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

REPLY BRIEF OF APPELLANT

Frederick T. Davis
Kristin D. Kiehn
Corey S. Whiting
Elizabeth A. Kostrzewa
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Martin J. McClain
McClain & McDermott, P.A.
141 N.E. 30th Street
Wilton Manors, Florida 33334
(305) 984-8344

Counsel for Jerry Michael Wickham

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL STATUTES

STATE STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

Page

I. INTRODUCTION

The principal theme of the State's Answer Brief is the strength of its case that Jerry Michael Wickham was the perpetrator who pulled the trigger resulting in the death of the victim. What the State continuously ignores, however, is that the basis for the imposition of the death penalty, which was unanimous neither in the jury nor in this Court, critically depended upon the testimony of accomplice witnesses and jailhouse "snitches." Post-conviction proceedings have now shown that every one of those witnesses had an undisclosed motive to enhance his or her testimony by adding additional details to the core events of the murder—the very details upon which the trial court relied to demonstrate statutory aggravators. It is no coincidence that the evidence the State had, but withheld, tended to undermine precisely these necessary additional details relating to the death sentence. The law may tolerate the use of such witnesses, even to support a death penalty, but only when appropriate procedures guarantee the defendant's constitutional right to challenge the evidence against him. Those procedures were not followed here.

In addition to being hampered by numerous *Brady* and *Giglio* violations, Wickham had virtually no affirmative evidence with which to oppose the State's case for death—because his attorney failed to spend the time necessary to find available evidence of Wickham's greatly diminished responsibility and incapacity to stand trial. The resulting prejudice is overwhelming: a fair trial, at which

diligent counsel had been armed with evidence withheld by the State and affirmative proof of Wickham's diminished capacities, would clearly have resulted in the imposition of a non-death sentence.

II. THE STATE PRESENTED FALSE AND MISLEADING TESTIMONY AND WITHHELD EXCULPATORY EVIDENCE

The State's case in support of the death penalty was riddled with false and misleading statements by critical witnesses relating to the key issue of premeditation, and the nondisclosure of exculpatory and impeachment evidence that would have exposed them. The multiple *Brady*/*Giglio* violations destroy any confidence in the legitimacy of Wickham's death sentence. Sections II(D) and (E) will demonstrate the impact the withheld evidence would have had on the trial; Sections II(A) through (C) will first address the State's illusory arguments that seek to avoid or diminish these crucial issues.

A. Each Claim in Wickham's Initial Brief is Properly Before this Court

Each of Wickham's *Brady/Giglio* claims was preserved in his 3.850 motion, which provided a "brief statement of the facts" on which the motion was based. Fla. R. Crim. P. 3.850(c)(6) (1995).[1] There is no requirement to develop the legal theories underlying the brief statement of facts; rather, "a movant is entitled to an

[1] Pursuant to Fla. R. Crim. P. 3.851(a), Wickham's motion is governed by Rule 3.850, not Rule 3.851, which requires that the motion provide "a detailed allegation of the factual basis" for the claims. Fla. R. Crim. P. 3.851(e)(1)(D) (2011); *see also Gaskin v. State,* 737 So. 2d 509, 513-14 n.10 (Fla. 1999).

evidentiary hearing unless the motion and record conclusively show that the movant is entitled to no relief." *Valle v. State*, 705 So. 2d 1331, 1333 (Fla. 1997).

- Wickham's *Brady* claim relating to failure to disclose the prosecutor's notes of Tammy Jordan's plea negotiations was preserved in Claim IX: "The existence of the State's notes tends to show that [Ms. Jordan's] trial testimony was false, as Ms. Jordan now indicates." (PCR 4716.)[2]
- The claims relating to failure to disclose Jordan's burglary charge and the prosecutor's false statements about her criminal record were preserved in Claim X, which stated that Hankinson made improper comments to the jury, and thus was sufficient to allege that he made materially misleading statements. (PCR 4717.)

The failure to disclose material information relating to the jailhouse informants was preserved in Claim IX:

- John Hanvey's forgery convictions: if "not for the *unimpeached* testimony of John Hanvey, there is a reasonable probability that Mr. Wickham would not have been found sane nor would he be awaiting his execution." (PCR 4713 (emphasis added).)
- Michael Moody's sentence reduction: the "basis for a claim that Moody was a state agent is strengthened in light of the fact that Michael Moody was initially housed with Larry Schrader and then placed in Jerry Wickham's cell." (PCR 4714.)
- Wallace Boudreaux's crime and plea agreement: "exculpatory evidence remained undisclosed." (PCR 4711.) And, in Claim VI: "Boudreaux's real motive [was] to get a deal from the State." (PCR 4691.)

Furthermore, the State has waived any right to object now by voluntarily

---

[2] Abbreviations used herein are as follows: **IB –** Initial Brief of Appellant, served on Feb. 17, 2012; **AB –** Answer Brief of Appellee, served on May 22, 2012; **HP** – Petition for Writ of Habeas Corpus, served on Feb. 17, 2012; **Habeas Reply** – Reply Brief of Petitioner for Writ of Habeas Corpus, served on Aug. 9, 2012. All other abbreviations are as used in Appellant's Initial Brief.

litigating these claims during the 2004 and 2010 evidentiary hearings, where it made virtually no objection to the admission of evidence supporting them.[3] The State had a duty to Wickham and the lower court to object to the presentation of evidence it believed was irrelevant or beyond the scope of the evidentiary hearing. *See Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State."); *Way v. State*, 760 So. 2d 903, 915 (Fla. 2000) (evidence properly excluded as outside scope of post-conviction hearing, following timely objection by State); (IB 56-57). By hiding its objections, the State left the lower court and Wickham in the dark, violating the very purpose of the contemporaneous objection rule.

The State tries to avoid this fact by suggesting that the post-conviction court's ruling on preservation put Wickham on notice of the deficiency, and by failing to raise it in his motion for rehearing, Wickham waived it. (*See* AB 64.) That argument misstates the purpose of a motion for rehearing, "[t]he sole and only purpose of [which] . . . is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision." *Sherwood v. State*, 111 So. 2d 96, 97 (Fla. 3d DCA 1959). It has never been the case that

[3] The State did object to evidence concerning the Wallace Boudreaux claims, (2011 PCR Vol. 11, Tr. 131–32), demonstrating that the State was perfectly aware of the need to do so with regard to the other claims.

claims not raised in such a motion are precluded from being raised on appeal.

B. The State Misstates the Law on Prejudice

The State's brief is replete with unfounded and misleading interpretations of the law on prejudice. *First*, contrary to the State's assertions, a cross-examination built on mere conjecture is no substitute for a cross based upon *actual* information that a witness had reason to testify favorably for the State. *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1343 (11th Cir. 2009), *followed by Smith v. State*, 75 So. 3d 205, 206 (Fla. 2011).[4] The *Brady* material establishing multiple witnesses' reasons to curry favor with the State was material impeachment evidence even if Padovano's cross speculated that the witnesses *might* have a reason to curry favor. *See Kyles v. Whitley*, 514 U.S. 419, 443 n.14 (1995) (information possessed by defense "provided opportunities for chipping away on cross-examination but not for the assault that was warranted" had withheld *Brady* material been disclosed).

Second, the State suggests that once defense counsel has established that a witness is less than credible or acting as a jailhouse snitch, any *Brady*/*Giglio* claim

---

[4] *See also United States v. Rivera Pedin*, 861 F.2d 1522 (11th Cir. 1988) (evidence of bribe offer to cooperating witness material despite aggressive cross at trial in which witness admitted substantial prior bad acts and reason to curry favor with DEA); *Brown v. Wainwright*, 785 F.2d 1457, 1466 (11th Cir. 1986) (promise of immunity material as "a new source of potential bias" for cooperating witness); *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) ("The fact that the history of a witness shows that he might be dishonest does not render cumulative evidence that the prosecution promised immunity for testimony.")

relating to that witness's credibility is "ineffectual." (*See* AB 57.) That is not the law, nor does it make any sense. The U.S. Supreme Court long ago affirmed the "right to probe into the influence of possible bias" of a crucial witness, regardless of the witness's character. *Davis v. Alaska*, 415 U.S. 308, 319 (1974).

Third, the State suggests that certain of Wickham's *Brady*/*Giglio* claims relating to post-conviction testimony by trial witnesses are newly discovered evidence claims, to be evaluated under that standard. (*See, e.g.*, AB 23.) The evidence in question actually demonstrates the constitutional insufficiency of the trial cross-examination—undertaken without the benefit of the *Brady* material in question—and that the trial testimony was false and misleading. *See Johnson v. State*, 44 So. 3d 51, 73 (Fla. 2010). And Wickham is entitled to relief even if the withheld evidence were insufficient to support a newly discovered evidence claim. *Id.* at 73 n.19. Further, any finding by the post-conviction court that a particular witness was not credible is not relevant when considering *Brady* materiality, as the controlling factor is the probable effect the testimony would have had on the jury *if elicited at the original trial*. *See Kyles*, 514 U.S. at 449 n.19. Indeed, the State's argument misses the point: these allegedly incredible witnesses were the very ones upon whom the State relied to support the death penalty; any purported lack of credibility on their part simply underscores their proclivity to stretch the truth, and vulnerability to pressure to do so, that was exploited at trial. (*See* IB 44-45.)

Fourth, the State repeatedly asserts that post-conviction witnesses re-affirmed portions of their trial testimony concerning Wickham's guilt. (*See, e.g.*, AB 55, 59.) Whether Wickham shot the victim is irrelevant to the issues on appeal because it is not disputed. The issues in dispute relating to the *Brady*/*Giglio* violations concern the constitutional validity of Wickham's death sentence.

Fifth, the State persists in assessing the materiality of each claim separately and in a vacuum. It is well-established that the only constitutionally meaningful approach to materiality is to evaluate *together* all evidence adduced in post-conviction proceedings. *Smith*, 572 F.3d at 1347 (cumulative analysis of undisclosed evidence critical as "sum of the parts almost invariably will be greater than any individual part"), *followed by Smith*, 75 So. 3d at 206; *see also Porter v. McCollum*, 130 S. Ct. 447, 454-55 (2009) (finding this Court's prejudice analysis of ineffective assistance claim unreasonable and remanding for new sentencing).[5] It is not sufficient for the State merely to show that, even considering the withheld evidence, there still would have been "enough" to convict. *Kyles*, 514 U.S. at 434-35 & n.8 (reversal required when "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the

[5] The holding in *Porter* applies with equal force to *Brady* materiality. *Rivera v. State*, 995 So. 2d 191, 205 (Fla. 2008) (equating "the materiality prong of *Brady*" with "the *Strickland* prejudice prong").

verdict").

C. A *Brady* Claim Is Not Dependent on a Finding That the Prosecutor Demanded Certain Testimony In Exchange for Leniency

The State frequently refers to the trial court's acceptance of the prosecutor's testimony that he did not pressure witnesses to testify in a certain manner, implying that the court's credibility finding forecloses a *Brady* claim. (*See, e.g.*, AB 40, 58.) However, any requirement that a prosecutor have explicitly conditioned leniency in exchange for specific testimony would be fatal to virtually every *Brady* claim that is based on undisclosed evidence of a witness's reason to curry favor with the State. No such requirement exists, nor is a prosecutor required to have knowledge that a witness is affirmatively biased.[6] The pertinent question is whether the withheld evidence would demonstrate that the witness had a reason to curry favor with the State. *See Smith*, 572 F.3d at 1343.

D. There is Specific, Compelling Evidence of Multiple *Brady*/*Giglio* Errors

1. Tammy Jordan

(a) February 1988 Notes

Tammy Jordan was the sole witness at trial who claimed to have heard

---

[6] *Cf. Morrell v. State*, 297 So. 2d 579, 580 (Fla. 1st DCA 1974) ("Testimony given in a criminal case by a witness who himself is under actual or threatened criminal investigation or charges may well be biased in favor of the State without the knowledge of such bias by the police or prosecutor because the witness may seek to curry their favor with respect to his own legal difficulties by furnishing biased testimony favorable to the State.").

Wickham speak of a potential killing prior to the robbery; three other witnesses in the traveling party said they heard no such statement. Without this crucial testimony, the only support for the CCP aggravating factor would have been the second-hand word of the jailhouse informants, whose testimony also was beset by *Brady* and *Giglio* errors. Her testimony that Wickham had said "there might be a killing in it" was so important that the State cited it in its sentencing memorandum, (R 230), and Judge McClure endorsed it by citing the testimony in his belated sentencing findings, (R 248). The fact that Jordan first mentioned Wickham's alleged statement during a cooperation negotiation—after failing to mention it during any of her interviews with the police—was crucial evidence in the State's possession.

The State does not dispute that the notes were improperly withheld, but focuses instead on a purported lack of prejudice, because Padovano "made full use of" Jordan's failure to mention Wickham's supposed comment to investigators upon her arrest in September 1987. (*See* AB 40.) As discussed above, the State ignores the difference between a cross based purely on conjecture and a cross supported by *actual* evidence. *Scipio v. State,* 928 So. 2d 1138, 1149-50 (Fla. 2006) (discovery violation never harmless unless State demonstrates beyond reasonable doubt that it did not impair defense counsel's trial preparation strategy); *see also Kyles*, 514 U.S. at 434-35 & n.8 (materiality standard is not sufficiency of

remaining evidence, but whether withheld evidence "undermine[s] confidence in the verdict"). Although the State calls it "raw speculation" that Jordan first indicated in February 1988 that Wickham said "there might be a killing," (AB 41), it is undisputed that the notes are the first indication in the record of such a statement. Had Wickham's lawyer been armed with this proof, he could have forcefully demonstrated that the very first time she made the alleged inculpatory statement was in the context of a plea negotiation to avoid a possible death sentence. His inability to make this point was deeply prejudicial to Wickham.

The State feebly attacks the exculpatory nature of the notes by maintaining that Hankinson testified he did not pressure Jordan to testify to anything specific. (AB 40.) As addressed above, Hankinson need not have suborned perjury or demanded specific testimony for the notes to constitute *Brady* material; the notes need only demonstrate that Jordan had a prime opportunity and reason to curry favor with the State when she first mentioned Wickham's statement of premeditation—which they plainly do. *See Smith*, 572 F.3d at 1343; *Haber v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985).[7]

---

[7] Courts reviewing *Brady* claims relating to significant witnesses do not dismiss them by assuming that the evidence was cumulative or accretive. If the jury credited the witness in any fashion, additional impeachment must be assumed to have been potentially probative. *See, e.g., Jacobs v. Singletary*, 952 F.2d 1282, 1287-88 (11th Cir. 1992) (*Brady* violation where witness's polygraph results that mirrored pre-trial statement provided to defense counsel were withheld, because

(b) Subsequent Testimony Underscores Prejudice to Wickham

Jordan's 2004 testimony that she fabricated her trial testimony concerning Wickham's statement of premeditation confirms the prejudice to Wickham because it demonstrates that defense counsel could have elicited that fact at trial *had he been armed with the prosecutor's February 1988 notes*.

Jordan clearly testified in 2004 that she had lied at trial under pressure from law enforcement:

> 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. And I could do—I couldn't deal with that, so I told them about a plan.

(PCR 4276; *see also* PCR 4277, 4316.) Although the State reprises every instance in which Jordan appeared hesitant or qualified a statement in the face of aggressive cross-examination during her deposition, not one contains a definitive retraction of her earlier testimony. Each statement in which she supposedly "recanted her recantation," (AB 42), occurred at the end of the cross, after a break necessitated by the witness's frustration and emotion. (PCR 4320-21, 4324.) On re-direct, Jordan unambiguously reasserted that she had lied at trial when she testified that Wickham said there might be a killing involved in the robbery. (*See* PCR 4330.)

"examiner's report possessed greater impeachment value"); *Cardona v. State*, 826 So. 2d 968, 974 (Fla. 2002) (withholding of prior inconsistent statements by testifying co-defendant prejudicial even when defendant knew of witness's deal to avoid death penalty).

Jordan also repeatedly emphasized that the police "threatened her with life in prison" and told her that if she "helped them . . . [she] wouldn't do much time." (PCR 4276.) Jordan testified that due to these threats and her fear of the police, she "told them what they really wanted to hear." (PCR 4276.) Her testimony establishes that Jordan knew she had a reason to curry favor with the State and acted on that motivation by inventing a statement helpful to the State's case.

The State also suggests that any favorable impact of Jordan's 2004 testimony is outweighed by the testimony's guilt-reinforcing content, specifically focusing on an alleged threat made by Wickham to Jordan's daughter after the murder. (*See* AB 14, 42.) But Wickham's guilt, and this alleged threat, are irrelevant to the critical issues raised here, which relate to the imposition of the death sentence. Jordan's invented additional testimony is crucial evidence upon which that sentence relies.

(c) 1988 Burglary Conviction

Jordan's undisclosed felony burglary charge also would have been effective impeachment material. The State tries to minimize the prosecutor's false statement to the jury that Jordan had never been in trouble, describing it as being made "in passing." (AB 38-39.) But the credibility of her testimony was crucial to the State's theory that the shooting was premeditated. *See supra* § II.D.1.a. The prosecutor thus gave the jury the entirely false impression just before penalty phase

deliberations that this critical prosecution witness was an innocent young woman with no reason to lie. (R 2015.)

The State makes the remarkable assertion that Wickham has not proven that the date written next to Hankinson's notes on the Presentence Investigation ("PSI") reflects the date he actually made the notes, and thus do not show he was aware of the charge prior to Wickham's trial. (AB 31.) The PSI is dated May 13, 1988, and the date written next to Hankinson's handwriting reads "8/5/88." (2011 SPCR 22.) There is no basis to suggest that Hankinson's notes were made at any time other than August 5, 1988, and certainly not after Wickham's trial had concluded.[8]

Even if one ignores the clear and irrefutable evidence that Hankinson's statement to the jury was not only false but was known to be false when made, Hankinson must in any event be held responsible for constructive knowledge of the circumstances of Jordan's prior crime. The U.S. Supreme Court has long held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437-38. The State cites several cases for the proposition that state officials should not be charged with constructive knowledge of a federal

[8] *See, e.g.*, *Johnson v. State*, 44 So. 3d 51, 60-61 (Fla. 2010) (accepting without question that dates accompanying prosecutor's handwritten notes detailing interviews with jailhouse informant signified dates of interviews).

investigation, and vice versa. (AB 32-35.) But at issue here is the Leon County prosecutor's knowledge of the Hillsborough County burglary prosecution—which must be imputed to him. *See Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992) ("[T]he *state* attorney is charged with constructive knowledge and possession of evidence withheld by other *state* agents, such as law enforcement officers.") (emphasis added). At the very least, the Leon County prosecutor must be charged with constructive knowledge of state agents within his own county, such as the Leon County Sheriff's Office, which arranged for the transport of Jordan out of the county to answer for her burglary charge in Hillsborough County.

The State also argues that because Jordan mentioned during her March 22, 1988, pre-trial deposition that she was accused of breaking and entering a garage, Wickham was on notice of the "potential existence of a Tampa case." (AB 36.) But Jordan's description of the arrest in her pre-trial deposition gives the strong impression that no formal charges were filed and the case was resolved.[9] (2011 SPCR 394 ("Q: Did you go to court . . . ? A: No, sir. . . . Q: Were you supposed to go to court? A: I don't know if I was or not. I stayed there at the address that I

[9] Both cases cited by the State in support of this argument are inapposite. *See Taylor v. State*, 62 So. 3d 1101, 1116–17 (Fla. 2011); *Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1314 (11th Cir. 2006). In each, the defense had knowledge of the precise evidence claimed to have been unlawfully withheld, not mere information that could have led to discovery of additional evidence which was already in the State's possession.

give them and I never did get a paper or nothing.").) In any event, Jordan's brief statement at her deposition did not absolve the prosecutor of his duty to disclose the fact of Jordan's guilty plea. *Sanfilippo*, 564 F.2d at 177-78 (providing witness cooperation agreement to defense does not absolve prosecutor of duty to correct witness's misleading testimony about agreement).[10]

2. Wallace Boudreaux

With respect to Wallace Boudreaux, the State yet again relies heavily on the prosecutor's post-conviction testimony that he did not believe there was a plea agreement with Boudreaux. (AB 45-46.) As discussed above, knowledge of an explicit *quid pro quo* agreement is not required to trigger a prosecutor's disclosure obligation under *Brady*, nor is a claimed subjective belief that no such agreement existed a sufficient basis upon which to deny a *Brady* claim; rather, it is sufficient for Wickham to demonstrate, as he has, that the State possessed, but withheld, evidence of a powerful reason for Boudreaux to curry favor with the State. *See Smith*, 572 F.3d at 1343; *see also Sanfilippo*, 564 F.2d at 178.

Furthermore, the State violated Wickham's right to due process under *Giglio*

[10] To the extent this Court finds that Wickham's trial counsel was on notice of potential impeachment material following the deposition, and failed to investigate and request a related court file, his performance was deficient and Wickham was prejudiced. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (ineffective assistance of counsel to fail to request and examine court file of prior conviction).

when it allowed Boudreaux to give the extraordinarily misleading testimony that he had received no benefit from his cooperation with the State, and that he had instead unilaterally decided "to reveal the truth, no matter what it cost." (R 1308.) In reality, after Boudreaux came forward with his story about Wickham's alleged statements, and despite his multiple escape attempts—one of which included an elaborate plan to murder a prison guard—Boudreaux's most serious charge of conspiracy to commit first-degree murder was *nolle prossed* and he ultimately received a sentence of no more than ten years.[11] (*See* IB 35-37.)

3. John Hanvey

The State blithely asserts there was no prejudice caused by withholding information about Hanvey's plea agreement because the jury was made aware of Hanvey's "basic situation."[12] (AB 51.) Once again, the State erroneously suggests that a modicum of impeachment renders superfluous any undisclosed evidence that could have been used to conduct a thorough, effective cross-examination. That

[11] These facts bear no relation to the cases cited by the State. In *Mansfield v. State*, an informant had mentioned to the jury several pending state charges, but failed to disclose there were pending federal charges. 911 So. 2d 1160, 1176-78 (Fla. 2005). In *Ponticelli v. State*, the State failed to disclose a prosecutor's note from a conversation with the witness's counsel which merely indicated that the witness had "hope for an unguaranteed, unspecified award." 941 So.2d 1073, 1089 (Fla. 2006). By contrast, Boudreaux's "award" was crystal clear: his most serious charge—conspiracy to commit first-degree murder—was dropped.

[12] The violations with respect to Hanvey implicate both *Brady* and *Giglio*, but the basic facts are common to both claims. Thus, they will be discussed together.

simply is not the law under *Brady*. *See supra* § II.B. Wickham had an absolute right to confront his accuser with any information that might render Hanvey less credible or support a motive to lie—in this case, the fact that Hanvey entered into a plea agreement reducing a felony battery charge to a misdemeanor with no jail time after he agreed to testify against Wickham. *Davis*, 415 U.S. at 319.

Further, as to both *Brady* and *Giglio*, the jurors undoubtedly were deceived by Hanvey's extremely misleading and unrebutted testimony that he had "walked away from a work-release center," when in fact he had bludgeoned a guard in order to escape and was charged with aggravated battery with a deadly weapon. (PCR 4477-79, 4486.) The contention that the record lacks support for the assertion that Hanvey beat the victim in the head numerous times is flatly wrong. (AB 51.) The complaint states that Hanvey "did strike the victim *about the head five times* with a *heavy* iron skillet" (emphasis added). (PCR 4486; *see also* PCR 4038.)[13]

The State also asserts without citation that "the details of Hanvey's case . . . appears to have been a public record." (AB 52.) Regardless of whether some details of Hanvey's violent escape may somehow have been available to Wickham

[13] The State also opines that multiple blows to the head might not have been proven at a trial, (AB 51), essentially conceding that these troubling facts would have damaged Hanvey's credibility. Even if those disturbing details were not proven at trial, however, they still are material because they show the seriousness of the charges Hanvey *was facing at the time* he was recruited as a State's witness, and hence, his motive to assist the State.

under Florida law governing public access to court records, "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).[14]

Finally, the State contends that Hanvey's astonishing 24 convictions for forgery were "immaterial" because Hanvey admitted to the jury he was incarcerated and charged with battery and escape. (AB 52.) That argument ignores the special importance the law places on crimes of dishonesty when impeaching a witness. *See, e.g.*, § 90.610(1), Fla. Stat. (forgery misdemeanors admissible as impeachment material; only felonies admissible for other crimes); *State v. Riechmann*, 581 So. 2d 133, 140 (Fla. 1991) (prior convictions for forgery and solicitation of perjury properly admitted to impeach credibility of testifying defendant).[15] The State's argument also ignores that, as with the troubling details

[14] Again, even if Padovano could have discovered this information, Wickham's *Brady* claim would merely become an ineffective assistance of counsel claim. *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996) ("To the extent . . . Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel. . . ."); *see also Smith v. Wainwright*, 799 F.2d 1442, 1444 (11th Cir. 1986).

[15] The State also focuses on Padovano's testimony that he did not recall being provided with a record of Hanvey's 24 forgery convictions. (AB 52-53; PCR 4038-39 ("I just can't say. I don't recall it, no.").) There is no evidence that Padovano was provided with the information, and in his 2010 testimony, he stated

of Hanvey's escape, the 24 forgery convictions demonstrate the seriousness of the situation in which Hanvey found himself when he was recruited to testify against Wickham, thus magnifying his motive to cooperate.

4. Michael Moody

Michael Moody's post-conviction admission that he lied at trial establishes the inadequacy (under *Brady*) of the original trial cross and the falsehood of Moody's prior statements (under *Giglio*). Moody clearly testified that Wickham *never stated* he killed Fleming because he did not want to leave a witness, (2011 PCR Vol. 14, Tr. 418), and he confirmed it on cross:

> Q: [Y]ou would be falsely adding on something that *he didn't want to leave a witness?* . . . Why would you have thought those words were important?
>
> A: Really didn't think those words were important.
>
> Q: So you would have made up a lie about something you didn't think was important?
>
> A: Yes, sir.

(2011 PCR Vol. 14, Tr. 422 (emphasis added).)

The State also contends that Moody's statement, "I think I would have said anything just to—my wording," (2011 PCR Vo. 14, Tr. 422),[16] indicates he

---

that had impeachment evidence about the full extent of a witness's criminal history been available, he would have used it. (*See* 2011 PCR, Vol. 11, 136-39.)

[16] The state erroneously quotes this passage as "I think I would have said anything to—my wording." (AB 55.)

"suggested that he merely changed Wickham's wording." (AB 55.) When read in conjunction with the preceding sentence, "I was 21 years old," it is clear that Moody meant to convey that, as a young man in trouble, he would have testified to any fact—true or false—which he believed would help him.

The State further suggests that Moody was telling the truth when he testified at trial that the ten-year sentence he received was the maximum for "the offense" with which he was charged, (AB 57), although the State fails to specify the "offense" to which Moody ostensibly was referring. When examined in context, it is apparent that he was asked whether he received the maximum jail time allowable for *all* of his charges relating to violation of probation and stolen property:

> Hankinson: What did you get sentenced to?
> Moody: Three ten-year sentences and eight five year sentences, running concurrent.
> Hankinson: So you essentially got a ten-year sentence?
> Moody: Ten-year sentence.
> . . .
> Padovano: What is the maximum penalty for the offense you were charged with?
> Moody: Ten years.
> Padovano: You got the maximum?
> Moody: I think I did.

(R 1618.) The fact that Moody initially was sentenced to 20 years establishes conclusively that this statement was false. (IB 39-40.)

Moody's false and misleading statement that he received the maximum sentence prejudiced Wickham. After delivering damaging testimony in the State's

rebuttal case, Moody was then permitted to disingenuously deny receiving any benefit whatsoever from the State. Although the State casually dismisses Wickham's *Giglio* claim by asserting that the jury had the "pertinent facts" about Moody, (AB 56), in reality, the jury remained ignorant of the most pertinent fact of all: Moody received a substantial benefit for his service to the State.

E. When Assessed Cumulatively, the *Brady/Giglio* Violations Demonstrably Warrant Resentencing

Cumulative evaluation is a bedrock principle of *Brady* and *Giglio* analysis. *See Kyles*, 514 U.S. at 436-37 (*Brady* material must be "considered collectively, not item by item").[17] The multiple *Brady/Giglio* violations paint a stark and systematic portrait of false and misleading testimony by witnesses under pressure to curry favor with the State, whose full criminal history and plea negotiations were never known to the jury. Their testimony, unimpeached by the withheld evidence, provided the critical and otherwise missing evidence for the State of Wickham's alleged state of mind—testimony that was not provided by *any other witnesses*.

---

[17] *See also Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1351 (11th Cir. 2011) ("[W]e must also consider the cumulative effect of the false evidence for the purposes of materiality."); *Smith*, 572 F.3d at 1334 (cumulative consideration requires adding up the force of all undisclosed evidence, weighing it against the totality of evidence introduced at the trial); *Floyd v. State*, 902 So. 2d 775, 788 (Fla. 2005) (vacating capital conviction on basis of cumulative effect of withheld evidence); *Mordenti v. State*, 894 So. 2d 161, 168 (Fla. 2004) (same).

Because cumulative consideration of materiality must focus on the combined effect on the jury's determination, *supra* § II.B, a post-conviction judge's credibility findings concerning particular testimony are not relevant in the materiality calculus. *Porter*, 130 S. Ct. at 453-54 (considering together effect of several potentially mitigating pieces of evidence not brought to jury's attention); *Kyles*, 514 U.S. at 449 n.19; *Evans v. Sec'y, Dep't of Corr.*, 681 F.3d 1241, 1266 (11th Cir. 2012), *reh'g en banc granted*, 2012 WL 2866242 (July 13, 2012); *see also Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (resolving uncertainty as to effect of withheld evidence on jury in favor of *Brady* petitioner).

III. COUNSEL'S INEFFECTIVE ASSISTANCE CLEARLY ENABLED THE DEATH SENTENCE

The record demonstrates how remarkably little Padovano did to prepare for a capital trial, particularly its near-inevitable penalty phase. Considered in its totality, the record establishes far more than a "reasonable probability" of a different outcome in the penalty phase had Padovano competently represented Wickham. *Sears v. Upton*, 130 S. Ct. 3259, 3267 (2010). Had constitutionally required procedures been followed, the aggravating evidence would have been substantially weaker than that before the trial court, and the mitigating evidence far more compelling than described by this Court on direct appeal. *Id.* at 3266-67 (courts must "'speculate' as to the effect of the new evidence—regardless of how much or how little evidence was presented during the initial penalty phase").

To assess whether defense counsel's deficient performance prejudiced Wickham, this Court must "consider the totality of the available mitigating evidence—both that adduced at trial, and the evidence adduced in [post-conviction]—and reweig[h] it against the evidence in aggravation."[18] *Porter*, 130 S. Ct. at 453-54 (quotations omitted). That standard was not applied by the post-conviction court. Instead, it dismissed outright the post-conviction mitigating evidence as cumulative, without first reweighing the totality of the mitigation evidence against the aggravating evidence. Order at 27-28. The result was an unreasonable application of *Strickland*. *See, e.g.*, *Sochor v. Sec'y, Dep't of Corr.*, No. 10-14944, 2012 WL 2401862 at *12 (11th Cir. Jun. 27, 2012) (finding it unreasonable under *Strickland* to "fail[] to consider or discount[] entirely" mental health evidence presented in post-conviction).

[18] Accordingly, the State's assertion that Wickham's claim that additional mitigating evidence would have negated evidence of aggravation is barred because no such argument was made in Wickham's 3.850 motion, (AB 81–82), is without basis. When the mitigating evidence that Wickham was under extreme mental and emotional disturbance at the time of the offense and had a substantially impaired capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, is reweighed against the aggravating evidence, it clearly also weakens the CCP and avoid arrest aggravators. *See Ferrell v. Hall*, 640 F.3d 1199, 1234-35 (11th Cir. 2011) (frontal lobe brain damage and temporal lobe epilepsy "measurably weakens" aggravating circumstances); *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988) (mental health evidence "not only can act in mitigation," it can also "significantly weaken the aggravating factors").

A. Trial Counsel's Performance Was Deficient

1. Counsel Spent Unreasonably Little Time on the Case.

"No one's conduct is above [*Strickland's*] reasonableness inquiry." *Chandler v. United States*, 218 F.3d 1305, 1316 n.18 (2000) (recognizing that "an experienced lawyer may, on occasion, act incompetently"). Although Padovano may ordinarily have been a good lawyer, in this case, the record is clear: he failed to conduct a timely or adequate investigation into Wickham's mental capacity, or the impact of his childhood on that capacity. As a result, he was unable to present evidence that would have established that Wickham's brain disorders were critical factors bearing on his responsibility for his actions, strongly mitigating against the death penalty. The failure to present this evidence also "precluded this Court from making a fully informed decision regarding the disposition of this case on direct appeal." *Robinson v. State*, No. SC09-1860, 2012 WL 2848697 at *10 (Fla. Jul. 12, 2012) (citation omitted).

There is no secret about the cause of Padovano's deficient performance: he was focused on his election campaign, and as an inevitable result he spent remarkably little time on the case—as starkly demonstrated by his time records—until he succeeded in his election shortly before trial. (IB 5-8.) The State suggests that this Court should ignore the time records and defer to Padovano's 2010 evidentiary hearing testimony—provided more than 20 years after trial—that he

had done a "lot of things [for Wickham's case] that were not written down for billing," such as conversations he recalls having with Dr. Carbonell, the defense psychologist, in a grocery store parking lot and times when he "woke up 'in the middle of the night thinking about the case.'" (AB 70-71.) This argument misses three points. *First,* Padovano testified that his bill is the "best record" of his time spent on Wickham's case, (2011 PCR Vol. 11, Tr. 39), as indicated by the care with which he noted (and was paid for) even minuscule amounts of time, (R 242-44). *Second*, the State never explains what Padovano actually did do to effectively represent Wickham during the negligible time he did spend working on the case. (*See* IB 5-10.) *Third*, any unrecorded time Padovano spent thinking about the case "in the middle of the night" or in a parking lot could not possibly cure his failure to conduct a reasonable investigation. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) ("strategy" cannot excuse trial counsel's conduct in the absence of professionally requisite steps to *learn the facts* upon which to decide appropriate strategy).

2. Trial Counsel Ignored Necessary Next Steps

From the outset of his representation, Padovano had pages of psychiatric notes containing conflicting diagnoses as well as records showing a lengthy history of institutionalization in substandard mental health facilities and high doses of antipsychotic medication administered during Wickham's critical developmental years. Although these records contained notes of a medical doctor (a psychiatrist),

Padovano hired Dr. Carbonell, a non-medical doctor (a clinical psychologist) to interpret the records and evaluate his client. When she reported that multiple tests showed some form of organic brain damage, and that Wickham had self-reported multiple head injuries and black-outs, Padovano failed to further investigate this information. Any reasonable attorney faced with the evidence Padovano had from the outset would have ensured his client was evaluated by a medical doctor or expert specializing in the brain—a critical and obvious next step. *See Ferrell*, 640 F.3d at 1227.

An exchange at trial reveals that Padovano was aware of the need to obtain additional medical evaluation in order to reach a full and proper diagnosis:

> Padovano: [Y]ou are not a medical doctor, are you?
>
> Carbonell: Absolutely not.
>
> Padovano: And the only way for us to be really positive as to the degree of brain damage this defendant has would be to have an EEG run. Is that correct?
>
> Carbonell: Absolutely not.
>
> Padovano: That's not correct?
>
> Carbonell: No sir . . . EEGs aren't particularly that good . . . Probably the most sensitive indicators of brain damage are neuropsychological testing.

(R 1536-37.) Yet, no neuropsychological testing was conducted. (*See* IB 9.) In addition, without an appropriate medical expert, Padovano was unable to rebut the State expert's incorrect diagnosis that Wickham suffered from anti-social personality disorder, which the State relied upon to rebut the presence of mitigating

circumstances bearing on Wickham's ability to premeditate. (IB 25-26, 66.)

Compounding this failure is the fact that the Categories Test—one of the "single best tests for brain damage"—was not administered until the day trial began. (*See* R 1472-73.) Waiting until the day of trial to administer the "single best" screening test for brain damage—when Padovano knew months earlier his client was likely brain impaired—is objectively unreasonable and inexcusable. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (ineffective assistance where counsel did not begin preparing for penalty phase until a week before trial).

Further, rather than elicit testimony about Wickham's history of deprivation and abuse from those who directly witnessed it—Wickham's siblings—Padovano relied on Dr. Carbonell to present much of this evidence. (R 1489-93.) This too was unreasonable and deficient. (IB 67-68.) *See Parker v. State*, 3 So. 3d 974, 985 (Fla. 2009) (criticizing counsel for presenting information about client's childhood and background via hearsay testimony of investigators).[19]

---

[19] Moreover, most of this evidence was presented in the guilt phase of trial. (*See* R 1382-90 (Bird), 1394-1402 (LaValley), 1462-1512 (Carbonell).) The only witness to testify on Wickham's behalf in the penalty phase was Dr. Carbonell, whose testimony was dismissed by the trial court as "conclusory." (R 250.) Contrary to the State's assertion, (AB 5, 74-75), presenting undeveloped mitigating evidence in the guilt phase with the expectation that the jury will "consider and give [it] effect," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), in the penalty phase undermines the very purpose of a bifurcated trial.

B. Wickham Was Prejudiced By Counsel's Failure To Present Mitigating Evidence of the Impact of His Brain Disorders

That Padovano's deficient performance prejudiced Wickham is made evident in Padovano's penalty phase closing argument and the trial court's sentencing findings. When Padovano admitted to the jury that "*we 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), he effectively admitted that there was *no evidence* of a correlation between Wickham's brain disorders and his behavior on the day of the crime. In its sentencing findings, the trial court noted the absence of a direct correlation between Wickham's impairments and their effect on his behavior: the "only testimony respecting this mitigating circumstance [that the crime was committed under the influence of extreme mental or emotional disturbance] was the *conclusory* opinion of Dr. Joyce Carbonell. . . . Dr. Carbonell failed to identify specific factors indicated [sic] that at the time of the homicide the Defendant was extremely disturbed." (R 250-52 (emphasis in original).) The trial court also found that Padovano failed to establish that Wickham's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, again referencing Dr. Carbonell's "conclusory" testimony. (R 251.) And the court found that the State's expert (who rendered a patently incorrect diagnosis) was more credible. (R 251.)

Had a psychiatrist and/or neuropsychologist been asked to examine

Wickham, such an expert would have discovered the very evidence that, as proven post trial, showed the direct correlation the jury and trial court needed in order to find Wickham less culpable and deserving of a life sentence. This is simply not a case in which post-conviction counsel merely found additional experts who could testify "more favorably." (AB 80.) Rather, trial counsel inexplicably refused to retain a professional capable of identifying the location of Wickham's brain damage—the frontal lobe and temporal lobe—and thereby was unable to present evidence concerning how damage to those specific areas of the brain directly impact Wickham's ability to premeditate and conform his conduct to the law. (IB 21-29, 64-66.) *See Robinson*, 2012 WL 2848697, at *6 (post-conviction evidence "not merely more detailed or cumulative," but "new evidence" that was far more "persuasive"). Further investigation of Wickham's background also would have provided additional mental health evidence to negate the State's evidence in aggravation.[20] *See, e.g.*, *Ferrell*, 640 F.3d at 1234-35 (frontal lobe

[20] The cases cited by the State, (AB 80), are not factually analogous. *See Wyatt v. State*, 78 So. 3d 512, 529, 532 (Fla. 2011) (strategic decision not to present expert testimony because would have opened door to harmful evidence); *Buzia v. State*, 82 So. 3d 784, 791 (Fla. 2011) (defense expert informed trial counsel that defendant had no indication or history of cognitive impairment and did not recommend further neurological testing); *Mendoza v. State*, 87 So. 3d 644, 658-59 (Fla. 2011) (defendant examined by neuropsychologist); *Peede v. State*, 955 So. 2d 480, 489, 493 (Fla. 2007) (defendant examined by medical doctor and uncooperative in providing names of necessary mitigating witnesses).

brain damage and temporal lobe epilepsy "measurably weakens" aggravating circumstances); *Crook v. State*, 908 So. 2d 350, 358 (Fla. 2005) (same); note 18, *supra*.

The State's glib assertion that "[when] Wickham wants to commit crimes, Wickham is smart enough," (AB 82), displays a fundamental misunderstanding of the effects of brain impairment and mental illness on an individual's behavior. Post-conviction expert testimony compellingly demonstrates that Wickham's brain disorders had a direct impact on his actions on March 5, 1986, mitigating his culpability for the offense. Padovano could have used such testimony to explain that critical impact to the judge and jury—had he conducted a reasonable investigation.

IV. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE TRIAL COURT'S FAILURE TO WEIGH AGGRAVATING AND MITIGATING FACTORS PRIOR TO SENTENCING

The State's contention that Wickham "affirmatively waived any requirement that the Court specify written reasons prior to imposing sentence," (AB 84), ignores the fact that Wickham had an unwaivable constitutional right to an independent, reasoned judicial consideration of the aggravating and mitigating factors and a determination of whether death was the appropriate penalty. *See State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973); (HP 9-14); (Habeas Reply 1-2).

To the extent this Court finds Padovano did waive Wickham's rights, that

waiver was deficient and prejudiced Wickham. Prior to Wickham's trial, this Court held that written sentencing findings must be contemporaneous with the pronouncement of a death sentence. *Grossman v. State*, 525 So. 2d 833, 841 (Fla. 1988). The trial record indicates that immediately after the Clerk read the jury's split recommendation of death, the judge announced he was "prepared to proceed to sentencing," at which point the prosecutor sought to establish "a waiver of the requirement of any written—." Padovano interrupted, stating he "spoke with Mr. Wickham about it and he concurs in that recommendation." (R 2044-45.) This purported waiver of *Grossman* was never verified with Wickham by the trial court or otherwise put on the record. [21] Given that sentencing occurred immediately after the jury's recommendation, any waiver could only have occurred *before* the jury's verdict, and thus, *before* Wickham's legal position was inexorably changed.

There was no strategic justification for such a waiver. The trial court proceeded to impose a death sentence without making any oral or written findings, and later adopted the State's sentencing memorandum virtually in full. (*See* IB 80-81; HP 9-14; Habeas Reply 1-6.) As such, Wickham never received his constitutionally guaranteed independent judicial consideration of the

[21] The substantial doubts about Wickham's competency render any such waiver all the more suspect. (*See, e.g.*, R 1034-35 (Padovano informed the judge it took 45 minutes to explain a routine matter to Wickham and asked to waive consent requirement).)

appropriateness of a death sentence, and he indisputably was prejudiced as a result.

V. WICKHAM WAS TRIED WHILE INCOMPETENT AND DEPRIVED OF A COMPETENCY HEARING IN VIOLATION OF DUE PROCESS

Contrary to the State's position, (AB 90-91), the post-conviction court's orders denying Wickham's competency claims are not due any deference; they were incorrect as a matter of law. (IB 87-88, 90, 94-95.)

The State's discussion of the merits of Wickham's competency claims is also erroneous, finding instances of Wickham's erratic and uncontrolled outbursts at trial to be evidence that he was belligerent, rather than incompetent. (AB 96.) It conveniently ignores the full range of signs of incompetence that Wickham exhibited prior to and during trial, which demonstrate that he decompensated in the months leading to trial. (IB 10-11.) *See Wright v. Sec'y, Dep't of Corr.*, 278 F.3d 1245, 1259 (11th Cir. 2002) ("The best evidence" of incompetence is how petitioner "related to and communicated with others" around the time of the trial.). Padovano described in stark terms the extent of Wickham's decompensation and Padovano's inability to communicate with Wickham before and during trial, including that Wickham was "barely functioning," "had almost 'zero' ability to help with his defense," and was "totally unmanageable" to the point that Padovano considered the trial court's insistence on getting "a personal waiver on everything

from [Wickham]" as "absurd."[22] (PCR 6826; IB 10-12.)

Wickham's behavior is consistent with post-conviction expert testimony about his frontal lobe brain damage, which causes "[b]ehavioral inappropriateness, inability to effectively plan . . . [t]rouble anticipating consequences of actions, [and] difficulty handling novel situations." (PCR 3689; IB 84-87). As a result, all of the post-conviction experts testified that his ability to understand the nature of the proceedings was probably severely compromised.[23] (IB 86.)

Given the extensive and multi-faceted evidence of incompetence, the State's comparison of Wickham's case with *Wright v. Secretary, Department of Corrections*, (AB 93-95), is entirely misplaced. Not only was the *Wright* court reviewing a state court judgment under the more deferential "unreasonable application" standard of 28 U.S.C. § 2254(d)(1),[24] the court found "plenty of

---

[22] These statements are recorded in Anne Jacobs O'Berry's notes, and are corroborated by her testimony, (PCR Vol. 14, Tr. 437-38), as well as Dr. Bonny Forrest's notes and testimony, (PCR 6833-41; 2011 PCR Vol. 12, Tr. 248-50).

[23] Further, Leon County Jail records from August 1988 describe Wickham's "frozen stare," (PCR 6823), strongly suggesting that Wickham's temporal lobe epilepsy was fully manifest leading up to trial. (IB 85-86.) Similarly, the "chronic deficits" caused by Wickham's residual schizophrenia would have had a detrimental effect on his behavior, decision-making, and brain function. (IB 85.)

[24] *Compare Wright*, 278 F.3d at 1256 *with* (IB 42-43); *see also James v. Singletary*, 957 F.2d 1562, 1574, n.18 (11th Cir. 1992) ("As competency to stand trial constitutes a mixed question of law and fact," such a finding would "not have been entitled to a presumption of correctness.").

unrebutted testimony indicating that . . . Wright was mentally competent during the period immediately leading up to the trial." *Wright*, 278 F.3d at 1257 (Wright conducted legal research, drafted legal documents, provided legal advice to other inmates, had normal discussions, read and watched TV, played cards, and discussed "plans to learn Spanish"). This stands in blatant contrast to Wickham. (*See, e.g.*, PCR 6826 (Padovano stated that Wickham had "the mentality of a little kid" whose "little social ability . . . to control himself" was "destroyed" by the "stress of the trial"); PCR 6823-24 (Wickham behaved irrationally and could barely take care of himself in jail).)

Wickham's competency claims are properly preserved. Claim II(b) of the 3.850 motion specifically stated, "HE WAS INCOMPETENT TO STAND TRIAL," and contained nearly eight pages describing Wickham's mental incompetence and several pages of underlying facts, including the findings of two mental health experts that Wickham had not been competent to stand trial in 1988. (*See* PCR 2766-2773, 2771.) Thus, even if a substantive competency claim raised in "piecemeal fashion" could be procedurally barred, as suggested by the State,[25]

[25] The State purports to quote *Thomas v. Wainwright*, 788 F.2d 684, 688 (11th Cir. 1986), to carve an exception to the rule announced in *Adams v. Wainwright*, 764 F.2d 1356, 1359 (11th Cir. 1985), that substantive competency claims cannot be procedurally defaulted. (AB 92-93.) But the language quoted by the State is actually from *Johnston v. Singletary*, 162 F.3d 630, 637 (11th Cir. 1998), which noted the lack of "a clear standard" in *Thomas* and addressed the merits of the

Wickham has not "attempted to manipulate the appeal or post-conviction process or to abuse the writ by invoking the competency issue in a piecemeal fashion," *Johnston v. Singletary*, 162 F.3d 630, 637 (11th Cir. 1998), having consistently raised the issue since his initial 3.850 motion.[26] (*See, e.g.*, PCR 3113.)

Finally, if Wickham's substantive competency claim were deemed to be procedurally barred, such a bar would contravene his Fourteenth Amendment rights under the U.S. Constitution. (*See* IB 88.)

VI. **CONCLUSION**

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

---

substantive competency claim because, as here, Johnston had "raised competency consistently since his initial motion for state post-conviction relief." *Id*.

[26] In fact, because the post-conviction court found that Judge Dekker's *Huff* hearing order denied Wickham's substantive competency claim, and refused to address it, Order at 5, this appeal is the first time Wickham could next raise the issue. (Wickham also raised the issue on appeal in 2007. *See* Initial Brief of Appellant in Case No. SC05–1012, served on June 18, 2007, at 44, 56-57.)

CERTIFICATE OF SERVICE

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

Stephen R. White, Esq.
Office of the Attorney General
107 W. Gaines Street
Tallahassee, Florida 32399-1050

Eddie Evans, Esq.
Assistant State Attorney
301 S. Monroe Street
Tallahassee, Florida 32399-2550

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: August 9, 2012
New York, New York

Respectfully submitted and served,

By: _____

Martin J. McClain
McClain & McDermott, P.A.
141 N.E. 30th Street
Wilton Manors, Florida 33334
(305) 984-8344

Frederick T. Davis
Kristin D. Kiehn
Corey S. Whiting
Elizabeth A. Kostrzewa
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

COUNSEL FOR APPELLANT