IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-___

JERRY MICHAEL WICKHAM,

Petitioner,

vs.

KENNETH S. TUCKER,
Secretary, Florida Department of Corrections

Respondent.

_____/

# PETITION FOR WRIT OF HABEAS CORPUS


Frederick T. Davis
Kristin D. Kiehn
Corey S. Whiting
Elizabeth A. Kostrzewa
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 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

**Page**

**FEDERAL CASES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**



**STATE CASES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**STATE STATUTES AND RULES**

## INTRODUCTION

Numerous errors were committed in the appeal of the conviction and death sentence of petitioner, Jerry Michael Wickham, a brain-damaged schizophrenic with an I.Q. of 85. These errors include the failure of Wickham's appellate counsel to raise a number of meritorious issues on appeal, as well as claims concerning the fundamentally unfair nature of Wickham's trial and the deprivation of due process he suffered—and continues to suffer—as a result.

Reversible error underpinned Wickham's conviction and sentence of death. In sentencing Wickham, the trial court failed to independently weigh aggravating and mitigating circumstances and improperly predicated the prior violent felony aggravator on two ineligible convictions. Wickham was tried despite clear signs of incompetency, which were not properly evaluated at the time of trial and no competency hearing was held. Wickham's trial was marred by misconduct during the jury selection process and by the prejudicial atmosphere in the courtroom during his trial.

All of these errors were apparent in the record, yet none was raised in Wickham's appeal. Had these claims been raised, a majority of this Court would have found merit in Wickham's appeal and his sentence of death would not have stood. As a result, appellate counsel's failure to raise these meritorious issues indisputably prejudiced Wickham.

## JURISDICTION

"The writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. The writ is an original proceeding in this Court, Art. V, § 3(b)(9), Fla. Const.; Fla. R. App. P. 9.030(a)(3), and is governed by Florida Rule of Appellate Procedure 9.100.

## STATEMENT OF THE CASE

On October 22, 1987, Wickham was indicted by a Leon County grand jury on charges of first-degree murder, armed robbery, and possession of a firearm by a felon. (R 1–2.)[1] From November 28 through December 8, 1988, Wickham was tried in Florida's Second Judicial Circuit before the Honorable Charles McClure. Wickham was represented by Philip Padovano (now Judge Padovano of the First District Court of Appeals), who was appointed on April 21, 1988, after three other attorneys withdrew due, in part, to the difficulty they encountered in working with a schizophrenic. (R 81, 97, 111, 113.) Defense counsel's motion for a change of venue, based on a prejudicial atmosphere and heavy media coverage in the relatively small community of Leon County, was denied. (R 912–914.)

[1] Citations to the record 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.

Defense counsel presented an insanity defense at Wickham's trial. On December 7, 1988, following three hours and twenty-five minutes of deliberation, the jury found Wickham guilty of first-degree murder and armed robbery. (R 160–63, 1863–64.)

The day after the guilty verdict, on December 8, 1988, the court proceeded to the penalty phase. After closing statements, the sentencing judge instructed the jury to weigh the aggravating and mitigating factors and render an advisory sentence. After two and a half hours of deliberations, by a vote of 11 to 1, the jury recommended a death sentence for Wickham. (R 164, 2043–44.) Immediately thereafter, the court sentenced Wickham to death without making any findings as to the presence or absence of aggravating or mitigating factors. (R 2046.)

Nearly two weeks later, on December 19, 1988, after receiving a sentencing memorandum from the State, the court issued a sentencing order that adopted the State's memorandum nearly verbatim. (R 228–35, 246–53.) The Order listed six aggravating factors: (*i*) the crime was committed "for the purpose of avoiding or preventing a lawful arrest;" (*ii*) the crime was committed in a "cold, calculated and premeditated manner;" (*iii*) the crime was "especially heinous, atrocious, or cruel;" (*iv*) the crime was committed by a person under a sentence of imprisonment; (*v*) Wickham had previously been convicted of a violent felony; and (*vi*) the crime was committed in the course of a felony—an armed robbery. (R 247–50.) The court

specifically found that no mitigating circumstances had been demonstrated. (R 252.) With respect to the separate armed robbery count, the sentencing judge departed from the guidelines, which he indicated provided for a term of imprisonment between 22 and 27 years, and instead sentenced Wickham to life in prison. (R 2047.)

On direct appeal, Wickham's appellate counsel argued that the trial court had committed seven errors.[2] A divided Florida Supreme Court affirmed

---

[2] Appellate counsel raised the following issues: (*i*) the trial court erred in precluding Wickham's counsel from asking his expert, Dr. Carbonell, about his abnormal mental condition in relation to his ability to form a specific intent to kill within the context of an insanity defense, and violated Wickham's right to present a defense under the Sixth and Fourteenth Amendments; (*ii*) the trial court erred in admitting evidence of an attempted jail escape by Wickham because he had not escaped and any attempted escape would not show consciousness of guilt for the charged crimes, and as a result such evidence was inadmissible and prejudicial; (*iii*) the trial court erred in finding the "heinous, atrocious, or cruel" aggravator because the victim died quickly and there was no evidence that he knew of his impending death or that Wickham prolonged his suffering out of sadistic pleasure; (*iv*) the trial court erred in finding the "cold, calculated and premeditated" aggravator because Wickham did not have any careful plan or prearranged design to kill and Wickham at least had a pretense of self-defense because he allegedly thought the victim was reaching for a gun when he shot him; (*v*) the trial court erred in failing to find any mitigation when it ignored evidence of Wickham's brain damage, his personality disorder, and his alcoholism; (*vi*) the trial court erred in failing to find any mitigation from Wickham's cultural deprivation, severe abuse by alcoholic parents as a child, and prolonged childhood institutionalization in two mental hospitals where he was diagnosed as schizophrenic; and (*vii*) the death penalty was disproportionate because this Court has reduced death sentences to life imprisonment previously for factors present in Wickham's case, including Wickham's brain damage and mental problems, which were aggravated by his alcoholism and beer consumption the day of the murder, and the fact that the

Wickham's conviction and sentence. In its December 12, 1991 ruling, this Court concluded that the trial court erred in finding that the killing was "heinous, atrocious, or cruel," and erred in failing to identify and then weigh any mitigating evidence. *Wickham v. State*, 593 So. 2d 191, 193 (Fla. 1991). But these errors were ultimately found to be "harmless beyond a reasonable doubt." *Id*. at 194.

On May 22, 1995, Wickham filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 ("3.850 Motion"), which he amended on March 31, 2003. (PCR 2878.) The Circuit Court summarily denied 13 of the 21 claims raised in the 3.850 Motion by order dated January 30, 2004. (PCR 3119.) Following an evidentiary hearing held June 2–7, 2004, the Circuit Court denied the remainder of the claims by order dated January 13, 2005. (PCR 7723–63).

Wickham appealed to this Court. This Court reversed the Circuit Court and remanded Wickham's case for a new evidentiary hearing, finding that all judges in the Second Judicial Circuit should have been recused from hearing Wickham's 3.850 Motion due to Judge Padovano's position on Florida's First District Court of Appeals. *See Wickham v. State*, 998 So. 2d 593 (Fla. 2008).[3]

---

murder was an unplanned, simple felony murder without torture, that lasted only seconds.

[3] Wickham's first petition for a writ of habeas corpus, Case No. SC07–1137, filed with his appeal of the circuit court's 2005 denial of his 3.850 motion, was dismissed without prejudice to re-file in light of this Court's remand for a new evidentiary hearing. *Wickham*, 998 So. 2d at 597.

On remand, a second evidentiary hearing was held on April 19–20, 2010, before Judge Willard Pope of the Fifth Judicial Circuit. (2011 PCR, Vols. 11–14.) By order dated April 7, 2011, Judge Pope denied all of Wickham's claims. (2011 PCR 822–86.) Wickham's appeal from the denial of 3.850 relief is currently pending before this Court in Case No. SC11–1193 ("3.850 Appeal").

## STATEMENT OF THE FACTS

The facts relevant to Wickham's claims for habeas corpus relief are set forth below in connection with the individual claims.

## GROUNDS FOR HABEAS CORPUS RELIEF

### I. APPELLATE COUNSEL FAILED TO RAISE ON APPEAL A NUMBER OF MERITORIOUS ISSUES THAT WARRANTED REVERSAL OF WICKHAM'S CONVICTION AND/OR SENTENCE OF DEATH.

As this Court has recognized, its "judicially neutral review" of death penalty cases is "no substitute for the careful, partisan scrutiny of a zealous advocate," whose role it is to "discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process." *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985). It is for this reason that a defendant has a constitutionally guaranteed right to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985); *see also Ferrell v. Hall*, 640 F.3d 1199, 1236–40 (11th Cir. 2011). Unfortunately for Wickham, his appellate counsel

rendered deficient performance by failing to raise several meritorious constitutional errors that undermined confidence in the outcome of Wickham's appeal. As a result, Wickham was deprived of his right to due process. *Wilson*, 474 So. 2d at 1165; *see also Ferrell*, 640 F.3d at 1236–40.

The *Strickland v. Washington* test for ineffective assistance of counsel, which requires a two-pronged showing that a counsel's performance was deficient and that the deficiency was prejudicial, also applies to allegations of appellate counsel's ineffectiveness. *See, e.g.*, *Eagle v. Linahan*, 279 F.3d 926, 938 (11th Cir. 2001). To demonstrate deficiency, a petitioner must show that counsel's performance "fell below an objective standard of reasonableness." *Eagle*, 279 F.3d at 938–39 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 943 (quoting *Strickland*, 466 U.S. at 694). Although appellate counsel need not raise every conceivable non-frivolous issue, where trial errors are "obvious on the record," appellate counsel is ineffective by failing to raise them. *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987); *see also Eagle*, 279 F.3d at 943; *Wilson*, 474 So. 2d at 1163-64.

The meritorious claims that were obvious on the record of Wickham's trial, but which his appellate lawyers failed to raise, and which, had they been raised on appeal, would likely have changed its outcome, include the following:

1. The trial court abdicated its responsibility to issue independent findings weighing aggravating and mitigating circumstances prior to sentencing Wickham to death, in clear violation of Florida law;

2. Two of Wickham's prior convictions were improperly admitted and relied upon as support for the prior violent felony aggravator, thus critically altering the balance on the scale between aggravation and mitigation;

3. Wickham was tried notwithstanding his incompetence to stand trial;

4. The trial proceedings occurred in a highly prejudicial atmosphere;

5. The trial court failed to inquire into misconduct during jury selection; and

6. The trial court failed to provide written reasons for departing from the sentencing guidelines in sentencing Wickham to life imprisonment for armed robbery.

Given the serious, reversible errors that appellate counsel did not raise, there is more than a reasonable probability that the outcome of the appeal would have been different had counsel done so. As a result, Wickham's conviction and sentence of death cannot stand. At the very least, a new direct appeal with new appellate counsel should be ordered.

### A. Appellate Counsel Unreasonably Failed To Challenge The Trial Court's Imposition Of The Death Sentence Without Weighing Or Making Specific Written Findings As To Aggravating And Mitigating Factors.

The trial court committed fundamental error by sentencing Wickham to death without independently weighing aggravating and mitigating circumstances and by failing to submit contemporaneous written sentencing findings. These errors go to the heart of the due process required by the Eighth and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 9 and 17 of the Florida Constitution, and are obvious from even a cursory review of the trial record. The failure of appellate counsel to raise these errors on direct appeal was constitutionally deficient performance. Had appellate counsel properly raised these issues, this Court almost certainly would have vacated Wickham's death sentence pursuant to established law and its handling of similar cases. As a result, appellate counsel's deficient performance prejudiced Wickham.

At the time of Wickham's trial, Florida law unequivocally mandated that a court imposing a sentence of death identify and *independently* weigh aggravating and mitigating circumstances before imposing sentence. *Patterson v. State*, 513 So. 2d 1257, 1261–63 (Fla. 1987). Trial courts were barred from delegating this responsibility to prosecutors. *Id.* Florida law also unequivocally required that the trial court "set forth in writing its findings . . . that there are insufficient mitigating circumstances to outweigh the aggravating circumstances," § 921.141(3), Fla. Stat.

(1988), and that these written findings "be prepared *prior* to the oral pronouncement of sentence for filing concurrent with the pronouncement." *Grossman v. State*, 525 So. 2d 833, 841 (Fla. Feb. 18, 1988) (emphasis added), *overruled on other grounds by Franqui v. State*, 699 So. 2d 1312, 1319 (Fla. 1997); *see also* § 921.141(3), Fla. Stat. (1988) (court shall impose sentence *after* weighing aggravating and mitigating circumstances); 3.850 Appeal, Arg. § II.B.1.

Where a trial court fails to issue timely written findings in a sentencing proceeding taking place after *Grossman*, this Court is "compelled to *remand for imposition of a life sentence*." *Stewart v. State*, 549 So. 2d 171, 176 (Fla. 1989) (emphasis added). Indeed, prior to Wickham's trial, this Court had vacated death sentences in two cases in which the trial court similarly failed to articulate any specific aggravating or mitigating circumstances when pronouncing a death sentence. *See Van Royal v. State*, 497 So. 2d 625, 628 (Fla. 1986); *Patterson*, 513 So. 2d at 1263. Thus, had Wickham's appellate counsel challenged the trial court's fundamental errors on direct appeal, this Court would have remanded for imposition of a life sentence. *See Perez v. State*, 648 So. 2d 715, 719–20 (Fla. 1995) (vacating death sentence and imposing life sentence because trial court "failed to provide written sentencing findings concurrently with the oral pronouncement of the sentence," as required by *Grossman*).

It is plain from even a perfunctory review of the record that the trial court failed to abide by its statutory and constitutional duties in this case. *First*, after the jury returned a recommendation of death, the trial court announced that it was prepared to proceed to sentencing and welcomed an offer from the State to submit a future memorandum in support of the jury's recommendation. (R 2044–45.) *Second*, the trial court requested that the prosecutor "set[] forth the aggravating and mitigating circumstances" in that memorandum. (R 2045.) *Third*, the trial court summarily entered a death sentence prior to submitting any written findings whatsoever and without a single remark concerning the circumstances that warranted the death penalty in Wickham's case. (R 2045–46.) *Fourth*, after the oral sentence, the trial court stated that it "will, within a reasonable period of time, set forth the reasons, setting forth the aggravating and mitigating circumstances" for the sentence, at the same time noting in open court that it would entertain the State's memorandum. (R 2047.) *Fifth*, Judge McClure's Findings in Support of the Sentence of Death, issued on December 19, 1988, transcribed nearly verbatim the State's Memorandum in Support of Recommendation of Jury. (*Compare* R 246–53 *and* R 228–35); *see also* 3.850 Appeal, Arg. § II.B.

The trial court's actions in Wickham's case were virtually identical to those in *Layman v. State*, 652 So. 2d 373 (Fla. 1995), in which this Court found the trial court's sentencing procedure to be in "clear violation of Florida law":

> First, the court failed to make specific findings concerning aggravating and mitigating circumstances prior to pronouncing sentence. *See Grossman*; § 921.141(3), Fla. Stat. (1991). Second, the court failed to weigh aggravating and mitigating circumstances prior to pronouncing sentence. *See* § 921.141(3), Fla. Stat. (1991). Third, the court failed to file its written order contemporaneously with pronouncing sentence. *See Grossman*. Finally, in asking the prosecutor to prepare the written sentence imposing death, the court evidenced a willingness to abdicate a key judicial function in the proceeding.

*Id.* at 375–76. As a result of these actions, this Court vacated the defendant's death sentence and remanded for imposition of a life sentence. *Id.* at 376. The same outcome should have occurred in this case on appeal.

Even prior to the Court's announcement of the *Grossman* rule that written sentencing findings had to be issued at the time of the pronouncement of a death sentence, this Court had made clear that, at a minimum, contemporaneous oral findings were required. *See Nibert v. State*, 508 So. 2d 1, 4 (Fla. 1987) ("Although we strongly urge trial courts to prepare the written statements of the findings in support of the death penalty, the failure to do so does not constitute reversible error *so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing*.") (emphasis added).

The trial court's statement following its oral sentence that it would "within a reasonable period of time" be "setting forth the aggravating and mitigating circumstances," (R 2047), was a telling indication that the court had not yet

engaged in the weighing process required by Florida law. Indeed, even after it imposed the sentence, it does not appear that the court independently weighed the aggravators and mitigators. 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, (*compare* R 228–35 *with* R 246–53), 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." (R 233, 251.) There can be no doubt that the court failed to engage in the independent weighing process required of it, whether before or after it pronounced the sentence.

The failure of the trial court to issue contemporaneous written sentencing findings or even to orally announce the factors that made Wickham particularly deserving of death destroys all confidence in the sentencing process and amounts to a denial of Wickham's right to due process. The trial court's actions constituted clear fundamental error which should have been appealed to this Court. *See Hildwin v. Dugger*, 654 So. 2d 107, 112 (Fla. 1995) ("The constitutional validity of the death sentence rests on a rigid and good faith adherence" to the detailed sentencing process required in capital cases.); *see also Maddox v. State*, 760 So. 2d

89, 99 (Fla. 2000) ("[I]n order to be considered fundamental, an error must be serious. In determining the seriousness of an error, the inquiry must focus on the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence.").

Appellate counsel's performance was deficient and prejudicial, as this Court would have been "compelled" to vacate Wickham's death sentence and "remand for imposition of a life sentence" if the trial court's failure to issue contemporaneous written sentencing findings had been raised on direct appeal. *See Stewart*, 549 So. 2d at 176. Although defense counsel purportedly waived Wickham's right to written sentencing findings prior to sentencing, he did not and could not waive his client's right—clearly established by this Court long before his trial—to have the trial court independently make a reasoned measurement of the aggravators and mitigators, and pronounce which specific factors in Wickham's case required a sentence of death. *See State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). The trial court's failure to engage in that indispensable weighing process was fundamental error that requires this Court to vacate Wickham's death sentence.

### B. Appellate Counsel Unreasonably Failed To Raise on Appeal the Trial Court's Improper Reliance Upon Wickham's 1969 and 1983 Convictions To Support the Prior Violent Felony Aggravator.

Appellate counsel's failure to raise on appeal the trial court's improper reliance on a 1969 armed robbery conviction and a 1983 aggravated motor vehicle

theft conviction to support the aggravating circumstance of a prior felony conviction "involving the use or threat of violence to the person" constitutes ineffective assistance of appellate counsel. *See* § 921.141(5)(b), Fla. Stat. (1988). Had the admission of these convictions been challenged on appeal, this Court almost certainly would have vacated Wickham's death sentence and imposed a life sentence or remanded for a new sentencing hearing. Given the other errors in this case—discussed *infra* § I.B.3—there simply would not have remained sufficient aggravation, when weighed against the substantial mitigation evidence, to sustain a death sentence.

**1. 1969 Michigan Conviction**

The trial court improperly relied upon Wickham's 1969 conviction for armed robbery in Michigan—a conviction that was obtained in violation of Wickham's constitutional rights—to support the prior violent felony aggravating circumstance. (R 247, Findings In Support of the Sentence of Death.) Defense counsel at trial objected to the introduction of any evidence of Wickham's prior armed robbery conviction, arguing that it was based on an involuntary and uninformed guilty plea obtained in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969), (R 1892–1904), but Judge McClure overruled the objection and found the Michigan conviction to be valid and admissible as support for the prior violent felony aggravating circumstance. (R 1903.)

Because Wickham's prior conviction had already been found to be obtained in an unconstitutional manner, the admission was in error, and appellate counsel's failure to raise this issue on appeal was deficient. Appellate counsel's deficient performance prejudiced Wickham because it left unchallenged the trial court's improper reliance on the constitutionally infirm armed robbery conviction to support the prior violent felony aggravator. At the very least, this resulted in improper weight being given to this aggravator; but when considered in conjunction with the improper reliance on the 1983 aggravated motor vehicle theft conviction, see *infra* § I.B.2, it becomes clear that Wickham was prejudiced by the improper finding of the prior violent felony aggravator. As a result, confidence in the outcome of Wickham's appeal is undermined because not only did this Court conclude that the trial court erred in finding the "heinous, atrocious, and cruel" aggravator, but it also found error in failing to find and weigh mitigating evidence. *Wickham*, 593 So. 2d at 193–94.

On the appeal of Wickham's armed robbery conviction, the Michigan Court of Appeals held that the conviction was constitutionally invalid because it was the result of a guilty plea Wickham rendered without being advised of his rights against self-incrimination, to a jury trial, or to confront witnesses. *People v. Wickham*, 200 N.W.2d 339, 340 (Mich. Ct. App. 1972). The Court recognized that Wickham would "ordinarily be entitled to a reversal of his conviction" under

*People v. Jaworski*, 194 N.W.2d 868 (Mich. 1972), a case that implemented the U.S. Supreme Court's decision in *Boykin*, which held that there must be an affirmative showing on the record that a defendant's guilty plea was voluntary and informed. *Wickham*, 200 N.W.2d at 340. However, the Michigan Court of Appeals could not reverse Wickham's conviction because *Jaworski* had been held not to be retroactive. *Wickham*, 200 N.W.2d at 340–41 (discussing how the Michigan Supreme Court limited its *Jaworski* rule to post-*Boykin* cases).

A conviction obtained in violation of a defendant's fundamental constitutional rights provides "no legitimate support" for a death sentence. *Johnson v. Mississippi*, 486 U.S. 578, 586 (1988) (vacating death sentence predicated, in part, on an aggravating circumstance supported by a constitutionally invalid prior conviction); *see also Preston v. State*, 564 So. 2d 120 (Fla. 1990) (remanding for re-sentencing case in which prior violent felony conviction had been vacated for ineffective assistance of counsel). To allow a petitioner's death sentence to stand, where it is based in part on a constitutionally invalid conviction, violates the principle that the decision to impose a sentence of death "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson*, 486 U.S. at 585 (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

Thus, the Michigan Court of Appeals' finding that Wickham's prior conviction for armed robbery was constitutionally defective should have precluded the conviction from providing any legitimate support for his death sentence in this case. That it did provide such support should have been raised on appeal, which would have permitted this Court to vacate Wickham's death sentence on this ground. The fact that the Michigan Court of Appeals was unable to reverse Wickham's conviction on the ground that *Boykin* was held not to be retroactive does not alter this conclusion. To allow Wickham's 1969 Michigan conviction to constitute an aggravating factor in Wickham's capital case, well after *Boykin*, is a *prospective* use and constitutes a renewed deprivation of Wickham's due process rights pursuant to *Boykin*. *See Burgett v. Texas*, 389 U.S. 109, 115 (1967).

In *Burgett*, the U.S. Supreme Court found that a prior Tennessee conviction had been obtained in violation of the Sixth Amendment right to counsel, pursuant to *Gideon v. Wainwright*, 372 U.S. 335 (1963). Thus, it held that the Tennessee conviction could not be used to establish guilt or to enhance the punishment for a subsequent crime in Texas, *even though the prior conviction had not been overturned*, because to do otherwise would "erode the principle of [*Gideon*]. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." *Id.* at 114–15; *see also United States v. Tucker*, 404 U.S. 443,

449 (1972); *Allen v. State*, 463 So. 2d 351, 357–59 (Fla. 1st DCA 1985) (convictions obtained in violation of defendant's fundamental rights—including those based on guilty pleas not made knowingly or voluntarily—may not support enhanced conviction or punishment for subsequent crimes, even if not overturned).

As was the case in *Burgett*, *Tucker*, and *Allen*, to permit the Michigan conviction to serve as the basis for a prior violent felony aggravator, or even to merely add weight to the aggravating circumstance, would erode the underlying constitutional principle of *Boykin* and would cause Wickham to suffer anew from the denial of his constitutional rights that occurred in the Michigan case. The fact that a policy concern for the finality of criminal convictions merited applying *Boykin* prospectively only, and denying Wickham a remedy in his Michigan case, does not alter the fact that a constitutional deprivation of Wickham's rights occurred when he pled guilty without being advised of his rights to a jury trial or to confront witnesses, or of his right against self-incrimination. As the U.S. Supreme Court has stated:

> 'Retroactivity' suggests that when . . . a new constitutional rule of criminal procedure is 'nonretroactive,' . . . the right at issue was not in existence prior to the date the 'new rule' was announced. *But this is incorrect. . . . [T]he underlying right necessarily pre-exists . . . articulation of the new rule.* What we are actually determining [is] . . . whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.

*Danforth v. Minnesota*, 552 U.S. 264, 271 (2008) (emphasis added).

### 2. 1983 Colorado Conviction

Given the error in admitting and relying upon the 1969 armed robbery conviction to support the prior violent felony aggravator, the court's equally improper reliance on a 1983 aggravated motor vehicle theft conviction in Colorado is all the more critical because it was the *only* other offense supporting this aggravator. Yet, the trial court improperly instructed the jury that the 1983 conviction supported the prior violent felony aggravator, when the circumstances of the conviction demonstrate that it did plainly does not support this aggravator. Appellate counsel's failure to raise these issues on appeal was deficient, and Wickham was prejudiced, as the sentencing court's reliance on this aggravator was allowed to stand uncorrected.

Violence is not a necessary element of first degree aggravated motor vehicle theft in Colorado:

> A person commits aggravated motor vehicle theft in the first-degree if he knowingly obtains or exercises control over the motor vehicle of another without authorization or by threat or deception and: . . . (f) Causes bodily injury to another person while he or she is in the exercise of control of the motor vehicle . . . .

§ 18–4–409, Colo. Rev. Stat. (1983). Defense counsel objected at trial to the State's characterization of the 1983 conviction as violent, and further argued that the question of violence was one of fact for the jury to determine. (R 1948, 1992–99.) Even the State acknowledged that the determination of whether a conviction

for a crime that is not, as a matter of law, a crime of violence qualifies as a prior violent felony conviction aggravator depends on the facts of the crime. (R 1948, 1996–98.)

The trial court, however, ultimately instructed the jury that, with respect to the prior violent felony aggravator, Wickham's aggravated motor vehicle theft conviction was, as a matter of law, a felony "involving the use or threat of violence to another person." (R 2037; *see also* R 1997–98 ("I am finding that . . . the crime of aggravated motor vehicle theft involved a crime of violence and that is why I'm giving the instruction."); R 217, ¶ 2(a) ("The crime of . . . First Degree Aggravated Motor Vehicle Theft [is a felony] involving the use or threat of violence to another person.") (Jury Instructions After Penalty Phase).)

This was error. Where a crime is not *per se* violent, a trial court must instruct the jury that whether the crime involves the use or threat of violence for purposes of applying the prior violent felony circumstance in Section 921.141(5)(b) must be based upon the facts of the crime. *Johnson v. State*, 465 So. 2d 499, 505 (Fla. 1985), *overruled on other grounds by In re Instructions in Crim. Cases*, 652 So. 2d 814 (Fla. 1995); *see also Hess v. State*, 794 So. 2d 1249, 1264 (Fla. 2001); *Gore v. State*, 706 So. 2d 1328, 1333 (Fla. 1998); *Sweet v. State*, 624 So. 2d 1138, 1143 (Fla. 1993). Given the trial court's error, Wickham's case should have been remanded on appeal to permit the jury to make a determination

as to whether the 1983 conviction constituted a prior violent felony based on the facts of the crime.

This was not mere harmless error. A review of the law and facts relating to Wickham's first degree aggravated motor vehicle theft conviction reveal that it plainly *did not* constitute a prior violent felony under Section 921.141(5)(b), contrary to Judge McClure's conclusion.

*First*, the trial court's finding that Wickham's conviction was a crime of violence was based on an incorrect standard. The court indicated that the basis for its conclusion was that Wickham had been in the "exercise and control of a motor vehicle that did cause bodily injury . . . ." (R 1948.) But the prior violent felony aggravator only attaches "to life-threatening crimes in which the perpetrator comes in direct contact with a human victim"—not to mere bodily injury. *See Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998) (robbery conviction insufficient to establish aggravator) (citing *Lewis v. State*, 398 So. 2d 432, 438 (Fla. 1981)).

To constitute a life-threatening crime, the force or violence used must be sufficient to overcome the victim's resistance. *Mahn*, 714 So. 2d at 394–95, 399 (finding that in absence of force against victim, robbery conviction did not constitute prior violent felony aggravator); *see also Hardwick v. Crosby*, 320 F.3d 1127, 1151 n.122 (11th Cir. 2003) (citing *Lewis*, 398 So. 2d at 438) ("The Florida Supreme Court has strictly interpreted prior felony convictions that qualify as an

aggravating circumstance at sentencing in a capital case;" they must be "life-threatening crimes in which the perpetrator comes in direct contact with a human victim."); *cf. Robinson v. State*, 692 So. 2d 883, 886–87 (Fla. 1997) (finding that Georgia purse snatching statute did not contain the necessary degree of force—*i.e.* force sufficient to overcome the victim's resistance—to elevate the offense from theft to robbery under Florida law).

*Second*, the facts surrounding the specific incident in question establish that Wickham's theft of the vehicle did not involve violence.[4] Wickham was arrested after a high-speed chase involving officers of Colorado's Adams County Sheriff's Department. (R 1949–57.) During the pursuit, Wickham's vehicle came into contact with a police car driven by Lieutenant James Hibberd, who was pursuing Wickham, causing minor damage to both cars and slight injuries to Lieutenant Hibberd. (R 1954–62.) At Wickham's 1988 trial, Lieutenant Hibberd testified that he believed Wickham intentionally rammed his car into the police cruiser three times while he attempted to elude police. (R 1954–57.) However, nowhere in the charging document was it alleged that there was a threat to Lieutenant Hibberd's life, and no violence was alleged in connection with the theft of the vehicle from

[4] These facts "may be established by documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both." *Johnson*, 465 So. 2d at 505; *see also Mann v. State*, 420 So. 2d 578, 581 (Fla. 1982).

its rightful owner—the actual crime for which Wickham was convicted.[5] (PCR 5690 (entered at Wickham's 1988 trial as State's Exhibit No. 22).)

In fact, it was a separate count for which Wickham was initially charged—vehicular eluding of a peace officer—that contained the allegedly "violent" conduct found by Judge McClure. (*See* PCR 5665 (criminal information filed by the prosecutor in 1983) (entered at Wickham's 1988 trial as State's Exhibit No. 22).) This count indicated that Wickham, while attempting to elude the police, "operated his vehicle in a reckless manner creating a substantial risk of bodily injury . . . and did cause bodily injury," (*id.*), which resulted in Lieutenant Hibberd suffering whiplash and a sprained thumb. (PCR 5668.) But this vehicular-eluding charge was subsequently *dismissed* by the court upon motion by the prosecutor.[6] (PCR 5689 (entered at Wickham's 1988 trial as State's Exhibit No. 22).)

---

[5] The test for whether a prior felony conviction qualifies as a felony "involving the use or threat of violence" requires determining whether a legal element of the crime upon which the defendant was convicted involved the use of violence. It is improper to allow the State to call a fact witness to attribute violence to the defendant's actions when the elements of the crime for which the defendant was actually convicted did not involve any violence. *See*, *e.g.*, *Mann*, 420 So. 2d at 581 (remanding for new sentencing where testimony that defendant committed sexual battery during burglary was improper basis to establish prior violent felony conviction, where the crime for which the defendant was convicted was *burglary*).

[6] The prosecutor's dismissal of that count must control. He decided not to proceed on the charges, perhaps because he could not believe Lieutenant Hibberd's claims regarding the incident and/or his injuries. In any event, a violent felony conviction did not result.

Indeed, there is no indication in the actual judgment of conviction that violence was involved during the aggravated motor vehicle theft. (PCR 5690 (entered at Wickham's 1988 trial as State's Exhibit No. 22).) Thus, Wickham's conviction did not constitute a prior violent felony for purposes of the capital aggravator. *See Mann v. State*, 420 So. 2d 578, 581 (Fla. 1982) ("We hold that a prior conviction of a felony involving violence must be limited to one in which the judgment of conviction discloses that it involved violence.").

### 3. Wickham Was Prejudiced By Appellate Counsel's Deficient Performance

Appellate counsel's failure to challenge the trial court's reliance on the 1969 and 1983 prior convictions substantially prejudiced Wickham. The admission of a constitutionally flawed conviction clearly is error, as is the finding that a crime whose facts do not meet the threshold requirement is a "violent felony." Had the admission of these convictions been challenged on appeal, it is highly likely Wickham's death sentence would have been vacated because, without those convictions, there is no support for the prior violent felony aggravator. *See Stringer v. Black*, 503 U.S. 222, 232 (1992) ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.").

Further, on direct appeal, this Court concluded that the trial court erred in finding other aggravation and in failing to find and weigh mitigation, *i.e.* there was error on *both* sides of the scale used to weigh the aggravating and mitigating circumstances. Had the court's error in finding the prior violent felony aggravator been raised on appeal, the totality of the Eighth Amendment error could not have been found harmless beyond a reasonable doubt. *See, e.g.*, *Sochor v. Florida*, 504 U.S. 527, 532, 539–40 (1992) (appellate courts must, at a minimum, conduct harmless error analysis upon finding such an Eighth Amendment error).

The prejudice to Wickham is all the more apparent in light of additional errors committed in his case. In particular, the finding of the statutory aggravating factors that the offense was committed in a cold, calculated, and premeditated manner and for the purpose of avoiding lawful arrest were based on violations of Wickham's constitutional rights and have no basis in the law.[7] *See* 3.850 Appeal, Arg. § I.

As a result, only two aggravating factors remain: the capital felony was committed while under a sentence of imprisonment (based on Wickham's parole

[7] As discussed in Wickham's 3.850 Appeal, the State failed to produce to the defense material exculpatory and impeachment evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and failed to correct multiple false and misleading statements made by the prosecutor and State witnesses, in violation of *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the substantial mental health mitigation evidence uncovered in post-conviction has substantially weakened these aggravating factors. *See* 3.850 Appeal, Arg. § II.A.2.(b).

violation) and while the defendant was engaged in the commission of a robbery. (R 247, Findings in Support of the Sentence of Death.) It simply cannot be the case that there remains sufficient aggravation to support a death sentence—especially when pitted against the mitigation evidence which, as this Court recognized on direct appeal, the trial court erroneously failed to weigh. *See Preston*, 564 So. 2d at 123 (reliance on a prior conviction that was later vacated was prejudicial, especially when viewed in light of this Court's elimination of another aggravating factor and mitigating evidence).

As a result of these deficiencies, Wickham was denied his right to a reliable direct appeal and/or a reliable death sentence. Habeas relief is therefore warranted. *See Cupon v. State*, 833 So. 2d 302, 305 (Fla. 2002) (quoting *Strickland*, 466 U.S. at 694) (prejudice demonstrated where, as a result of appellate counsel's deficient representation, "there is a reasonable possibility that, but for appellate counsel's error, the result of the proceeding would have been different").

### C. Appellate Counsel Unreasonably Failed To Appeal the Deprivation of Wickham's Constitutional Right Not To Be Tried While Incompetent.

In his 3.850 Appeal, Wickham demonstrates that he was deprived of his constitutional right to be tried while mentally competent and mentally fit to assist in his defense. 3.850 Appeal, Arg. § III. Wickham also presents his arguments as to why the court below erred in dismissing the competency claims as procedurally barred on the ground that they were not raised on direct appeal. 3.850 Appeal, Arg.

§§ III.A.2, III.B.2. However, should this Court conclude that the court below was correct and that the claims are procedurally barred, Wickham argues in the alternative that appellate counsel was ineffective for failing to raise those claims on direct appeal.

### 1. Appellate Counsel Was Ineffective In Failing To Challenge Wickham's Trial on the Ground That He Was Not Mentally Competent To Stand Trial.

The right of a criminal defendant not to be tried while incompetent is protected by the Florida Constitution (Article I, Section 9) and 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); *Bishop v. United States*, 350 U.S. 961, 961 (1956); *Hill v. State*, 473 So. 2d 1253, 1259 (Fla. 1985); *Lane v. State*, 388 So. 2d 1022, 1024–25 (Fla. 1980). 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); *see also Dusky*, 362 U.S. at 402.

Given the ample indications in the record that Wickham did not meet these standards, appellate counsel could have demonstrated "clear and convincing evidence" which would have created a "real, substantial and legitimate doubt" about his competency to stand trial. *James v. Singletary*, 957 F.2d 1562, 1573–74 (11th Cir. 1992); *Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985). This evidence included brain damage, mental illness, long-term commitment to two psychiatric institutions, and an insanity defense, as well as his documented disturbing behavior at and near trial. Failure to challenge the fairness of Wickham's trial in the face of this evidence constituted ineffective assistance of appellate counsel.

*First*, several defense attorneys prior to Padovano had to be relieved due in part to their inability to work with the mentally ill Wickham. (R 17, 18, 81, 97, 111, 113.)

*Second*, Wickham's Motion for an Order Authorizing the Expenditure of Funds for Psychological Evaluation, filed on May 5, 1988, identified the need for psychological testing in part because Wickham "was involuntary [sic] committed to the North[ville] Regional Psychiatric Facility in North[ville] Michigan for a period of 10 years, between the years 1957 and 1967." (R 114.)

*Third*, Wickham's first Motion for Continuance, filed on May 20, 1988, identified Wickham's history of mental illness and schizophrenia, and indicated he

likely was brain damaged. (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, explained that Wickham "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.)

*Fifth*, Wickham plainly had difficulty manifesting proper courtroom behavior. *See* Fla. R. Crim. P. 3.211 (1988) (in considering the issue of competence to proceed, examining experts required to assess 11 factors, including defendant's capacity to "manifest appropriate courtroom behavior").[8]

- 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), and made "inappropriate remarks" to the jury. (R 2048.)

[8] Effective January 1, 1989, Rule 3.211 was amended to reduce the number of competency factors to six. *See In re Amendments to Florida Rules of Criminal Procedure*, 536 So. 2d 992 (Fla. 1988).

*Sixth*, jail guards observed Wickham behaving irrationally in the weeks before trial: Wickham had an "unkempt" appearance and at times fell into what guards described as a "frozen stare." (PCR 6823.) Defense psychologist Dr. Carbonell made the court aware of this when she testified during the guilt phase that jail records indicated with respect to Wickham: "frozen stare, looking at people funny." (R 1499.)

*Finally*, in her deposition taken *one week before trial*, Dr. Carbonell testified that *at that time* Wickham had an "inability to understand, [or] reason accurately," and that he had "trouble really with cause and effect." (PCR 4524–25.) *See* Fla. R. Crim. P. 3.211 (1988).

Dr. Carbonell's testimony at the guilt phase of the trial further demonstrated that Wickham was not competent. She testified that he suffered from some form of brain damage, (R 1473–74, 1479–81), a lack of touch with reality, (R 1484), and had a history of mental illness, including schizophrenia. (R 1493–1501.) Psychological tests indicated he had difficulty "reason[ing], form[ing] concepts, and solv[ing] problems," (R 1473; *see also* R 1476–79), and "look[ed] psychotic." (R 1500; *see also* R 1484–85, 1487.) Wickham's medical records also indicated "borderline convulsive tendencies." (R 1493.) Although Dr. Carbonell was unable to fully diagnose Wickham's disorders or fully and precisely explain how they related to the aggravating and mitigating factors the jury and trial court were to

consider in sentencing, see 3.850 Appeal, Arg. §§ II.A.1.(c), II.A.2, her testimony was more than sufficient to flag for the trial court, and in turn for appellate counsel, that there were serious issues regarding Wickham's competency that should have been pursued.

Further, because competency can change over time, the fact that Dr. Carbonell had concluded that Wickham was competent to stand trial following brief meetings six months earlier did not preclude the distinct possibility that Wickham, a known schizophrenic, decompensated in the following months and at trial—as the evidence plainly shows he did. *See Drope*, 420 U.S. at 181 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); *Lane*, 388 So. 2d at 1025 (an earlier finding of competency "does not control" over subsequent "evidence of possible incompetency") (citing *Bishop*, 350 U.S. at 961).

Based on even a summary review of the record, appellate counsel should have recognized that Wickham was mentally incapable of understanding the proceedings or participating in his own defense. Because this evidence on the record was "clear and convincing," and raised a "real, substantial and legitimate doubt" as to Wickham's competency, appellate counsel's failure to raise this issue

on appeal prejudiced Wickham in that this Court affirmed his death sentence notwithstanding his lack of competence to stand trial.

### 2. Appellate Counsel Was Ineffective By Failing to Argue That The Trial Court Erred By Not Ordering a Competency Hearing.

The evidence in the record certainly was sufficient to demonstrate, at a minimum, that a competency hearing should have been held. At the time of Wickham's trial, Florida law mandated that to protect a defendant's due process right not to be tried while incompetent, if there is reasonable ground to believe a defendant *may* not be competent to stand trial—that is, if the defendant shows *any* sign of incompetency—the trial court must immediately set a hearing and appoint two or three experts to examine the defendant regardless of whether the defendant or counsel requests a hearing. *See* Fla. R. Crim. P. 3.210–3.215 (1988); *Tingle v. State*, 536 So. 2d 202, 203–04 (Fla. 1988); *see also Hill*, 473 So. 2d at 1257 ("[T]he trial court . . . [must] 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.

Although there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," *Drope*, 420 U.S. at 180, evidence of a defendant's "irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are *all* relevant in determining whether further inquiry is required," and "even one of these factors standing alone

may, in some circumstances, be sufficient." *Id.* (emphasis added); *see also Lane*, 388 So. 2d at 1025–26.

As discussed above, the record contains overwhelming evidence of "reasonable grounds" to doubt Wickham's competency. *See* Fla. R. Crim. P. 3.210(b) (1988); *Lane*, 388 So. 2d at 1025–26; *see also Drope*, 420 U.S. at 180. Yet, in the face of those compelling signs, the trial court failed to invoke the procedures designed to protect Wickham's right not to be tried or convicted while incompetent. *See Drope*, 420 U.S. at 172; *Hill*, 473 So. 2d at 1257. In turn, Wickham's appellate attorneys were deficient when they did not raise in Wickham's direct appeal the trial court's failure to order a competency evaluation *sua sponte*. Again, because of the fundamental nature of the due process right not to be tried while incompetent, and because there was stark evidence suggesting that Wickham very likely was not competent, appellate counsel's deficient performance prejudiced Wickham.

### D. Appellate Counsel Unreasonably Failed To Challenge The Prejudicial Atmosphere That Pervaded The Trial Proceedings.

The atmosphere surrounding Wickham's 1988 trial was so prejudicial that it violated Wickham's right to a fair trial and impartial sentencing as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Section 16 of the Florida Constitution. Defense counsel properly objected to the prejudicial atmosphere by renewing a previously tendered motion

for change of venue, but the trial court denied the renewed motion. (R 912–14.) Although the denial was erroneous, appellate counsel failed to raise the issue on direct appeal. There was no strategic or tactical reason for appellate counsel's failure to raise such a basic claim. Appellate counsel's failure undermines confidence in this Court's denial of Wickham's direct appeal and thus constitutes prejudicially deficient performance. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985).

The right to a trial before a fair and impartial tribunal "is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252, 2259 (2009). In analyzing whether this right has been violated, the relevant inquiry is whether the trial atmosphere presented "an unacceptable risk . . . of impermissible factors coming into play" for the jury. *Carey v. Musladin*, 549 U.S. 70, 75 (2006) (internal citations omitted); *see also Holbrook v. Flynn*, 475 U.S. 560, 570 (1986); *Woods v. Dugger*, 923 F.2d 1454, 1456–57 (11th Cir. 1991) ("[The Constitution requires] courts [to] guard against the atmosphere in and around the courtroom becoming so hostile as to interfere with the trial process.") (*citing Estes v. Texas*, 381 U.S. 532, 560 (1965) (Warren, J., concurring)). The vigilance necessary to defend the impartiality of the process is heightened in capital cases, where the jury's discretion must be delicately guided and channeled. *See generally Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (decision to impose

death must be "guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant").

The environment in which Wickham was tried was hostile and inherently prejudicial. Media presence was so invasive that it even caused a delay in the trial at one point, when one of the State's witnesses, Jimmy Jordan, refused to testify so long as cameras and lighting equipment were trained on him. (R 1222–26.) During *voir dire,* one prospective juror reported to the court that news reporters were openly and audibly discussing the facts of the case, including the fact that Wickham's co-defendants had pleaded guilty. (R 434); *see infra* § I.E. The father of the victim, Philip Fleming, spoke with prospective jurors during the jury selection process—an intrusion serious enough to warrant the court's questioning Mr. Fleming under oath. (R 527); *see infra* § I.E. Mr. Fleming was also demonstrably agitated during portions of the trial and issued threats to defense counsel that necessitated appointment of a court security detail. (R 1885–89.)

Additionally, numerous jurors indicated to the court that they had been exposed to pre-trial publicity. (R 360–61 (actual juror Amanda Whiting admitted she followed the case and may have attended high school with the victim), 367, 377–78, 407-08, 422, 442, 454, 459, 478, 492, 506, 561, 567–68, 578, 597–98, 603–04 (actual juror Mary Jordan commented that the story was on the "front page"), 611, 620–21, 634, 640 (actual juror Martin Hoppe admitted reading

coverage in that morning's newspaper), 662–63, 674–75, 686, 691, 697–68). In sum, roughly half the venire persons questioned admitted to being exposed to some form of pre-trial publicity. This media coverage included inflammatory remarks by Mr. Fleming, the father of the victim. At co-defendant Larry Schrader's sentencing on June 23, 1988, Mr. Fleming had expressed his desire that Wickham be put to death, (PCR 4450); those remarks were reprinted in the Tallahassee Democrat on November 28, 1988, two days before jury selection in Wickham's case began. (R 912); *see infra* § I.E.

This intrusive media presence, the widespread pre-trial publicity, and the conspicuousness of the victim's father contributed to a circus-like atmosphere that created an unacceptable risk that the jury convicted and sentenced Wickham in an arbitrary and capricious manner. Although news media enjoy generous rights of access to public trials, the U.S. Supreme Court has held that extremely intrusive coverage can create prejudice necessitating reversal. *Sheppard v. Maxwell,* 384 U.S. 333, 362–63 (1966); *Estes,* 381 U.S. 532. Additionally, the media coverage itself—in the form of broadcasts and written reports—may be so pervasive that a fair trial is not possible. *Irvin v. Dowd,* 366 U.S. 717, 725 (1961) (concluding that overwhelming and pervasive coverage resulted in a "building up prejudice" that was "clear and convincing"); *Rideau v. Louisiana*, 373 U.S. 723, 726–27 (1963) (trial was but a "hollow formality" after broadcasts of defendant's confession);

*Coleman v. Kemp*, 778 F.2d 1487, 1538–39 (11th Cir. 1985) (community "deeply prejudiced" by media coverage).

These extensive intrusions undermine "confidence in the correctness and fairness of the result" of both the guilt and penalty phases required to sustain a sentence of death. *Wilson*, 474 So. 2d at 1165. Had this claim been raised on direct appeal, the proper remedy would have been vacatur and re-trial. *Murphy v. Florida*, 421 U.S. 794, 798 (1975) (*citing Irvin*, 366 U.S. at 725; *Rideau*, 373 U.S. at 726–27; *Sheppard*, 384 U.S. at 362–63); *see also Coleman*, 778 F.2d at 1538–39. Even if defense counsel's motion for a change of venue did not adequately preserve Wickham's claims as to the prejudicial trial atmosphere, appellate counsel nevertheless had an obligation to raise them on direct appeal, as fundamental error. *See, e.g.*, *Rideau*, 373 U.S. at 726 (erroneous refusal to grant change of venue constitutes denial of due process). Appellate counsel's failure to raise the claim was prejudicially deficient performance.

### E. Appellate Counsel Unreasonably Failed To Challenge As Fundamental Error The Trial Court's Failure To Inquire Into Misconduct During Jury Selection.

From the very beginning of Wickham's trial, misconduct by prospective jurors, coupled with a total failure by the court to take corrective action, resulted in the tainting of the jury pool—the group of citizens who would eventually recommend a sentence of death. Instead of the fair and impartial jury guaranteed

by the Sixth and Fourteenth Amendments to the U.S. Constitution, and by Article I, Section 16, of the Florida Constitution, Wickham's fate rested in the hands of a panel drawn from a venire that openly discussed the case, overheard others discuss the case, and interacted with the victim's father, who was present during *voir dire.* These facts raised serious doubts about the impartiality of the jurors selected—doubts that should have been resolved through corrective action by the trial court. The failure to do so was fundamental error and should have been raised on direct appeal by Wickham's appellate counsel.

Although the duty to secure an impartial jury lies in the first instance with the trial court, and the conduct of *voir dire* is left to its discretion, such discretion is always subject to the essential demands of fairness. *See Cummings v. Dugger*, 862 F.2d 1504, 1507 (11th Cir. 1989) ("The discretion afforded the trial judge to conduct *voir dire* as he sees fit must be bounded by protection of the defendant's constitutional rights, especially in a situation of extensive pretrial publicity."). It has long been established in Florida and federal law that the trial court has a responsibility to excuse jurors whose impartiality might reasonably be questioned; all doubts should be resolved in favor of excusal. *See Jordan v. Lippman*, 763 F.2d 1265, 1275 (11th Cir. 1985) ("Relief is required where there is a significant possibility of prejudice plus inadequate *voir dire* to unearth such potential prejudice in the jury pool."); *Singer v. State*, 109 So. 2d 7, 23–24 (Fla. 1959) ("If

there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused . . . by [the] court on its own motion."); *Segura v. State*, 921 So. 2d 765, 766 (Fla. 3d DCA 2006) (same). This need for impartiality with respect to juries is heightened in cases in which capital punishment may be imposed. *See generally Wainwright v. Witt*, 469 U.S. 412 (1985).

Such vigilance was notably absent during jury selection at Wickham's trial. During individual *voir dire*, when potential jurors were asked privately about their exposure to pre-trial publicity and their views on the death penalty, panelists informed the court that the details of the alleged crime were being discussed among the jury pool. (R 434–35, 448–49.) One of the prospective jurors, Ms. Morrow, told Judge McClure that venire persons were deliberately ignoring the court's instruction not to discuss the case, stating "I'm sorry to say it was somebody this morning who informed me [about the facts of the case]. So they're not all listening. It is being discussed some." (R 448.) Another potential juror, Mr. Lee, even admitted that he had already formed the opinion that Wickham was guilty and had shared his opinion with other jury pool members:

> Well, yeah, I did make a comment even out loud that it didn't look too good that his three friends admitted their

> guilt. That didn't look too good for him. It seems to me all he had to do was to be placed at the scene.

(R 435.) Though Mr. Lee was excused from jury selection on the basis of these remarks, (R 437), each of these cases illustrates the troubling extent—both in depth of detail and frequency of occurrence—of unauthorized conversations within the venire, and thus renders suspect any panel selected from it.

Additionally, the father of the victim in the case, Philip Fleming, was seated among the potential jurors during initial selection and even admitted under oath that he had spoken with them. (R 527.) Further, the trial court allowed Mr. Fleming and members of the media to be present during individual *voir dire*, during which jurors were queried on their views regarding the death penalty. (R 343.) Mr. Fleming's interactions with venire persons are troubling because, as the victim's father, he was highly likely to arouse sympathy; his presence during individual *voir dire* was even more problematic given his well-known and strong views on the appropriateness of the death penalty in this case, (PCR 4450); *see supra* § I.D., and the fact that the purpose of the proceedings was to elicit venire persons' unvarnished opinions on the death penalty. For these reasons, defense counsel should have requested that private *voir dire* be truly private, and that both Mr. Fleming and the reporters be excluded.

Despite these obvious indications that improper conversations were taking place, the court made no attempt to identify the individuals with whom Mr. Lee or Mr. Fleming had spoken; or those whom Ms. Morrow had overheard. To be sure, the trial court appropriately admonished Mr. Fleming not to speak to prospective jurors, but this intervention only took place on the second day of jury selection, (R 528), after eight of the eventual twelve jurors had already been screened. (R 348 (Walby), 352 (Dupree), 360 (Whiting), 377 (Johnson), 384 (Outland), 387 (Field), 489 (Taylor), 519 (Rankin).) In the same vein, the court only became aware that Mr. Lee had expressed opinions about the case, and that Ms. Morrow had heard opinions about the case, after it had already screened six of the eventual twelve jurors.

While courts are not required to conduct inquiries where the tainting of a juror or jurors is merely speculative, *Sundberg v. Sec'y, Dep't of Corr.*, No. 5:07-cv-478-Oc-10GRJ, 2010 U.S. Dist. LEXIS 111148, at *44–45 (M.D. Fla. Oct. 7, 2010), there was no question of speculation in this case. Mr. Fleming and Mr. Lee told the court unequivocally that they *spoke* to venire persons, and Ms. Morrow made clear that conversations about the case were audible. Because the trial court failed to ascertain who was spoken to and when, it failed to properly investigate and cure any possible taint.

Further, by permitting the victim's father and media to be in the courtroom during jury selection and to potentially taint the process, the trial court effectively nullified the purpose of conducting the *voir dire*—particularly the private *voir dire*—which is to allow prospective jurors the opportunity to openly voice their views on sensitive topics. *See United States v. King*, 140 F.3d 76, 83–84 (2d Cir. 1998) (noting that the "airing of jurors' responses will significantly inhibit the candor necessary to assure a fairly selected jury"); *Brown v. United States*, No. 407CV085, 2008 US Dist. LEXIS 81096, at *5–6 (S.D. Ga. 2008) (citing "encouraging candid answers" as one reason for sealing juror data); *cf. United States v. Nash*, 910 F.2d 749, 753 (11th Cir. 1990) (*voir dire* questions must give "reasonable assurance to the parties that any prejudice of the potential jurors would be discovered").

These errors were so fundamental that they deprived Wickham of his right to an impartial jury. From the record that was available to appellate counsel—revealing that the jury pool did not follow the trial court's instructions and had been in contact with the victim's father, who had publicly advocated for the death penalty for Wickham—this error was apparent. Had it been raised on appeal, the appropriate remedy would have been to vacate Wickham's sentence and remand for a new trial. Appellate counsel's failure to raise the error on appeal constituted deficient performance that prejudiced Wickham.

## F. Appellate Counsel Unreasonably Failed To Challenge The Trial Court's Lack of Written Reasons For An Upward Departure When Sentencing Wickham To Life Imprisonment For Armed Robbery.

The jury found Wickham guilty of first-degree murder and armed robbery. The trial court committed fundamental and reversible error when it failed to issue written reasons for departing upward from the sentencing guidelines in sentencing Wickham on the armed robbery count. Although Florida sentencing guidelines in 1988 provided for a sentence of 22 to 27 years, (R 2047), the trial court sentenced Wickham to a term of life imprisonment.[9] The court orally announced that it would "depart from the guidelines, which score out from 22 to 27 years" because "you [Wickham] have been convicted of a capital felony," but it failed to enter any written findings justifying the drastic upward departure. (R 2047.)

At the time of Wickham's sentencing, Florida law imposed an unambiguous responsibility on trial courts to issue a written statement delineating the reasons for the departure when imposing a sentence outside of the guidelines range. Fla. R. Crim. P. 3.701(d)(11) (1988); *State v. Oden*, 478 So. 2d 51 (Fla. 1985); *State v.*

---

[9] Although the original sentencing guidelines score sheet is not contained within the Record, the State explicitly acknowledged that a life sentence on the armed robbery count would be a departure from the guidelines. At a bench conference just after the announcement of the jury's recommendation of a sentence of death on the murder count and before Judge McClure pronounced the sentence, the State announced that "we had a score sheet prepared on the armed robbery conviction and would request the Court to depart from the guidelines and ask for a life sentence consecutive to the sentence imposed." (R 2045.)

*Jackson*, 478 So. 2d 1054, 1055 (Fla. 1985), *overruled on other grounds by Wilkerson v. State*, 513 So. 2d 664 (Fla. 1987). This Court also had emphatically "reject[ed] the . . . contention that a transcript of oral statements by the judge during sentencing should be sufficient to justify departure from the guidelines." *Jackson*, 478 So. 2d at 1055. The remedy for this fundamental error is to remand for resentencing with no possibility of departure from the guidelines. *Pope v. State*, 561 So. 2d 554, 556 (Fla. 1990).

Although the trial court's omission constituted a clear violation of due process under existing Florida law, Wickham's appellate counsel failed to raise the issue on direct appeal. Notably, even though defense counsel registered no objection to the departure, or the lack of written reasons for the departure, at the time of Wickham's appeal, this Court had ruled that the contemporaneous objection rule does not apply in the sentencing process. *See State v. Rhoden*, 448 So. 2d 1013, 1016 (Fla. 1984) ("[T]he contemporaneous objection rule is not present in the sentencing process."), *overruled on other grounds by Maddox v. State*, 760 So. 2d 89, 100 (Fla. 2000); *Matchett v. State*, 791 So. 2d 1087, 1088 (Fla. 2001) ("[A] trial court's failure to file written reasons justifying the imposition of a departure sentence constitute[s] fundamental error that [can] be corrected on direct appeal."). As such, appellate counsel was fully able to appeal the error, but failed to do so.

Appellate counsel's unreasonable failure to raise this meritorious claim on appeal has prejudiced Wickham because he now has raised several meritorious grounds on which his death sentence must be vacated and a reduced sentence imposed. Because it is clear that the trial court erred in departing from the sentencing guidelines without written reasons, a guidelines sentence on the armed robbery charge should be imposed as part of his re-sentencing.

**G. The Accumulation of Appellate Counsel's Errors Prejudiced Wickham**

As amply demonstrated above, appellate counsel failed to raise a number of meritorious issues on direct appeal. Each of those issues, standing alone, would be sufficient to raise substantial doubts about the correctness of the decision on direct appeal. But even if this Court finds that the individual errors are insufficiently prejudicial, the Court still should grant relief because the *cumulative effect* of appellate counsel's errors, evaluated as a whole, render the decision on direct appeal untrustworthy. *Barclay v. Wainwright*, 444 So. 2d 956, 959 (Fla. 1984) (finding cumulative effect of claims of ineffective assistance of appellate counsel sufficient to grant relief); *see also Mendoza v. Woodford*, Civil No. 04cv1809 BTM(RBB), 2006 U.S. Dist. LEXIS 95904, at *40 (S.D. Cal. May 15, 2006) (requiring Petitioner to demonstrate that had "his appellate attorney raised the omitted claims, the court of appeal would have found Petitioner's due process

rights violated by the cumulative effect of prosecutorial misconduct, ineffective assistance of trial counsel, and a biased judge").

In sum, Wickham was sentenced to death in the absence of any contemporaneous, written findings or independent judicial analysis explaining why a death sentence was warranted. He was sentenced to death in part on the basis of a constitutionally infirm prior conviction and erroneous reliance on another conviction, which critically altered the balance of mitigators and aggravators. He was subjected to trial while not competent, in a community prejudiced by extensive publicity. And, he was convicted by a jury drawn from a venire that flagrantly disregarded directives to refrain from discussing the facts of the case. The direct appeal Wickham received was fundamentally flawed in failing to take account of *any* of these reversible errors.

## CONCLUSION AND RELIEF SOUGHT

For all of the foregoing reasons, Wickham respectfully requests that this Court grant *habeas corpus* relief. At a minimum, a new direct appeal must be permitted at which the claims presented herein seeking, at the very least, a new sentencing hearing, if not a new trial, can be properly briefed and addressed by this Court.

## 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, FL 32399-1050

Eddie Evans, Esq.
Assistant State Attorney
301 S. Monroe Street
Tallahassee, FL 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: February 17, 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, NY 10022

(212) 909–6000

COUNSEL FOR APPELLANT