms. Jordan pleaded guilty and received a sentence of three years' imprisonment in July 1988. (2011 SPCR 54–61.) Clearly, the prosecutor had the information. But in any event, he is charged with constructive knowledge and possession of evidence withheld by other state agents.[15] *Guzman*, 663 F.3d at 1349.

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terrified of Wickham's release. (PCR 4321–22; 2011 PCR Vol. 14, Tr. 505.) By contrast, in 1988, she had a clear reason to fabricate—avoiding the fate that now awaits Wickham. (PCR 4263; 2011 PCR Vol. 14, Tr. 498–99.)

[15] *Breedlove v. State*, cited by the court below, involved entirely different circumstances in which this Court refused to charge the prosecution with constructive knowledge of ongoing illegal activities of investigating detectives, whose right against self-incrimination protected them from disclosing criminal activities. 580 So. 2d 605, 606–08 (Fla. 1991). Similarly, in *Jones v. State*, 998 So. 2d 573 (Fla. 2008), also cited by the court below, this Court found it

### B. Wallace Boudreaux

Jailhouse informant Wallace Boudreaux testified at the guilt phase that Wickham confessed to him and described how he planned the robbery. *See* Facts § I.C.1. Boudreaux also testified that Wickham had approached him about planning an escape. *See* Facts § I.C.1. Boudreaux further testified he had no deal with the State and was obtaining no benefit from his testimony. (R 1308–09.)

That testimony was false or at the very least extremely misleading. At the hearing below, uncontested documentary evidence was presented showing that after Boudreaux came forward with his allegations, the State agreed to drop a murder conspiracy charge and *nolle prossed* the remaining charges. *See* Facts § II.C.2. The fact that Boudreaux's sentence included a provision that he "not be placed in an institution where there are people he testified against," including Wickham, (PCR 7115), plainly establishes that the lenient disposition of his cases was in consideration for his testimony. The State failed to correct his testimony and failed to turn over the documents reflecting the charge reduction. (2011 PCR, Vol. 11, Tr. 136.)

Boudreaux had even more reason to curry favor with the State following his

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unreasonable to charge the State with constructive knowledge of ongoing illegal activity of a witness who had been arrested less than 24 hours before defendant's sentencing. *Id*. at 581–82. Tammy Jordan entered her plea on the burglary charge *four months* before Wickham's trial.

escape attempt in July 1988 prior to his testimony against Wickham. Again, information about this escape attempt, including a document indicating that Boudreaux was to be "housed in max custody and treated as an escape risk," (PCR 7150), was improperly withheld from Wickham's counsel. *Smith v. Sec'y*, 572 F.3d at 1342–43. Not only could this information have been used to impeach Boudreaux's testimony that Wickham had approached him with an escape plot, but for the first time at trial Boudreaux claimed that Wickham had also said the robbery victim begged for mercy. (R 1298.) Defense counsel crossed Boudreaux extensively about his failure to mention these alleged statements at his June 1988 deposition. (R 1298–99.) Of course, between the June deposition and the November trial testimony, Boudreaux had made an undisclosed effort to escape once again, and thus had considerable additional motivation to curry favor with the State. Had he known, defense counsel could have offered that crucial additional motivation as an explanation for the allegedly improved recall at the time of trial.

Still more *Brady* material was contained in Boudreaux's Pre-Plea Investigation relating to State witness Captain Schleich from the Leon County Jail, who "described [Boudreaux] as a very dangerous person in whom he would not trust." (PCR 7098.) This evidence not only provided impeachment of Boudreaux, but described statements by the very witness the State called to corroborate Boudreaux's testimony that he came forward with information about Wickham

allegedly planning an escape.

The court below found that the failure to disclose this valuable impeachment and to correct Boudreaux's false testimony was "inconsequential, immaterial, and non-prejudicial" because Boudreaux already had been sentenced by the time of Wickham's trial. Order at 49. That simply makes no sense. The court ignored the fact that the most serious charge against Boudreaux was dropped *after* he came forward with evidence of Wickham's purported admissions. The court also completely ignored the wealth of favorable evidence as to Boudreaux which the State did not disclose.

**C. John Hanvey**

Hanvey, another cellmate, testified that Wickham told him 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, defense counsel asked Hanvey why he was in jail. Hanvey responded, "[e]scape and aggravated battery." (R 1329.) 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 at best very misleading. Evidence presented in post conviction proceedings showed that Hanvey was charged with aggravated battery with a deadly weapon, and in fact beat the victim in the head with a heavy iron skillet numerous times. (PCR 4477–79, 4486.) *See also* Facts § II.C.3.

Not only did the State fail to correct this misleading testimony, but it failed to disclose that in a judgment dated May 25, 1988, Hanvey entered a *nolo* plea to escape and misdemeanor battery (a lesser offense). The 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." (PCR 4507–09; 4039–40.) Defense counsel testified at the 2004 hearing that this information would have been potent impeachment material. (PCR 4041.) Defense counsel had no information about Hanvey's conviction on 24 counts of forgery. (PCR 4038–39.) *See also* Facts § II.C.3.

The court below stated that Hanvey's forgery convictions were "immaterial and non-prejudicial," and that, generally, no evidence was offered "to support the claim that the State withheld any evidence or favorable information." Order at 46. That dismissive analysis simply ignored the post-conviction evidence presented.

**D. Michael Moody**

Moody was the third of Wickham's cellmates called to testify by the State. When asked at trial if he received any consideration for testifying, Moody answered that he received the maximum sentence. (R 1615, 1618.) That testimony was false or at the very least extremely misleading. On June 23, 1988, well after he had been identified as a potential witness for the State, (R 101), Moody's sentence was amended so that two 10–year sentences he had previously

received were to be served concurrently. (PCR 7200.) *See* Facts § II.C.4. Thus, a few months prior to Wickham's trial, with specific acquiescence of the State, and unknown to defense counsel, (PCR 4043–44), Moody's sentence was cut in half.

Further, at the 2010 evidentiary hearing, Moody admitted that he had lied at trial about Wickham's supposed confession and "add[ed] to what actually happened[.]" (2011 PCR Vol. 14, Tr. 421, 419.) His testimony corroborated a 2004 affidavit in which he explained, "I told the judge and the jury that [Wickham] confessed to me but he never did." (PCR 7372.) The Court below summarily dismissed Moody's post-conviction proof on the ground that he had "no credibility." Order at 36. But this summary finding simply begs the real question, which is whether Wickham was denied an opportunity to show that Moody had "no credibility" *at trial*, when the State offered and relied upon his testimony, because the State withheld material critical to an effective cross-examination.

The testimony of Moody and Tammy Jordan relating to pressure applied by the State to testify favorably was corroborated by Larry Schrader and Darnell Page. Schrader testified that in fact he never had a conversation with Wickham after the robbery about why Wickham had killed Fleming, *see* Facts § II.C.4, and specifically admitted that he lied at trial. (2011 PCR Vol. 14, Tr. 507.)[16] Page testified

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[16] Although Schrader did not backtrack under cross, the court below found that he subsequently "confirm[ed] his trial testimony." Order at 34. But a close

that he was contacted repeatedly by Leon County officials and asked to fabricate testimony against Wickham in exchange for leniency and various other incentives. (PCR 4220–23, 4226–27, 4232.) *See also* Facts § II.C.4. This pressure applied to elicit favorable testimony also was undisclosed to Wickham's counsel.

### E. Sylvia Wickham and Matthew Norris

Matthew Norris's taped statement to the police was never produced to defense counsel, nor were the prosecutor's notes which included the statements: "Larry [Schrader] asked them to flag someone down" and "D [Wickham], Larry [Schrader] + Jimmy [Jordan] came out [of the woods]." *See* Facts § II.C.5. The prosecutor testified in 2010 that these notes "would be what [he] anticipated [Norris] would say." (2011 PCR Vol. 13, Tr. 369.) Had these statements been

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reading of the record shows that Schrader was addressing the motive for *a different shooting*, one that he believed Wickham committed in Oklahoma. The State's first attempt to ask about motive elicited Schrader's statement, "that was another thing . . . . It was in McAlester, Oklahoma." (2011 PCR Vol. 14, Tr. 501.) After a series of questions that led Schrader to cry, the State again asked about motive, referring to the shooting victim as "the guy" rather than "Mr. Fleming," so it was unclear which shooting was at issue. (*Id.*, Tr. 508–09.) A third attempt elicited a result similar to the first: "I think that's referring to the Oklahoma case." (*Id.*, Tr. 522.) Finally, the State got the answer it wanted only when it confused Schraeder into thinking he was confirming his testimony about the Oklahoma case. After confirming the statement he made in his 1988 testimony, the State asked: "And you testified here today during my cross examination of you that that was a true statement, didn't you?" (*Id.*, Tr. 522–23.) Schrader responded, "yes," but the statement he confirmed was true was the one in which it was not clear to which shooting the State was referring. (*Compare id.*, Tr. 522–23 *with id.*, Tr. 508–09.)

disclosed, defense counsel could have developed evidence that Schrader had a greater role in planning and executing the robbery, thus rebutting the State's argument that Wickham had taken the lead.

The court below rejected this claim on the basis that the prosecutor testified in 2010 that the notes were "not contemporaneous . . . but things [the prosecutor] anticipated Norris would say at trial." Order at 45. Whether the notes were contemporaneous is irrelevant. The prosecutor's anticipation that Norris would say that Schrader had asked the group to flag down a motorist and that he came out of the woods together with the other two men was favorable information. *Kyles*, 514 U.S. at 438 ("[T]he prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.").

The prosecutor's pretrial notes also contain the statement "D [Wickham] + Larry [Schrader] said something about robbing someone" under the heading "Sylvia Wickham." *See* Facts § II.C.5. Again, the State was required to disclose this exculpatory statement, which defense counsel could have used to further refute the State's theory that Wickham was the mastermind of the robbery plan.

### F. The Cumulative Effect Of These Violations Establishes Overwhelming Prejudice

Although each instance of the State's non-disclosure or failure to correct false and/or misleading testimony and argument was prejudicial in and of itself, the collective impact of these failures overwhelmingly prejudiced Wickham. In

analyzing prejudice, the court must examine the *cumulative effect* of all withheld and misleading evidence. *Kyles*, 514 U.S. at 436; *Smith v. Sec'y*, 572 F.3d at 1347. The court below completely failed to conduct this analysis.

When a proper cumulative analysis of the *Giglio* violations is conducted, it is clear that the due process deprivation was not harmless beyond a reasonable doubt. *See Guzman*, 663 F.3d at 1351. When a proper cumulative analysis of the *Brady* violations is conducted, confidence in the outcome plainly is undermined. *See Cone*, 129 S. Ct. at 1786. The post-conviction evidence demonstrates that defense counsel was prevented from effectively rebutting evidence offered by multiple State witnesses in support of premeditation and motive, which the State also used to rebut Dr. Carbonell's testimony as to insanity and mitigation. Defense counsel also was prevented from using the withheld evidence to cast doubt on the witnesses' credibility by exposing their favorable deals with the State and the pressure applied to elicit false testimony. When the proper analysis is conducted, Rule 3.850 relief is required—particularly as to the penalty phase verdict.

**G. The *Giglio*/*Brady* Claims Were Properly Preserved**

The court below inexplicably found several of these claims to be untimely and procedurally barred. Order at 46–47, 49–51. These claims were litigated at the 2004 evidentiary hearing mostly without objection, raised on appeal before this Court in Wickham's previous appeal without any objection, and most were also

raised without objection at the 2010 evidentiary hearing. In such circumstances, the failure to make a contemporaneous objection, the purpose of which is to give notice and opportunity to demonstrate collateral counsel's diligence, precludes barring these claims. When a contemporaneous objection is not made, counsel is not in a position to know that she must demonstrate diligence as to how the issue was developed and litigated. Accordingly, the want of a timely objection by the State forecloses any argument or finding of a procedural bar. *Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993). In any event, Wickham preserved all of the *Giglio/Brady* claims in his 3.850 Motion.

Finally**,** with respect to each of Wickham's *Giglio*/*Brady* claims, to the extent this Court were to find that the State did disclose the favorable information, or that defense counsel unreasonably failed to discover it, then defense counsel's failure to discover or present the information to the jury was deficient performance that prejudiced Wickham. *See Gunsby*, 670 So. 2d at 924.

## II. WICKHAM'S DEATH SENTENCE RESULTED FROM INEFFECTIVE ASSISTANCE OF COUNSEL

### A. Defense Counsel Failed To Conduct An Adequate Investigation

The evidence presented below demonstrates that defense counsel failed to conduct a timely and adequate investigation. As a result, favorable evidence went undeveloped and was not presented at Wickham's trial. When the undeveloped and unpresented favorable evidence is properly assessed, there is more than a

"reasonable probability" of a different outcome, particularly at the penalty phase. Defense counsel's failure to investigate leads that would have led him to discover this evidence substantially prejudiced Wickham, constituted ineffective assistance of counsel, and simply cannot be excused as a "strategic" decision. Order at 27. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Sears v. Upton*, 130 S. Ct. 3259, 3266–67 (2010); *Porter*, 130 S. Ct. at 452 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)) (noting that in 1988 trial counsel had "an obligation to conduct a thorough investigation of the defendant's background.").

Further, when this favorable evidence, including evidence demonstrating that Wickham's mental disorders would have severely impacted any ability to premeditate or appreciate the consequences of his actions, is considered together with the State's *Giglio/Brady* violations, including evidence directly undermining the testimony of key witnesses relied upon by the State in arguing its theory of premeditation, the prejudice is undeniable. *See Gunsby*, 670 So. 2d at 924.

### 1. Defense Counsel's Investigation Was Unreasonably Deficient

#### (a) Failure To Conduct An Appropriate Investigation Was Not An Excusable "Strategic" Decision

Trial counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. *Strickland*, 466 U.S. at 691. Instead, Wickham's defense counsel "abandoned [his] investigation of [his client's] background after having acquired only rudimentary knowledge of

his history from a narrow set of sources." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Where, as here, the decision not to further investigate *itself* was unreasonable, it was error for the court below, Order at 27, to defer to defense counsel's testimony that he made a "strategic" decision not to present additional mitigation evidence. *See Hurst v. State*, 18 So. 3d 975, 1010 (Fla. 2009); *Ragsdale v. State*, 798 So. 2d 713, 720 (Fla. 2001) ("[Counsel] was not informed as to the extent of the child abuse suffered, and thus he could not have made an informed strategical [sic] decision not to present mitigation witnesses.").

In assessing the reasonableness of an attorney's investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527; *see also Ferrell v. Hall*, 640 F.3d 1199, 1226–27 (11th Cir. 2011); *Hurst*, 18 So. 3d at 1010. The court therefore must "reconstruct the circumstances of counsel's challenged conduct, and [evaluate] the conduct from counsel's perspective at the time." *Coleman v. State*, 64 So. 3d 1210, 1217 (Fla. 2011) (quoting *Strickland*, 466 U.S. at 689).

Here, there can be no doubt that a number of investigative steps fairly cried out to be rigorously pursued in establishing mitigation. In May 1988, mitigation specialist Greenberg gave Padovano a list of steps necessary to *begin* a penalty phase background investigation, including identifying records to collect, witnesses

to interview, and experts to consult. (PCR 4399–4403.) *See* Facts § I.A.1. Padovano did almost nothing on the list. In 2010, his explanation was, "I had the information that I wanted to present to the jury," and "the case was not going to get any better by me going to find somebody . . . who knew [Wickham] when he was four years old . . . ." (2011 PCR Vol. 11, Tr. 71–72.)

Those statements simply do not reflect the standard of care to which attorneys, especially those representing capital defendants, are held. Padovano's claim that he "already had" the information he wanted to present to the jury belies the fact he had developed almost no mitigation evidence at all; his statement that "the case was not going to get any better" ignores the crucial teaching of *Wiggins* that so-called "strategy" cannot justify a failure to investigate. To have made a reasonable determination that additional evidence would have been cumulative, defense counsel would have had to investigate and *locate* that evidence first. *See Wiggins*, 539 U.S. at 527; *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991); *cf. Ferrell*, 640 F.3d at 1229–30 (decision to end investigation was unreasonable where counsel did not speak with any penalty phase witnesses other than parents until immediately before penalty phase). Instead, counsel inexplicably and unreasonably determined at the outset that additional evidence would "turn the jurors . . . off." (2011 PCR Vol. 11, Tr. 69.)

As reflected in Greenberg's plan, based on her careful review of records containing "numerous, obvious indicators that should have led counsel to pursue a more comprehensive mental health investigation," *Ferrell*, 640 F.3d at 1227, a reasonable attorney defending a capital case would have taken the time to conduct appropriately thorough interviews of the medical personnel who cared for Wickham, and would have retained experts who could diagnose, interpret, and explain to the jury the full nature and extent of Wickham's brain damage and decades' long history of mental illness, epilepsy, and institutionalization, as well as the impact those conditions would have had on Wickham's actions on the day of the offense. All of these leads—and more—were not only evident in the medical records available to Padovano, but in fact yielded very significant evidence for use in mitigation when actually pursued by post-conviction counsel.

Further, in the face of suggestions of severe physical abuse that emerged in the superficial interviews conducted with family members, a reasonable attorney defending a capital case would have taken the time to conduct appropriately thorough interviews of Wickham's family members and others who were eye witnesses to the abuse he sustained. *See id.* at 1230; *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 936 (11th Cir. 2011) (granting habeas relief where "the description, details, and depth of abuse" brought to light in state post-conviction proceedings "far exceeded" what the jury was told); *Cooper v. Sec'y, Dep't of*

*Corr.*, 646 F.3d 1328, 1354 (11th Cir. 2011) (same). There was simply no excuse for Padovano's failure to do so. *Johnson*, 643 F.3d at 934–35; *see State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002) ("[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated."); *State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000).

Such information also was important for the guilt phase insanity defense, as evidenced by the fact that defense counsel called two family members during the guilt phase to give cursory information that counsel had learned from the witnesses in the hallway just before putting them on the witness stand. The reason this last-minute testimony was cobbled together was because it was needed to provide a foundation for Dr. Carbonell's testimony about Wickham's insanity. The failure to prepare in advance, particularly given Greenberg's plan developed six months before trial, was inexcusable.

#### (b) Defense Counsel's Time And Attention Spent Preparing Wickham's Defense Were Grossly Deficient

Mr. Padovano clearly was aware in May 1988 of what was necessary to conduct a proper investigation. But because he did not regularly meet with her, it was not until Dr. Carbonell stated *a week before trial* in her deposition by the State that, in her opinion, Wickham was insane at the time of the offense, that defense counsel became aware of an insanity defense. It was only then that consideration was given to developing a mental health defense at the guilt phase.

Prior to trial, defense counsel was granted two continuances in order, he represented, "to conduct a much more detailed investigation into the defendant's background," which would "likely support [statutory mitigating factors]," including further investigation of Wickham's involuntary confinement as a child, history of schizophrenia, low I.Q., and possible brain damage. (PCR 4405; *see also* PCR 4409.) But instead, counsel spent his time running for election, and this investigation did not occur.

After obtaining his first continuance in May 1988, defense counsel's work on Wickham's case virtually ceased.[17] *See* Facts § I.A.1. Until two weeks before trial, following his November 2008 election, he spent only approximately 44.5 hours on the case. *See id.* He also waited two months before replacing his investigator (who left because in her view counsel was not devoting sufficient attention to the case) with Bill Harris, whom counsel never met. *See* Facts § I.A.2. Harris spent less than 25 hours on the case. (R 268.)

[17] The Circuit Court misunderstood Wickham's contention about defense counsel's election campaign. It was not presented as a basis for relief, but rather to show how he spent his time between July, when he started his active campaign, and November, when he won the election. Counsel's time records show that his efforts on behalf of Wickham came to a virtually complete stop during the campaign—which was exactly when critically necessary mitigation investigation should have been done. (*See* R 242–44.)

### (c) Defense Counsel Failed To Engage Experts Who Could Have Properly Diagnosed And Testified About Wickham's Mental Conditions

Padovano was aware that Wickham had some form of brain damage, a history of mental illness—including records reflecting institutionalization and anti-psychotic medications—and had suffered abuse resulting in head injuries. (PCR 4846–96.) He represented to the trial court as early as May 1988 that further testing relating to brain damage and schizophrenia was necessary. (PCR 4405.) He also observed Wickham's deeply disturbed behavior. *See* Facts § I.B.1. And he had Greenberg's specific recommendations in May 1988 regarding the work that needed to be done to develop mitigation. (PCR 4399–4403.)

Yet, despite being urged to do so, Padovano never took *any* steps to consult with mental health experts who possessed the specialized knowledge crucial to properly diagnosing Wickham's numerous mental deficiencies and explaining to a jury their impact on his behavior and capacity to premeditate the offense. Similarly, despite an abnormal EEG contained in the medical records, he failed to investigate whether Wickham suffered from epilepsy. Instead, he retained one psychologist, who had no special training in assessing brain impairment, and following Dr. Carbonell's initial evaluation of Wickham in May 1988, allowed months to pass before any further testing occurred on the eve of trial. Even after the trial began, testing—which consisted primarily of screenings–was still

incomplete. (R 1472 (Categories Test administered Nov. 30, 1988).)

The post-conviction mental health experts uniformly agreed that, at a minimum, a psychiatrist or neuropsychologist was critical to accurately diagnosing Wickham's conditions for the jury. (PCR 3740–41 ("[I]t [was] absolutely imperative to get the other relevant professionals on board. In this case, a psychiatrist and … a neurologist.") (Mills), 3602–05 (Riebsame), 3693 (Van Gorp).) An appropriately trained expert also would have been able to diagnose Wickham's temporal lobe epilepsy, which would have provided further evidence at trial that Wickham was under extreme mental or emotional disturbance at the time of the offense and, therefore, qualified for statutory mitigators. *See* Arg. § II.A.2.(a). Absent such expertise, the jury received incomplete, inadequate, and flatly incorrect information about the extent and impact of those deficiencies. *See Wiggins*, 539 U.S. at 524; *Ferrell*, 640 F.3d at 1234–36 (finding collateral evidence of defendant's frontal lobe brain damage, temporal lobe epilepsy, bipolar disorder, and borderline mental retardation to be "consistent, unwavering, compelling, and wholly unrebutted"); *Parker v. State*, 3 So. 3d 974, 985–86 (Fla. 2009) (failure to present expert testimony of neuropsychological impairment); *Orme v. State*, 896 So. 2d 725 (Fla. 2005) (failure to investigate and present evidence of bipolar disorder); *Ragsdale*, 798 So. 2d at 717 (limited presentation of history of head trauma and failure to present evidence of how it affected defendant's behavior).

The court below dismissed the experts' opinions as cumulative, and instead relied on the opinion of defense counsel—who has no medical training—and the lack of testimony from the trial psychologists that psychiatric evaluation was necessary. Order at 8–9. However, the State's psychologist, Dr. McClaren, testified in 2004 that he was only qualified to testify to a limited extent regarding the types of problems that a person with frontal lobe brain damage may experience, because he is not a neuropsychologist or neurologist. (PCR 4132–33). Dr. Carbonell also was unable to meaningfully interpret Wickham's medical records and diagnose his brain damage, epilepsy, and schizophrenia, and in fact she *did* indicate to defense counsel that more testing was needed. *See* Facts § II.A.2.(a).

Further, Dr. Carbonell was not asked to refute Dr. McClaren's erroneous diagnosis that Wickham had an anti-social personality disorder, (R 1642, 1982), nor did defense counsel cross Dr. McClaren on whether such a diagnosis was proper unless schizophrenia and brain damage had been ruled out, thus leaving the jury with the impression that Wickham was merely a rule-breaker, rather than seriously mentally ill. (R 1643; PCR 3760–62.) Had defense counsel consulted with an expert about Dr. McClaren's testimony, he would have been able to show that it was erroneous under prevailing medical standards. *See* Facts § II.A.2.(b). This omission is all the more egregious given that, in connection with sentencing, Judge McClure found Dr. McClaren to be the more credible expert. (R 251.)

### (d) Trial Counsel Failed To Adequately Investigate Wickham's Abusive Childhood

The failure to conduct a timely and adequate investigation into Wickham's abusive and impoverished childhood also was uninformed and unreasonable. *See Hurst*, 18 So. 3d at 1008; *Parker*, 3 So. 3d at 985–86; *Ragsdale*, 798 So. 2d at 719–20; *see also Horton*, 941 F.2d at 1462. Wickham's family members witnessed first-hand his abuse and the effects of his mental disorders, but were barely asked any questions about it in the months leading up to trial.

Harris, Padovano's investigator, only spoke to a few family members by telephone during the limited work he put into this capital case, and never met them in person or conducted in-depth interviews. (PCR 4397.) Indeed, Harris had no background in capital cases and was not trained in developing mitigation. *See* Facts § I.A.2. Although Dr. Carbonell also spoke to family members, her conversation with Edward Wickham, which took place mere days before trial, and with Wickham's wife, Sylvia, which took place *after* trial began on November 30, totaled a mere 1.5 hours. (R 265.) Although she also had brief conversations with Wickham's sisters *after* trial began on December 2 and 3, she did not even bill time for those conversations. (R 1538; *see also* R 265.)

Padovano himself had almost no contact with lay witnesses. *See* Facts § I.A.1. Without interviewing a single lay witness before trial, he chose to call only two family members, who testified in the guilt/innocence phase and were not

recalled in the penalty phase, to provide a brief snippet which the sentencing judge disregarded. Padovano testified below that his decision to present just two witnesses was based on his conclusion, formed without talking to any other witnesses—and without talking to the two he did call until the morning of their testimony—that there was no need to present additional witnesses or seek additional testimony at either phase. (2011 PCR Vol. 11, Tr. 27.) As noted above, *see* Arg. § II.A.1.(a), such uninformed analysis—made without having conducted a pertinent factual investigation—simply is not an acceptable "strategic" decision.

As a result, counsel failed to elicit testimony about the depth of deprivation suffered by the Wickham family, the extreme abuse and violence Wickham endured as a boy, and the sexual abuse he witnessed his sisters suffer. *See* Facts § II.B. *See also, e.g.*, *Ferrell*, 640 F.3d at 1230 (defense counsel could have elicited "significant, and powerful, additional mitigating evidence from the witnesses who were willing to testify, and did testify," if only counsel had asked); *Cunningham v. Zant*, 928 F.2d 1006, 1017 (11th Cir. 1991) (counsel was ineffective who interviewed lay witnesses only moments before trial and asked few questions during direct examination). Defense counsel also failed to investigate or present evidence of Wickham's history of alcohol abuse, including how his use of alcohol on the day of the offense would have aggravated the effects of his mental illness.

In addition, defense counsel knew that Darnell Page had been incarcerated

with Wickham, based on John Hanvey's testimony that Page was present when Wickham allegedly spoke about the Fleming offense. (R 1327.) Yet, counsel failed to interview Page to ascertain whether he would back up Hanvey's story. Had counsel spoken to Page, he would have learned not only that Page disputed Hanvey's testimony, but also about Page's observations of Wickham's mental dysfunction while incarcerated and the State's efforts to recruit jailhouse witnesses to give testimony favorable to the State. (PCR 4220–27.) *See* Facts § II.A.2.(c).

**2. Wickham Was Prejudiced By Counsel's Deficient Performance**

To determine whether a defendant has been prejudiced by counsel's deficient performance, the reviewing court must determine whether confidence in the reliability of the outcome has been undermined. Stated another way, the reviewing court must determine if the evidence offered to show prejudice casts the case in a new light.

Wickham's insanity defense was presented based upon Dr. Carbonell's testimony. The State responded to that defense by relying upon the testimony of Tammy Jordan, Boudreaux, and the other jailhouse informants, including testimony that Wickham had made statements indicating he intended to kill Fleming and had planned an escape from jail. (R 1764–65.) Dr. Carbonell was crossed about Wickham's alleged plan to escape from jail, and she responded that she did not believe such a plan was Wickham's plan given his mental deficiencies. (R

1557–58.) Thus, medical evidence that supported Dr. Carbonell's opinion would have squarely undercut the testimony from these witnesses. Similarly, evidence that the witnesses' testimony was untrue or impeachable would have hurt the State's argument that Dr. Carbonell's testimony should not be credited. Darnell Page's testimony, which counsel unreasonably failed to discover, would have been particularly beneficial to Wickham, since he directly refuted the testimony of the jailhouse informants and supported Dr. Carbonell's findings in his description of Wickham's demeanor and odd behavior in the jail. (PCR 4218–19.)

The prejudice to Wickham is starkly apparent in the context of the penalty phase. In considering counsel's deficient performance in preparing for the penalty phase of a capital case, a reviewing court must "reweigh the evidence in aggravation against the totality of the mental health mitigation presented during the post-conviction evidentiary hearing . . . ." *Hurst*, 18 So. 3d at 1013 (quoting *Hannon v. State*, 941 So. 2d 1109, 1134 (Fla. 2006)). The court below failed to assess the impact of the additional evidence presented in the post-conviction process. *Sears*, 130 S. Ct. at 3266–67 ("[A court must] 'speculate' as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase.") (internal citations omitted).

When the evidence is re-weighed, the prejudice is clear. Wickham's sentencing judge concluded that *no mitigation* had been established. That conclusion

clearly would not have been reached had a timely and adequate investigation occurred and its fruits then presented at trial. Evaluations of Wickham's mental condition presented in post-conviction demonstrated the severe impact that his brain damage, mental illness, epilepsy, and alcoholism would have had on his mental capacity and behavior at the time of the offense. Had such evidence been presented fully, there is more than a reasonable probability that Wickham would not have been sentenced to death. Such evidence would have both established the presence of mitigating circumstances and negated the State's evidence of aggravation. *See, e.g.*, *Ferrell*, 640 F.3d at 1234–35 (finding that evidence of frontal lobe brain damage and temporal lobe epilepsy "measurably weakens" aggravating circumstances); *Crook v. State*, 908 So. 2d 350, 358 (Fla. 2005) (same).

**(a) Evidence Not Presented At Trial Would Have Established Statutory And Non-Statutory Mitigators**

At the penalty phase of Wickham's trial, defense counsel told the jury: "[W]e don't know what effect [Wickham's brain damage] may have had on this offense, what effect it may have had on his behavior." (R 2027.) But, a timely and adequate investigation into Wickham's mental history would have cast a whole new light on the case by permitting counsel to make a strong, affirmative showing of the effect of his client's brain damage, instead of saying he "didn't know." The defense could have and should have had specific and convincing evidence to present that Wickham's brain damage, mental illness, temporal lobe epilepsy, and

alcohol use meant he was under an extreme mental and emotional disturbance at the time of the offense. Brain damage and schizophrenia are "by their very nature extreme conditions of high significance . . . ." (PCR 3752 (Mills).) These conditions, along with his alcohol abuse, "easily place[d]" Wickham in the category of extreme emotional disturbance. (PCR 3610 (Riebsame).)

> Because [frontal lobe brain damage] is a static condition, meaning it is one that doesn't go away. We don't wake up non-frontally lobe damaged one day and frontally lobe damaged the next. It doesn't waiver. And schizophrenia, as we know it, is basically a lifelong illness which does have peaks and valleys. But both are extreme serious conditions.

(PCR 3696 (Van Gorp).) And they are enhanced by stressful situations. (*Id.*)

This evidence would have shown Wickham to be less culpable than depicted in the abbreviated and incomplete presentation at trial. *See Ferrell*, 640 F.3d at 1235 n.17 ("Mitigating evidence unrelated to dangerousness may alter the juror's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." (quoting *Williams*, 529 U.S. at 397–98)); *Nibert v. State*, 574 So. 2d 1059, 1062–63 (Fla. 1990) ("[Evidence of brain damage] is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior."); *Carter v. State*, 560 So. 2d 1166, 1168–69 (Fla. 1990).

Expert evaluation of Wickham's brain damage also would have provided strong evidence that he had a substantially impaired capacity to appreciate the

criminality of his conduct or to conform his conduct to the requirements of the law. *See Nibert*, 574 So. 2d at 1062–63; *Carter*, 560 So. 2d at 1168–69. According to Dr. Mills, Wickham's frontal lobe damage "really means that he is highly impulsive, lacks the ability to plan; his executive functions are highly diminished. To my mind, that means that he could not conform his conduct of the requirements of law." (PCR 3753.) Dr. Riebsame testified 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." (PCR 3610–11.) Dr. Van Gorp explained that an individual with frontal lobe damage has a "disconnect between thought and action." (PCR 3697.) Again, what the jury did not hear at trial was how Wickham's culpability was mitigated by his brain damage.

Testimony from family members and others who were direct witnesses to the abuse Wickham suffered also would have provided powerful non-statutory mitigating evidence. Instead, most of the minimal testimony about Wickham's childhood presented to the jury was in the form of hearsay relayed through Dr. Carbonell in a way that diminished its effectiveness and led Judge McClure to reject it as non-statutory mitigation because of its apparent "remoteness" to the offense. (R 252.) That was deficient performance. *See Parker*, 3 So. 3d at 985 ("In addition to [the] failure to conduct an adequate investigation, [defendant's]

counsel presented the information about his childhood and background through the hearsay testimony of the [defense] investigators and not from first-hand sources."); *State v. Lara*, 581 So. 2d 1288, 1289 (Fla. 1991) (affirming finding of ineffective assistance of counsel where, in contrast to the cursory trial testimony, post-conviction witnesses "evoked vivid images" of defendant's difficult childhood).

**(b) Evidence Not Presented At Trial Would Have Substantially Weakened Statutory Aggravators**

Collateral evidence concerning the location and significance of Wickham's brain damage, the extent and impact of his schizophrenia, and his diagnosis of epilepsy would have substantially discredited the State's theory that Wickham was a calculating criminal mastermind, thereby weakening two aggravating factors: commission of the offense in a cold, calculated, and premeditated manner and for the purpose of avoiding lawful arrest. *See Ferrell*, 640 F.3d at 1234–35; *cf. Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1998) ("[Psychiatric evidence] not only can act in mitigation, it also could significantly weaken the aggravating factors.") (internal quotations omitted). Notably, the State has tacitly conceded there was no evidence at trial of temporal lobe epilepsy or evidence relating to the type, location, or extent of Wickham's brain damage. (2011 PCR 787, 789 (State's Post-Evidentiary Hearing Memorandum, Sept. 20, 2010).)

Wickham's frontal lobe brain damage makes it highly unlikely that he could have committed the offense in a cold, calculated, and premeditated manner. (PCR

3695–96; *see also* PCR 3751–52.) Wickham had a long history of impulsive and poorly planned interactions while institutionalized (PCR 4804–30 (excerpts of Leon County Jail records); 4844–4946 (Northville and Ionia records)), including acting out aggressively and refusing to cooperate with treatment, which mirrored his inability to cooperate during mental health testing by experts hired by his own defense or at his own trial. (PCR 3547–48, 3594, 3666, 3732.) This history, had it been adequately interpreted by a qualified expert, would have established that Wickham does not comprehend his behavior or its impact on his future circumstances. (PCR 3608–09 ("Given the evidence that I've reviewed, I don't see the potential for any kind of calculated or premeditative behavior on the part of Wickham across most circumstances.") (Riebsame).)

Wickham's mental disorders also precluded him from committing the offense for the purpose of avoiding lawful arrest. Drs. Riebsame, Van Gorp, and Mills all testified that Wickham's brain damage and schizophrenia, along with evidence of his intoxication on the day of the offense, rendered him incapable of deliberating or anticipating the consequences of his actions.

> We have an individual with an abnormal brain that impairs his ability to make decisions. We have an individual with a history of schizophrenia. We have a person that is likely intoxicated as well. All those factors together, you are not going to get a person that is going to make decisions that are planful or purposeful. They will be impulsive at the moment. That is what you get.

(PCR 3607 (Riebsame); *see also* PCR 3695 (Van Gorp), 3746–47 (Mills).)

Dr. Mills also testified that if Wickham was experiencing a temporal lobe seizure or had recently experienced a seizure and was in the post-seizure phase, he could have been "out of it and not able to anticipate and control and plan the way an ordinary person could." (PCR 3746–47.) The jury never heard that Wickham was an epileptic and was unable to consider how his epilepsy may have affected his behavior at the time of the offense.

**(c) *Kilgore v. State* is Inapposite**

The court below incorrectly analogized this case to *Kilgore v. State*, 55 So. 3d 487 (Fla. 2010), and that case's citation to *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), for the proposition that Wickham was not prejudiced by counsel's performance. Order at 61–62. Although certainly "there comes a point at which evidence . . . can reasonably be expected to be only cumulative, and the search for it distractive from more important duties," *id.*, Padovano's extremely limited efforts never came close to that point. As explained above, Wickham's initial medical records demonstrated the existence of substantial additional evidence concerning serious mental disorders and epilepsy, and a long history of institutionalization. But defense counsel *never* searched for that evidence, and clearly he was not engaged in "more important duties" relating to Wickham's case—he was busy running for election.

### B. Defense Counsel Was Ineffective For Failing To Object To The Trial Court's Failure To Weigh Aggravating And Mitigating Factors Prior To Issuing Its Death Sentence

Upon receiving the jury's recommendation that Wickham be put to death by a vote of 11 to 1, the trial court immediately sought to sentence Wickham: "Okay. I am prepared to proceed to sentencing. Does the State have anything they wish to say before we proceed with sentencing?" (R 2044.) The State then obtained a waiver from defense counsel of Wickham's right to contemporaneous written sentencing findings: "If there is any authority which would require the Court to set out written reasons before imposing a grounds for the sentence, we waive that requirement. I don't see any need to postpone the sentence." (R 2045.) With no recess or delay reflected in the record, the court proceeded to sentence Wickham to death without considering the aggravators and mitigators and making written findings of fact, in violation of Wickham's right to due process. (R 2046.)

#### 1. The Trial Court Failed to Consider the Aggravators and Mitigators Prior to Sentencing Wickham

At the time of Wickham's trial, Florida law required that "[i]n each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the [aggravating and mitigating] circumstances and upon the records of the trial and the sentencing proceedings." § 921.141(3), Fla. Stat. (1988). This Court long ago explained that written sentencing findings are required because "[n]ot only is the sentence then

open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute." *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973).

> [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. *Id.* at 10.

As such, in the years before Wickham's trial, this Court enacted procedural safeguards with respect to sentencing findings to ensure that this essential judicial balancing took place. In *Patterson v. State*, 513 So. 2d 1257 (Fla. 1987), this Court imposed on trial courts the obligation to specifically articulate aggravating and mitigating circumstances before imposing a death sentence. *Id.* at 1262–63. Subsequently, this Court established a clear rule that "written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." *Grossman v. State*, 525 So. 2d 833, 841 (Fla. 1988), *overruled on other grounds by Franqui v. State,* 699 So. 2d 1312 (Fla. 1997).

Despite this Court's unambiguous directives, the trial court sentenced Wickham to death without so much as a single comment as to why he deserved the death penalty. Indeed, it would have been impossible for the court to have performed the required nuanced and complex analysis in the few minutes between the jury recommendation and his oral declaration of sentence. *See Van Royal v.*

*State*, 497 So. 2d 625, 630 (1986) (Ehrlich, J., concurring) ("[T]he 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 to me that any meaningful weighing process can take place otherwise.")

Furthermore, even after sentencing, the trial court abdicated its responsibility to independently assess aggravating and mitigating circumstances. In its Findings In Support Of Sentence of Death, the Court adopted almost verbatim the sentencing memorandum submitted by the State six days after oral sentencing, on December 14, 1988. A side-by-side comparison reflects that the trial court adopted each finding proposed by the State, making only those changes grammatically necessary to systematically render the State's proposed findings those of the trial court—replacing, for example, the phrase "the State submits" with the phrase "the Court finds." (*See, e.g.*, R 233, 251.) The court did so even though a year earlier this Court had held that a trial court may not delegate its responsibility to issue sentencing findings to the State. *See Patterson*, 513 So. 2d at 1262 (such delegation "raises a serious question concerning the weighing process that must be conducted before imposing a death penalty"); *Riechmann,* 777 So. 2d at 351–52 ("[C]onfidence in the outcome of the Defendant's penalty phase has been undermined," when the State's "draft order and the subsequent final order . . . were virtually identical.")

When a trial court abdicates its responsibility by orally pronouncing a death sentence without clearly discussing aggravating and mitigating circumstances, the remedy is to vacate and remand for imposition of a life sentence. *See Layman v. State* 652 So. 2d 373, 375-76 (Fla. 1995); *Bouie v. State*, 559 So. 2d 1113, 1116 (Fla. 1990).

### 2. Defense Counsel Was Ineffective By Waiving The Requirement For Written Sentencing Findings

Defense counsel's waiver of Wickham's right to have aggravators and mitigators weighed by the judge prior to sentencing constituted ineffective assistance. There is no strategic justification for waiving this right. The only person who did not benefit from defense counsel's waiver was Wickham, who had nothing to lose by waiting for written sentencing findings. For defense counsel, however, the waiver meant quickly wrapping up the case before he took the bench. Counsel's explanation for the waiver was that he "didn't necessarily want to wait another week for the judge to sentence [Wickham] after the jury recommended death. He didn't think there was anything to be gained by it. He knew McClure was going to sentence [Wickham] to death; no doubt about it. Why go through the exercise?" (PCR 6826 (O'Berry notes); *see also* PCR 6834 ("I didn't want to wait—had to know J. McClure to know that one.") (Forrest notes).) A belief that a sentencing judge is predisposed to impose a death sentence, however, is not a valid basis for waiving the requirement that the court articulate the reasons for imposing death prior to sentencing the defendant:

> The trial judge's denial of relief here was [based on] his candid belief that the sentencing judge was so predisposed to imposing death that there was virtually nothing that counsel could have done to change the outcome . . . . However, *such a decision is controlled by the circumstances of each particular case, and cannot be made until those circumstances are developed through the detailed sentencing process required in capital cases*. The constitutional validity of the death sentence rests on a rigid and good faith adherence to this process.

*Hildwin v. Dugger*, 654 So. 2d 107, 112 (Fla. 1995) (finding counsel ineffective at the penalty phase) (Anstead, Shaw and Kogan, JJ., specially concurring) (emphasis added).

By waiving Wickham's right to written sentencing findings, defense counsel effectively waived the right to an independent judicial consideration of aggravating and mitigating circumstances essential to the individualized sentencing determination required by the Eighth Amendment. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). The risk of arbitrary and capricious action simply is too great when the detailed process required by Florida law is not followed. Wickham therefore was prejudiced as a result of defense counsel's waiver.

### C. Defense Counsel Was Ineffective By Failing To Object To The State's Inflammatory Language During Its Closing Argument

Defense counsel's failure to object to the State's inflammatory language in its penalty phase summation also rendered his assistance ineffective and prejudiced Wickham. During its penalty phase closing, the State argued:

> There is only one way to assure that [the defendant is] 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 this defendant isn't on the street. Only one way we can be assured there isn't another victim. (R 2016–17.)

The State violated the Eighth and Fourteenth Amendments when it argued that Wickham should be put to death because he could be paroled in 25 years and might kill again. *See Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985).

Well before Wickham's trial, this Court had condemned this type of conduct. *See Teffeteller v. State*, 439 So. 2d 840 (Fla. 1983). In *Teffeteller*, the prosecutor emphasized the fact that the defendant would be eligible for parole in 25 years, urging the jury: "Don't let Robert Teffeteller kill again." *Id.* at 844–45. This Court held that "it was reversible error for the trial court to deny appellant's motion for a mistrial or for a cautionary instruction," and remanded for a new sentencing hearing. *Id.* at 845.

To the extent that defense counsel failed to object to this misconduct and move for a curative instruction or a mistrial, he provided ineffective assistance of counsel, as "there is no place in our system of jurisprudence" for arguments made to convince the jury that, if death is not recommended, the defendant will be released and will kill again. *Teffeteller*, 439 So. 2d at 845; *see also Brooks v. State*, 762 So. 2d 879, 900 (Fla. 2000); *Urbin v. State*, 714 So. 2d 411, 419 (Fla. 1998).

## III. WICKHAM WAS TRIED WHILE INCOMPETENT AND DEPRIVED OF A COMPETENCY HEARING IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL

The right of a criminal defendant not to be tried while incompetent is protected by the Florida Constitution (Art. I, Section 9) and Florida Rules of Criminal Procedure (3.210 and 3.211), as well as by the U.S. Constitution's guarantees to substantive and procedural due process contained in the Fourteenth Amendment and the right to counsel contained in the Sixth Amendment. *Pate v. Robinson*, 383 U.S. 375, 376, 385 (1966); *see also Drope v. Missouri*, 420 U.S. 162, 171–72 (1975); *Dusky v. United States*, 362 U.S. 402, 402 (1960).

Wickham's constitutional rights regarding his competency to stand trial were violated on three independent grounds. *First*, Wickham was denied substantive due process when he was tried and convicted while incompetent. *James v. Singletary*, 957 F.2d 1562, 1573 (11th Cir. 1992). *Second*, Wickham was denied procedural due process when the trial court failed *sua sponte* to hold a competency hearing despite blatant signals of mental instability. *See id.* at 1571; *see also Pate*, 383 U.S. at 378, 384–86. *Third*, in the face of significant evidence of irrational behavior and mental illness, trial counsel was ineffective for failing to request a competency hearing. *Futch v. Dugger,* 874 F.2d 1483, 1486–87 (11th Cir. 1989).

Although it may be possible in some cases to conduct a *nunc pro tunc* examination to determine whether a petitioner was competent at the time of trial,

given the "inherent difficulties" of such a determination, and where the trial was in the distant past, the remedy required is a new trial. *Hill v. State*, 473 So. 2d 1253, 1258–60 (Fla. 1985); *see also Pate*, 383 U.S. at 386–87; *Dusky*, 362 U.S. at 403.

### A. Wickham Was Tried While Incompetent In Violation Of His Right To Substantive Due Process

In 1988, under both Florida and federal law, a defendant was considered competent to stand trial if he had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and had a "rational, as well as factual, understanding of the proceedings." Fla. R. Crim. P. 3.211 (1988) (listing 11 factors); *see also Dusky*, 362 U.S. at 402. The post-conviction record establishes clear and convincing evidence that Wickham lacked a rational understanding of the proceedings and the ability to communicate rationally with counsel, raising "real, substantial and legitimate doubt" that he was competent to stand trial in 1988. *James*, 957 F.2d at 1573.

#### 1. Clear And Convincing Evidence Creates A Real, Substantial And Legitimate Doubt As To Wickham's Competency

Wickham's post-conviction mental health experts testified that he suffers from frontal lobe brain damage, schizophrenia, and epilepsy, and that he chronically abused alcohol. *See* Facts §§ II.A.2, II.A.3. As a result, they testified, his ability to understand the nature of the proceedings against him and participate meaningfully in his defense was substantially impaired, as reflected by his own

decompensating behavior. *See* Facts § I.B. Although some partial evidence of Wickham's afflictions was presented at trial, neither psychologist was a medical doctor or an expert in neurology or psychiatry, nor did they have all the relevant facts due to defense counsel's deficient investigation and failure to pass on key information about Wickham's behavior. As a result, they were unable to conduct a meaningful evaluation of Wickham's competency to stand trial.

The post-conviction testimony was not merely cumulative, as found by the court below, but was significant and critical to presenting a complete and fair picture of mitigation. In particular, the post-conviction proceedings established that Wickham's frontal lobe brain damage manifests as "[b]ehavioral inappropriateness, inability to effectively plan . . . . Trouble anticipating consequences of actions, difficulty handling novel situations." (PCR 3741, 3594–96.) Wickham's schizophrenia—a "serious mental condition" that left Wickham with "chronic deficits" which are more pronounced when the schizophrenic is not in an institutionalized setting—affects Wickham's decision-making ability and the general ability of his brain to function. *See* Facts § II.A.2(b). Wickham's long history of disabling seizures—resulting from temporal lobe epilepsy, which Dr. Mills testified manifests as a person appearing to be not fully present—would have made communication with his defense counsel very difficult, thereby helping to explain the withdrawal of several of Wickham's assigned counsel. *See* Facts §

II.A.2(c). As a result, the experts uniformly agreed, Wickham's ability to understand the nature of the proceedings was likely severely compromised. (PCR 3600, 3615–19 (Dr. Riebsame); 3700–04 (Dr. Van Gorp); 3755–56 (Dr. Mills).)

These deficits are exacerbated at times of stress, making Wickham highly susceptible to changes in competency. (PCR 3755 (Dr. Mills); 3700 (Dr. Van Gorp); 3615 (Dr. Riebsame).) It is not surprising, therefore, that Wickham decompensated considerably in the period leading up to and during his trial. *See* Facts § I.B. His chronic refusal to attend pretrial proceedings or the penalty phase suggests a substantial degree of mental instability, underscored by his erratic and self-defeating behavior once present. *Id*. Records from Leon County Jail contain numerous observations of Wickham's irrational behavior. *Id*. In her deposition taken one week before trial, Dr. Carbonell testified that Wickham *at that time* had an "inability to understand, [or] reason accurately," and that he had "trouble really with cause and effect." (PCR 4524–25.) Even defense counsel later described his client as "[having] almost 'zero' ability to help with his defense," being "totally unmanageable," (PCR 6826), behaving in a "childlike" manner and "act[ing] out." (2011 PCR Vol. 11, Tr. 167.) Defense counsel also indicated that "the trial destroyed what little social ability he may have had to control himself." (PCR 6826.) These startling admissions alone should raise "real, substantial and legitimate" doubts about Wickham's competency. *James,* 957 F.2d at 1573.

When presented with the complete picture of Wickham's mental impairments and disturbed behavior before and during trial, *every* post-conviction expert—including the State's expert, (PCR 4172–76 (McClaren))—testified that an inquiry into Wickham's competency should have been conducted. *See* Facts § II.A. Even Dr. Carbonell testified that when she later read in the newspaper that Wickham had been acting out at trial—information Judge Padovano never gave her—she became concerned about his competency. (PCR 3562, 3567.)

In the words of Dr. Mills, there were "lots and lots of reasons to question [Wickham's] competence 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." (PCR 3756; *see also* PCR 3705 (Dr. Van Gorp).)

### 2. This Claim Is Properly Preserved

Wickham's substantive due process claim was erroneously denied by Judge Dekker in her *Huff* Hearing Order. (PCR 3113 (citing *Carroll v. State*, 815 So. 2d 601 (Fla. 2002); *Patton v. State*, 784 So. 2d 380 (Fla. 2000).) However, the *Carroll* and *Patton* cases she cited are inapposite. In both cases, the trial court had previously determined the defendant's competency, and its decision was not challenged on direct appeal. *See Carroll*, 815 So. 2d at 610–11; *Patton*, 784 So. 2d at 393. By contrast, the trial court here *never* determined Wickham's competency. In such circumstances, a post-conviction court must decide whether a competency

hearing should have been held to protect the defendant's right to due process. *See Mason v. State*, 489 So. 2d 734, 735–36 (Fla. 1986); *Hill*, 473 So. 2d at 1260.

Even if this claim were procedurally barred under Florida law, such a bar would be unconstitutional. The U.S. Supreme Court and the Courts of Appeal for the Eighth, Tenth and Eleventh Circuits have held that a defendant's Fourteenth Amendment right to due process requires a court to consider claims of incompetence at any time, regardless of whether the claim was raised on direct appeal or exhausted in state court proceedings. *See Pate*, 383 U.S. at 384 ("[I]t 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."); *see also, e.g.*, *Ryan v. Clarke*, 387 F.3d 785, 791 (8th Cir. 2004); *Wright v. Moore*, 278 F.3d 1245, 1258–59 (11th Cir. 2002); *Rogers v. Gibson*, 173 F.3d 1278, 1289 (10th Cir. 1999).

### B. The Trial Court's Failure To Order A Competency Hearing Violated Wickham's Right To Procedural Due Process

The law in Florida at the time of Wickham's trial mandated that if there was reasonable ground to believe a defendant *may* not be competent to stand trial—that is, if the defendant showed *any* signs of incompetency—the trial court must immediately set a hearing and appoint two or three experts to examine the defendant regardless of whether a hearing was requested. *See* Fla. R. Crim. P. 3.210–3.215 (1988); *Tingle v. State*, 536 So. 2d 202, 203 (Fla. 1988). The trial

court's failure to do so in this case despite numerous troubling signs of decompensation violated Wickham's right to procedural due process.

### 1. The Trial Court Ignored Blatant Signs of Incompetency

Evidence of a defendant's irrational behavior and demeanor at trial are relevant to evaluating the need for a competency hearing. *Drope*, 420 U.S. at 180. Even before Wickham's trial began, his potential lack of competency was evident.

*First*, several defense attorneys prior to Judge Padovano had to be relieved due to their inability to work with Wickham, among other reasons. (R 17, 18, 81, 97, 111, 113; *see also* 2011 PCR Vol. 11, Tr. 29 (Judge McClure personally asked Judge Padovano to represent Wickham because he "would be a very difficult client").) *Second*, the trial court was forced to order the use of "reasonable force if necessary" to ensure Wickham's attendance at pretrial proceedings. (R 80.) *Third*, Wickham's first Motion for Continuance, filed on May 20, 1988, put the trial court on notice of Wickham's mental deficiencies. (R 124 (noting "involuntary confinement" for ten years, diagnosis as "childhood schizophrenic," "very low intelligence quotient," and "a present mental illness," which was possibly the result of "organic brain damage").) *Fourth*, a Notice of Intent to Rely on Defense of Insanity, filed on November 21, 1988, further explained that "defendant has been mentally ill throughout the greater part of his adult life," and "[a]t the time of the offense in this case he was suffering from a form of

schizophrenia which rendered him legally insane under the standard of insanity applicable in Florida." (R 145.) Despite these warning signals, the trial court never ordered a competency hearing. *Cf. Tingle*, 536 So. 2d at 203.

Even if, *arguendo*, there were not grounds to order a competency hearing *prior* to trial, the court was obligated to ensure that Wickham's mental state did not deteriorate and render him incompetent at a later point. *Drope*, 420 U.S. at 179–80. Yet, the court took no action when flagrant evidence of Wickham's lack of competency—including disruptive and inappropriate outbursts—occurred in front of its bench. *See* Facts § I.B. *See also Hill*, 473 So. 2d at 1257 ("[*Pate*] places the burden on the trial court . . . to make an inquiry into and hold a hearing on the competency of the defendant when there is evidence that raises questions as to that competency."); *James*, 957 F.2d at 1572 n.15.

#### 2. This Claim Is Properly Preserved

Judge Dekker erred in summarily dismissing Wickham's claim as procedurally barred. The cases on which the court relied—*Carroll* and *Patton*—are inapposite because both held that *substantive* claims of incompetency were procedurally barred, as discussed (and distinguished) above. *See Carroll*, 815 So. 2d at 610; *Patton*, 784 So. 2d at 393. Neither case addressed a claim that the trial court should have ordered a competency hearing *sua sponte*, and thus neither establishes a procedural bar to such a claim here.

### C. Defense Counsel Was Ineffective By Not Requesting A Competency Hearing

Although defense counsel's representation of Wickham surely was borne of a commitment to public service, the decision to continue notwithstanding his competing commitments led him to unreasonably dismiss objective indicia that Wickham was not competent to stand trial. *See* Facts §§ I.A., I.B. As a result, his defense of Wickham was deficient.

#### 1. Trial Counsel Unreasonably Failed To Provide Dr. Carbonell With Critical Details About Wickham's Decompensation

Dr. Carbonell's early assessment that Wickham was competent to stand trial was formed solely on the basis of brief interactions in May 1988. (R 147, 265.) Contrary to the summary recitation of the record by the court below, Order at 7, following Dr. Carbonell's initial evaluation six months before trial, she was never asked by defense counsel to reevaluate Wickham's competency. (PCR 3553–54.)

Despite later testifying that he understood that Wickham's organic brain damage and schizophrenia made him particularly susceptible to stress-induced decompensation, (PCR 3440–41), defense counsel did not ensure adequate evaluation and monitoring of Wickham's mental condition, and instead claimed that he relied on Dr. Carbonell to inform him if there was an issue of incompetence. (2011 PCR Vol. 11., Tr. 58 ("I had other people who were—who were evaluating that on a professional level."), *see also id*., Tr. at 109 ("If there was some change, she

probably would have told us, I'm sure.").) That approach, however, plainly was unreasonable given that he failed to ensure Dr. Carbonell had the necessary information that would have allowed her to raise an issue of competency. (PCR 3561 ("It would have been more likely that Mr. Padovano would have raised [concerns about Wickham's competency] to me.") (Dr. Carbonell)); Facts § I.B.2. (*See also* PCR 3621–22 (Dr. Riebsame), 3703–06 (Dr. Van Gorp), 3756 (Dr. Mills).) Judge Padovano also failed to raise the issue of competency with the trial court. *Cf. Johnston v. Singletary*, 162 F.3d 630, 635 (11th Cir. 1998) ("[T]rial counsel's failure to apprise the court of a client's changing mental state—thereby depriving the court of critical information regarding its *own* potential duty to hold a *Pate v. Robinson* hearing—can constitute ineffective assistance.").

#### 2. Trial Counsel Unreasonably Dismissed The Issue Of Wickham's Competency

Counsel is required to request a mental health examination *whenever* factual circumstances raise a reasonable question regarding the client's ability to stand trial. *Hill*, 473 So. 2d at 1259 (rejecting as improper the trial court's refusal to hear evidence on competency because the court assumed "the issue of competence was a judgment call to be decided by the defense attorney"); *accord Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1993) (citing *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989)); *Hull v. Freeman*, 932 F.2d 159, 168 (3d Cir. 1991) ("[Lawyers]

are wholly unqualified to judge the competency of their clients."); *Becton v. Barnett*, 920 F.2d 1190, 1192 (4th Cir. 1990).

Instead of passing on pertinent information regarding Wickham's mental state leading up to trial, and obtaining an appropriate evaluation, Padovano unreasonably dismissed obvious signs of Wickham's incompetency.[18] The post-conviction mental heath experts testified that, rather than suggesting competence, Padovano's assertion that Wickham "was childlike" was consistent with the behavior of an incompetent person suffering from organic brain damage. (PCR 3619 (Riebsame), 3756 (Mills).) Unfortunately, defense counsel's dismissive handling of the issue appears to have been clouded by his desire to see his client's case through to the end before taking the bench:

> Q: Were it true [that you had zero-ability to communicate with him], that would be a very, very difficult situation to be in because it would indicate he's not competent to stand trial?
>
> A: Yes. And I would ask for a competency evaluation, which ultimately, would have relieved me of the obligation of trying his case, I'm sure, because I wouldn't have been able to do it. *The evaluation itself would have consumed more time than I*

---

[18] Defense counsel later explained his thoughts about competency on superficial grounds. (2011 PCR Vol. 11, Tr. 19 ("Look at his handwriting on there. Does that look like the handwriting of a mentally ill person?"), 63 ("[I]f somebody is calling you . . . if there is something wrong with that person, you can get a sense that—you could get a sense if there's something is wrong."), 167 ("[T]his was expected behavior of somebody in Jerry's situation. . . . He was childlike. He acted out when he—when he had stress.").)

> *had left as a lawyer*. But, as I said, *that would have been the easy way out, wouldn't it*?

(2011 PCR Vol. 11, Tr. 195–96 (emphasis added); *see also id.*, Tr. 30; PCR 6839.)

### 3. The Court Below Erred In Condoning Counsel's Failure To Request A Competency Hearing As Acceptable Trial Strategy

In his 1995 meeting with post-conviction investigators O'Berry and Forrest, defense counsel suggested that another reason he did not pursue competency was he thought it might help the insanity defense if the jury saw Wickham acting out:

> [Wickham] had almost "zero" ability to help with his defense. But that didn't bother [Judge Padovano], because he was running an insanity defense; he figured it wouldn't hurt to have the jury see him like that and since his defense was insanity, then obviously he couldn't expect his client to be able to assist in his defense.

(PCR 6826 (O'Berry notes); *see also* PCR 6835 ("if raising insanity, what is the problem" (Forrest notes).)

Although defense counsel did not recall whether this had been his strategy, he did not disagree with its merit. (2011 PCR Vol. 11, Tr. 125 ("[I]t's not a bad idea, is it . . . ?").) The court below also credited his failure to request a competency hearing because he feared "creating evidence and witnesses for the state." Order at 7.

Contrary to the court's opinion, a defense counsel cannot constitutionally justify a failure to request a competency hearing on the basis that having an incompetent client visibly "act out" during trial might help develop a mitigation case before a jury, and it is startling that Padovano apparently may have enter-

tained such a strategy. *See Broomfield v. State*, 788 So. 2d 1043, 1044–45 (Fla. 2d DCA 2001). The right to be competent at trial cannot be waived—as a matter of trial strategy or otherwise. *Pate*, 383 U.S. at 384; *Bundy v. Dugger*, 816 F.2d 564, 567–68 (11th Cir. 1987).

The court below also erred by giving no weight to the testimony of Forrest and O'Berry, despite finding them credible. *See* Order at 63. The court erroneously held their supposed lack of trial expertise against them, even though they were fact witnesses testifying as investigators to statements made by defense counsel in May 1995, *not* expert witnesses testifying about the steps defense counsel should have taken. The court further dismissed their testimony on the ground that "Judge Padovano never told either of them that he believed Wickham was incompetent." *Id*. That conclusion completely ignored counsel's statements bearing directly on Wickham's competency. (PCR 6826 (O'Berry) (Wickham was "totally unmanageable," was "barely functioning," had "almost 'zero' ability to help with his defense," was "marginally able to function"); PCR 6837 (Forrest) ("marginally able to function," "unable to talk," "little social ability was gone").) The separate notes of that meeting plainly establish that defense counsel knew, or should have known, that Wickham was not competent to proceed with trial.

## IV. THE CUMULATIVE IMPACT OF JUDICIAL ERROR DEPRIVED WICKHAM OF HIS RIGHT TO A FAIR TRIAL

As this brief has shown, Wickham's trial was saturated with serious, prejudicial errors committed by defense counsel, the State, and the trial court. In such cases, it is incumbent upon a reviewing court to evaluate those errors *together* when conducting its harmless error analysis. *See, e.g., State v. Gunsby,* 670 So. 2d 920, 924 (Fla. 1996); *cf. Harvey v. Dugger,* 656 So. 2d 1253, 1257 (Fla. 1995). The cumulative effects of trial error must be scrutinized particularly carefully in capital cases. *See, e.g.*, *Zant v. Stephens*, 462 U.S. 862, 885 (1983). In addition to all of the errors described above, multiple additional errors occurred.

For example, prospective jurors at Wickham's trial were exposed to improper influences, including conversations with the victim's father. (R 527.) The record contains frequent indications that jurors discussed the case, in derogation of the court's instructions, (R 435, 448), and read media accounts. (R 360, 367, 377–78, 407–08, 422, 442, 454, 478, 459, 492, 506, 561, 567–68, 578, 597–98, 603–04, 611, 620, 634, 640, 662–63, 674–75, 686, 691, 697–68). The jury pool was further influenced by the carnival-like atmosphere created by the presence of media, security, and the victim's family. (R 1222–24, 1885–87.)

The prosecutor made a number of improper arguments to the jury, including opining that Wickham's insanity defense was a calculated ploy, (R 936), and encouraging the jury to begin deciding the case before it had heard all of the

evidence and to disregard "long and cumbersome" jury instructions. (R 1743–56.) The prosecutor also offered personal opinions and observations (*e.g.*, "I almost fell out of my chair" upon hearing defense counsel's closing argument). (R 1834.)

As explained in Wickham's pending Habeas Petition, both predicate violent felonies offered in the penalty phase were ineligible. *First*, Wickham's 1969 guilty plea to armed robbery in Michigan was constitutionally infirm because he was never advised of the trial rights he was waiving. *People v. Wickham*, 200 N.W.2d 339, 340 (Mich. Ct. App. 1972); *see also Boykin v. Alabama,* 395 U.S. 238 (1969). *Second*, Wickham's 1983 conviction for aggravated motor vehicle theft in Colorado did not fall into the category of "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." *See Lewis v. State,* 398 So. 2d 432, 438 (Fla. 1981). These problems were compounded by a jury instruction for the CCP aggravator that failed to differentiate simple premeditation from the required "heightened premeditation." (R 2037.) *See Rogers v. State,* 511 So. 2d 526, 533 (Fla. 1987).

Wickham's death sentence likely was influenced by the opinion of the victim's father, who, at the sentencing of Larry Schrader, indicated on the record, before the same trial court that sentenced Wickham, his desire to see Wickham sentenced to death. (PCR 4450.) *See Booth v. Maryland*, 482 U.S. 496, 508–09 (1987), *overruled on other grounds by Payne v. Tennessee*, 501 U.S. 808, 830 n.2

(1991) (opining that admission of "emotionally charged opinions" regarding appropriate punishment violates the Eighth Amendment); *see also* § 921.141(7), Fla. Stat. (1992) ("Characterizations and opinions about . . . the appropriate sentence shall not be permitted as a part of victim impact evidence.").

Each of these many issues is subject to harmless error review. Accordingly, there is a danger that each, judged in a vacuum, would be dismissed. However, these errors must be considered not simply in conjunction with each other, but in tandem with all of the errors raised and discussed more fully elsewhere in this brief, and in tandem with those errors already recognized and adjudged harmless by this Court on direct appeal. *Wickham v. State,* 593 So. 2d 191, 193–94 (Fla. 1991). Viewed in their totality, the myriad errors in this case make manifestly clear that Wickham failed to receive the fundamentally fair trial to which he was entitled. *See, e.g.*, *Noeling v. State*, 40 So. 2d 120, 121 (Fla. 1949).

## V. WICKHAM IS EXEMPT FROM EXECUTION UNDER THE EIGHTH AMENDMENT

Wickham suffers from a number of serious mental impairments, including frontal lobe brain damage, temporal lobe epilepsy, and schizophrenia; injuries resulting from repeated head trauma; years of overmedication on anti-psychotic drugs as a child and alcohol abuse as an adult; and a very low IQ. (R 1408–10, 1473, 1477–85, 1508.) *See also* Facts § II.A. As demonstrated above, these disabilities directly reduce Wickham's ability to understand and process

information, to learn from experience, to engage in logical reasoning, and to control his impulses.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the U.S. 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. *Id.* at 321. Although Wickham does not meet the current standards for mental retardation under Florida law, the same concerns detailed in *Atkins* should preclude imposition of the death penalty here. § 921.137(1), Fla. Stat. (2012).

The goal of retribution will not be served by executing Wickham, as "the severity of the appropriate punishment necessarily depends on the offender's culpability." *Atkins*, 536 U.S. at 319. Wickham's substantial mental impairments should accord him the same recognition of lessened culpability recognized in *Atkins*. As for any deterrent effect, the death penalty is not an effective deterrent to persons with limited capacity to reason and control themselves, exemplified by Wickham. *See id*. at 319–20.

## CONCLUSION

For the foregoing reasons, Jerry Michael Wickham should be granted a competency hearing, and re-trial and re-sentencing if he is now found to be competent to stand trial, or, at a minimum, he should receive a new sentencing hearing or alternatively his sentence should be commuted to life in prison.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to:

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document was computer-generated using Microsoft Word, in Times New Roman 14-point font, and is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Dated: February 17, 2012
New York, New York

Respectfully submitted and served,

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