IN THE SUPREME COURT OF FLORIDA

MICHAEL ALLEN GRIFFIN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

APPEAL NUMBER: SC01-457

LOWER CASE NO.: F90-16875C

ON APPEAL IN THE CIRCUIT COURT OF THE

ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR MIAMI-DADE COUNTY

THE HONORABLE ALEX E. FERRER

PRESIDING CIRCUIT COURT JUDGE

APPELLANT'S INITIAL BRIEF

Attorney for Appellant

Michael V. Giordano
412 East Madison Street
Suite 824
Tampa, Florida 33602
(813) 228-0070
(813) 221-2603

Honorable Robert A. Butterworth
Attorney General
401 N.W. 2nd Avenue
North Annex, Suite 921
Miami, Florida 33131
Attorney for Appellee

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STATEMENT OF CASE AND FACT

This appeal addresses the trial court's ruling which denied Michael Griffin an evidentiary hearing on 29 of the issues raised in his motion filed pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, as well as the trial court's denial, following an evidentiary hearing, of Michael Griffin's remaining claims for post-conviction relief.

On May 2, 1990, Mr. Griffin and codefendants Nicholas Tarallo and Samuel Velez were charged with the first degree murder with a firearm of Metro-Dade police officer Joseph Martin; the aggravated assault of Metro-Dade Officer Juan Crespo; armed burglary; two counts of grand theft; and one count of petit theft. Mr. Griffin was also charged with one count of being a felon in possession of a firearm. Subsequently, State dismissed the aggravated assault charge and refiled it as the attempted murder of Officer Juan Crespo.

On January 30, 1991, Michael Griffin and Samuel Velez were jointly tried before separate juries. On February 8, 1991, Mr. Griffin was convicted of first degree murder of a law enforcement officer; attempted first degree murder of a law enforcement officer; armed burglary; two counts of grand theft; and one count of petit theft. On February 13, 1991, penalty phase proceedings were held and the jury returned a recommendation of death.

On March 7, 1991, Michael Griffin was sentenced to death for

the murder of Officer Joseph Martin; to life imprisonment for the attempted murder of Officer Juan Crespo; and five years incarceration on each grand theft charge, all sentences to run concurrently. Following this Court's affirmation of the convictions and sentence of death in 1994,[1] and the U.S. Supreme Court's denial of certiorari in 1995,[2] Mr. Griffin filed a timely motion to vacate judgments of conviction and sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure.

In his second amended motion for post-conviction relief, Mr. Griffin raised 31 claims of error. On February 1, 2000, a *Huff* hearing was held. On May 5, 2000, the trial court summarily denied 23 of Mr. Griffin's claims, and ruled against him on all but two others without an evidentiary hearing.[3] Pursuant to a stipulation between the State and defense counsel, the court held an evidentiary hearing on Mr. Griffin's claims of ineffective assistance of counsel based on trial counsel's failure to investigate and present significant mitigation evidence (claim 9), and Mr. Griffin's allegations that the sentencing court

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[1] Griffin v. State, 639 So.2d 966 (Fla. 1994).

[2] Griffin v. State, *cert. denied*, 115 S.Ct. 1317 (1995).

[3] The trial court summarily denied Appellant's claims as to numbers 1, 2, 6, 8, 10 - 18, 20 - 23, 26 - 29, and 31. As to claim 3, relating to possible bias by the original trial judge, the court denied the claim as being insufficient. The court also cursorily examined claims 4 and 5, 7, 24, 25, and 30 before denying them too.

failed to independently weigh and evaluate the evidence presented during the sentencing phase of the trial, as well as possible *ex parte* communications between the sentencing judge and the State of Florida prior to the court's preparation of the sentencing order, and defense counsel's ineffectiveness for failing to object (claim 19). The evidentiary hearing was held on September 15, 20 - 22, and October 19 - 20, 2000.

This case comes before the Court following the trial court's denial of Mr. Griffin's remaining claims following the evidentiary hearing. The appeal will address the issues summarily dismissed by the trial court, those the trial court dismissed with a ruling, and the court's order denying relief on the two issues raised and considered at the evidentiary hearing.

At the post-conviction evidentiary hearing, Mr. Griffin presented substantial evidence of mitigation which had not been presented to the jury. The mitigation evidence was introduced through the testimony of Mr. Griffin's mother, Marianne Griffin, his brother, Charles Griffin, and psychologist Dr. Ernest Bordini. Mr. Griffin also testified as to witnesses he would have called at the penalty phase of his trial.

Mr. Griffin's former counsel, Andrew Kassier, also testified. Mr. Kassier addressed his reasons for not presenting any expert psychological testimony; his recollection of his investigation and

preparation for the sentencing hearing; and other issues related to his representation of Mr. Griffin. Assistant State Attorney Penny Brill appeared and gave testimony on matters relating to the preparation of the court's order sentencing Michael Griffin to death.

Kassier testified that at the time he represented Mr. Griffin, he had been licensed to practice law for nine years. His earlier employment had been with the Dade County Public Defender's office; he went into private practice in January 1990. (RV4 - 793) Although Mr. Kassier had previously worked on first degree murder cases in which the penalty was death, (RV4 - 796), Michael Griffin's case was the one in which Kassier personally handled penalty phase proceedings. (RV4 - 854)

Mr. Kassier defended Michael Griffin without the assistance of co-counsel even though he knew Dade County permitted the appointment of a second attorney to defend a capital case (RV4 - 854). Because appointment of co-counsel would have result in a reduction of his fee, he chose not to engage a second attorney to assist him. (RV4 - 855)

At the time of the evidentiary hearing, Mr. Kassier had been suspended from the practice of law since 1997. This was the result of his failure to properly represent or handle two clients' cases, his failure to comply with a subpoena for records from the Florida Supreme Court, mismanagement, and irregularities in both his trust and operating accounts. (RV4 - 833) Kassier conceded his desire to practice criminal

law again, and acknowledged the Court would be reviewing his work due to Mr. Griffin's post-conviction proceedings. (RV4 - 834-35)

Prior to trial, Kassier hired a psychiatric expert, Dr. Mary Haber, and a private investigator, Al Fuentes to assist him in preparing Mr. Griffin's defense. (RV4 - 793) Kassier had worked with Dr. Haber before and knew the quality of her work, but could not recall whether or not he had previously retained Dr. Haber to present mitigation evidence at a sentencing hearing. (RV4 - 802) Kassier had never worked with Mr. Fuentes before, and the Griffin case was the first death penalty case Mr. Fuentes had worked on. (RV4 - 856)

Mr. Kassier requested Fuentes gather materials for Dr. Haber to assist her in her evaluation of potential mitigation, but the only records Kassier specifically recalled providing were Mr. Griffin's school records: "there may have been other documents, but I specifically remember and primarily recall that it was getting a hold of Mr. Griffin's medical records, excuse me, school records." (RV4 - 804) Kassier admitted he did not provide Dr. Haber with the police reports relating to the case, (RV4 - 848-849), or the depositions taken, nor had he attempted to schedule a meeting between her and Mr. Griffin's father, Clarence Thomas "Tommy" Griffin. (RV4 - 851)

Kassier could only recall one phone conversation with Dr. Haber regarding tests she performed on Michael, and did not remember if he had received a written report of the testing. (RV4 - 849-850) On

February 11, 1991, two days before Mr. Griffin's sentencing hearing was to begin, Dr. Haber submitted a three page summary of her opinions and findings.[4] The summary was consistent with a previous conversation between Kassier and Dr. Haber during which she advised him she could not provide any evidence to support mitigation. (RV4 - 806) Dr. Haber's sole diagnosis was Mr. Griffin was anti-social, but she did not offer any advice regarding the use of a different expert: "it was not indicated in her report, and I do not recollect that she made a recommendation that I seek out another expert or another type of expert." (RV4 - 806)

Kassier did not call Dr. Haber as a witness because, "I felt overall, based upon her written report and subsequent conversation that I had with her that the kind of testimony she would give would in the long run would prove much more harmful that beneficial to the case." (RV4 - 809) When questioned about when he had made the decision not to use Dr. Haber, and whether the decision had been made prior to receiving her February 11th letter, Mr. Kassier could not remember. It was apparent from the last sentence of Dr. Haber's letter that her conclusions were not based on a review of all the evidence: "I have yet to hear from Michael's father and as yet have not received the records from Youth Hall." (RV4 - 844 - 45)

Kassier notified the prosecution of his decision not to present the testimony of Dr. Haber on February 11, 1991. Penalty phase

[4] The summary was admitted into evidence as exhibit A-3.

proceedings began two days later. Kassier did not request a continuance or request more time to hire another expert to evaluate Mr. Griffin. (RV4-852)

Mr. Kassier recounted details of the investigation he and Mr. Fuentes conducted. After an extensive interview with Tommy Griffin, the decision was made not to contact or interview other potential witnesses, including Tommy's former wife, Michael's mother Marianne, or his brother, Charles, because Tom Griffin told them Marianne and Charles would not be helpful. (RV4 - 810-11) Thus, during penalty phase, the only witness who testified about Michael Griffin's family life was Tommy Griffin. Not surprisingly, Tommy Griffin did not acknowledge the abuse and neglect Michael suffered at his hand.[5]

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[5] Tommy Griffin was the first defense witness to testify at the penalty phase. His testimony is found at AR - 3639-3671. Based on the number of pages of testimony, and assuming a rate of approximately one minute per page of transcript, it appears Tommy Griffin testified for less than 45 minutes on his son's behalf before a jury that was going to recommend whether Michael live or die. The elder Griffin's testimony was characterized by terse, one or two word answers, a general lack of detail, and an inability to assume responsibility for his contribution to his son's problems. For example, when asked:

> Q: When Michael was an infant, was there any special medical attention that you had to have for him?
>
> A: Yes. I had to put him in the hospital when he was six, eight months old.
>
> Q: Do you remember why you had to put him in the hospital?
>
> A: He wasn't being taken care of properly. AR 3642-43.

When asked to explain why he had not contacted these other potential witnesses, Kassier said:

> After speaking with Tommy Griffin and also after speaking with my investigator, Al Fuentes, who had also spoken to Mr. Griffin, we were aware that Mike's mother, Marianne, had very severe mental health problems. And neither Al nor myself believed that she would be able to be the kind of witness that could be beneficial to Michael – in terms of being able to be a good reporter or a good source of information about Michael's background because of the particular circumstances of Michael's childhood... She wasn't with him that much, during the period of time that I felt was most relevant and in explaining how Michael grew up. (RV4 - 810-811)

Regarding Charles Griffin, Kassier advised:

> he was not available and I didn't think that he would have very much to add. Again, it was the same dilemma that I was facing because of the circumstances of Michael's life, having to determine which witnesses were in the best position to know how he grew up and the circumstances under which he grew up. I did not think that his brother, Charles, would be able to do that – I didn't see that there was any additional information that he would be able to provide, that I wasn't able to gain testimony from the father, from Tom Griffin." (RV4 - 813-814)

Kassier also claimed "there was not a lot of contact between Michael and his brother during their formative years." (RV4 - 866) Charles Griffin's mother, Geneva Hammock Griffin, was not

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In fact, Michael Griffin was hospitalized when he was about two months old because he was the victim of severe neglect.

called as a witness; Mr. Kassier could not recall whether Michael had ever told him about her.

In the same vein, Kassier did not call Linda Burton Smith, Mr. Griffin's stepmother, because, "my understanding, after speaking to my client and my investigator, was that there was not a particularly good relationship between them – and that what she would offer would be negative." Again, Kassier offered no evidence of an attempt to contact and interview Ms. Burton Smith to evaluate her testimony before she dismissed as a potential witness. (RV4 - 814-815)

Likewise, when asked about another potential witness, Steve Minnis, Kassier said, "my understanding was that he wasn't going to be available to testify. That is what was related to me by Mr. Fuentes." (RV4 - 817)

When asked if he would have elicited testimony suggesting Michael had been a victim of sexual abuse while in his father's care, and if such testimony would have been helpful to the defense, Kassier acknowledged if he had known of the information, he should have explored it. (RV4 - 866) When quizzed about stories that Michael's father had driven drunk with Michael and Charles in the car, and whether such information would have helped illustrate the quality of Michael's life with his father, Kassier was dismissive,

stating it would have been consistent with other evidence the jury had heard.[6] He conceded evidence Tommy hit Michael would have been helpful. (RV4 - 867-68)

Mr. Kassier was questioned about a possible intimidation attempt by a police officer against Steve Minnis. Kassier said he had asked Minnis "to please wait outside until there was a break, and I had an opportunity to speak with him." However, Minnis was not present when Kassier looked for him. Later, Kassier asked Al Fuentes to find Minnis, but they were not able to get him into court. (RV4 - 817-19)

On the issue of the sentencing proceedings and the court's sentencing order, the judge requested Kassier prepare a memorandum of mitigation factors proved at trial. The judge also requested a memo from the State.

According to Kassier, the penalty phase was done in three parts. Part one was the presentation of evidence and witnesses before the jury. In part two, after the jury made its recommendation, the judge was supposed to give the defense and prosecution an opportunity to present additional witnesses and testimony. Part three was when sentence would be announced. (RV4 - 824) However, the trial record reflects: the penalty

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[6] Tommy Griffin testified: "I drank, yes. I quit about ten years ago. I suppose I drink a little too much at times, yes, sir." AR - 3654. He did not, however, consider himself to be an alcoholic.

phase began on February 13, 1991; on that day and the next, witnesses were presented and the prosecution and defense argued their respective positions (AR - 3629 - 3841); on February 14, 1991, the jury returned its recommendation (AR - 3836); on March 7, 1991, Mr. Griffin made a personal statement to the court (AR - 3845 - 3862), and immediately thereafter, the court read the previously-prepared sentencing order (AR 3863-3884). Thus, Mr. Griffin was not given an opportunity to speak until the court had already determined sentence and prepared the sentencing order.

Mr. Kassier was asked if he had told Al Fuentes the defense didn't have a chance in this case because the judge was a good friend of the deceased officer's father, but the Court would not allow Mr. Kassier to answer the question. (RV4 - 858)

Prosecutor Brill testified she was the author of the State's sentencing memorandum, but did not recall who requested she do it. (RV4 - 895) While preparing the memo, she did not receive any inquiries from Judge Snyder. Although she believed she sent a copy of the sentencing memorandum to Mr. Kassier, the cover letter did not reflect it was sent to him. Her recollection was that Mr. Kassier was handed a copy of the memorandum with a cover letter. Ms. Brill dropped off

the memo at Judge Snyder's office, but could not recall if the Judge was present. (RV4 - 904) According to Ms. Brill, the sentencing order differed from the memorandum because the memorandum did not address the weight to be given to the aggravators or whether the aggravators outweighed the mitigators. (RV4 - 908)

Defense counsel presented the testimony of Dr. Ernest Bordini, a clinical psychologist with a specialty in Forensic Neuropsychology.[7] (RV2 - 270) Before preparing his opinion, Dr. Bordini reviewed more than "a banker's box of documents"

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[7] A licensed psychologist since 1988, Dr. Bordini received his undergraduate degree from Boston College, and both his Master's and Ph.D. from the University of Florida. He performed his dissertation research at the North Florida Evaluation and Treatment Center. He was appointed to an assistant professorship in the Department of Psychiatry, Forensic Psychiatry, at the University of Florida, where he performed up to 1000 neuropsychological evaluations, supervising maybe half as many more. His current practice provides neuropsychological and psychological assessments for a number of municipal and government agencies.

Dr. Bordini belongs to a number of professional societies, and has held several leadership positions, including serving as the founder and President of the Neuropsychology Interest Division with the Florida Psychological Association. He has received numerous awards, including being named Distinguished Psychologist by the Florida Psychological Association in 2000.

Finally, Dr. Bordini has done extensive work in the areas of clinical psychology and neuropsychology in the State of Florida in criminal cases, including capital cases. The State stipulated to his designation as an expert and his Curriculum Vitae was admitted into evidence as Defense Exhibit A. (RV2 - 272-77)

encompassing the available medical and school records of Michael Griffin, depositions of family members, records from the Department of Corrections, police reports, and witness statements. (RV2 - 281)

Dr. Bordini did a clinical interview with Mr. Griffin, and spent more than three hours obtaining answers to a 24-page questionnaire which dealt with background history, attitude towards parents, childhood experiences, etc. He then conducted another, more focused interview to expand upon on the information provided. (RV2 - 281) He reviewed the evaluations and results of another defense psychologist, Dr. Eisenstein,[8] and administered tests to Mr. Griffin over a two-day period at the Dade County jail. In total, twenty-five procedures were performed, two of which were given to determine if Mr. Griffin was malingering. Dr. Bordini was able to rule out malingering. (RV2 - 288)

In Dr. Bordini's opinion, Mr. Griffin suffered from neuropsychological impairment. (RV2 - 284) He supported his diagnosis with a variety of observations, including Mr. Griffin's difficulties with certain types of psycho-motor skills, that is, the ability to manipulate, coordinate, and write quickly. (RV2 - 287) In terms of functional abilities,

[8] Dr. Eisenstein's report was stipulated to and entered into the record at hearing as defense exhibit __.

Michael Griffin's "visual memory, depending on the task that you gave him, range all the way normal (SIC) on some tasks to severely impaired." (RV2 - 293)

Mr. Griffin's constructional skills, the ability to draw complex figures from memory, was also in the severely-impaired range. (RV2 - 294) Additionally, in executive function testing, which requires identification of appropriate and inappropriate responses and tests the ability to plan, organize, and control one's behavior, moods, and emotions, Mr. Griffin's impairment was within the range of "loud to probably moderate impairment." (RV2 - 294-95)

Dr. Bordini described Mr. Griffin's difficulty with abstract reasoning, i.e., the ability to think flexibly, which he found to be indicative of frontal lobe damage. (RV2 - 296) Testing revealed per severation, also associated with frontal lobe difficulty, that is, the inability to shift gears, and he noted Mr. Griffin's performance on Dr. Eisenstein's test showed the same difficulty. (RV2 - 297)

Dr. Bordini's observations of Mr. Griffin also supported the diagnosis of frontal lobe impairment; he found Michael had difficulty with impulse and anger control. (RV2 - 298) He saw evidence of neuropsychological impairment in Mr. Griffin's school records, (RV2 - 299), and, in Mr. Griffin's history,

evidence of risk factors that would predispose him to neuropsychological impairment. (RV2 - 300)

Although no birth records were available, there was also an indication of difficulty during Mr. Griffin's birth, another risk factor. A report suggested Mr. Griffin may have suffered a broken collarbone as an infant; this raised the issue of whether he had been a shaken baby and suffered a head injury. There was also a report of a skull fracture in early childhood. Other evidence included, "some abuse there – so, there is again really multiple sources of possibilities, in terms of risk – the issue of, you know, did this was this behavior related to some neurological condition." (RV2 - 301)

Dr. Bordini described the negative impact of the neuropsychological impairment on Mr. Griffin's education and personal development. (RV2 - 303 & 309 & 310). Mr. Griffin's school records contained abundant evidence of attention deficit disorder (ADHD); it too had a negative impact. (RV2 - 311-12, 314) Dr. Bordini observed behavioral symptoms of the disorder during his clinical interview with Mr. Griffin. (RV2 - 313)

Records indicated Mr. Griffin had been given anti-seizure medication at various times in his life, although it was not clear who had prescribed the medication. Mr. Griffin's prison

records revealed he had been prescribed the same medication for what was described as post-traumatic seizures. (RV2 - 317)

As to specific psychological diagnoses, Dr. Bordini identified Intermittent Explosive Disorder, a disorder of impulse control. (RV2 - 314-16) Additionally, Marianne Griffin's severe psychiatric problems, including bipolar disorder and paranoid schizophrenia, in conjunction with Michael's ADHD, would place him at an elevated risk for bipolar disorder. (RV2 - 319)

According to Dr. Bordini, Mr. Griffin met the criteria for a bipolar disorder not otherwise specified; he found evidence of the disorder in his clinical interview. (RV2 - 319-20) His diagnosis was supported by the multitude of crimes committed by Mr. Griffin, his school records, and his elevated clinical scale for mania. (RV2 - 320) The diagnosis of bipolar disorder not otherwise specified was a relatively conservative one. (RV2 - 321-22) Mr. Griffin also met the criteria for anti-social personality disorder based on his history of criminal offenses, aggression against others, and adaptation of criminal lifestyles. (RV2 - 322)

Dr. Bordini testified Mr. Griffin met the requirements for the statutory mental health mitigator found in Section

921.141 (6)(B), Florida Statutes, that is, the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Mr. Griffin was severely emotionally disturbed at the time of the homicide. (RV2 - 334) The death of Michael's brother, coupled with the shooting death of his close friend, Jose Toledo, fueled Mr. Griffin's rage. (RV2 - 337) The importance Mr. Griffin placed on his friend's death demonstrated his poor impulse control and was another example of his mental and neurological illnesses. (RV2 - 339-340)

In addition to establishing statutory mitigation, Dr. Bordini found non-statutory mitigation based upon Mr. Griffin's childhood of abuse and neglect. Dr. Bordini recounted a police report of the sexual abuse of Mr. Griffin when he was twelve. (RV2 - 326) Apparently, Mr. Griffin's stepmother did not want him to report the incident; the psychological impact was that Mr. Griffin's family did not care about him. (RV2 - 327)

Dr. Bordini's review of school records also revealed multiple attempts by school officials to induce his father to get involved and address Michael's many problems. Tommy Griffin did not respond and was consistently uncooperative. (RV2 - 327) Tommy Griffin's deposition indicated he had no

clue why his son was in special classes; a clear indication of his father's disregard for Michael's welfare. (RV2 - 328)

When Michael's father removed him from the Montejo home, a loving environment with limits and structure,[9] and placed him in the chaotic, unpredictable, and cold environment where his father was his primary caretaker, there was a negative impact on Michael's development. (RV2 - 328-30) Mr. Griffin's aggressive and inappropriate behavior escalated when he was in his father's care; Michael's responses in the clinical interview demonstrated classic signs of psychological numbing and a loss of a sense of normalcy. (RV2 - 330)

Although Mr. Griffin had been placed in emotionally handicapped classes, there was no psychological or psychiatric diagnosis. (RV2 - 332) As a result, Mr. Griffin was treated as a bad kid rather than the severely emotionally disturbed child he was. Based on Mr. Griffin's behavior, Dr. Bordini felt Michael should have been in a psychiatric treatment facility. (RV2 - 333)

On cross-examination, Dr. Bordini admitted the evidence of a head injury was subjective rather than objective. (RV3 -

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[9] Mario Montejo and his wife, Raquel, began babysitting Michael when he was an infant. Eventually, he lived with the Montejos and was raised along with their own son. When Michael was eight or nine years old, Tom Griffin removed him from the Montejo household. (AR - 3745-49)

505) He acknowledged information from the Presentence Investigation Report which contained statements allegedly made by Mr. Griffin at the time of the offenses, including Michael intended to shoot the police rather than go back to prison.

Dr. Bordini confirmed Mr. Griffin's gate, posture, receptive or expressive language, facial expressions, were observable normal, he was alert and generally attentive. Although Mr. Griffin's speech was clear and articulate, Dr. Bordini noted "it was also not logical or coherent, so there were problems in the speech." (RV3 - 507-508)

Mr. Griffin's school behavior records revealed he was experiencing problems in the first grade. (RV3 - 513) At the age of ten, Mr. Griffin had become a discipline problem and had poor work habits. He was held back in the fourth grade. (RV3 - 514) The school sent a letter stating his behavior was becoming unacceptable because he brought a pocket knife to school. (RV3 - 515) In October 1982, school officials requested permission to test Michael. Tom Griffin gave permission for projective testing to determine whether or not to place him in a program for the emotionally handicap.

Dr. Bordini explained the significance of only allowing projective testing:

> what you left out is that his father reluctantly signed those and the importance

> of that particular thing is that his father only allowed projective testing – not doing further testing is that you are not going to find certain types of problems if you only do one particular type of testing, sir, versus another and I thought that was a significant event because it contributed to the fact that he was misdiagnosed. (RV3 - 517-518)

In November 1982, Michael was transferred to the emotionally handicapped program. (RV3 - 522) He was suspended for throwing a chair and striking a teacher and teacher's aid. He continued to engage in disruptive classroom behavior (RV3 - 523) and was suspended October 1983, for refusing to obey a teacher, in January 1984, for fighting, and again in February 1985, for slapping a teacher. (RV3 - 524)

Dr. Bordini acknowledged Department of Corrections medical records in which Michael denied any history of seizures, but disputed the prosecution's statement that the Union Corrections medical staff ruled out petit mal seizures. "That's incorrect. The impressions were to rule out petit mal, but it doesn't rule out petit mal seizures." (RV3 - 532) According to Dr. Bordini, the records disclosed Michael "was treated with Dilantin and diagnosed with post traumatic seizures by medical doctors and other times they said he didn't have that and taken off his medication." (RV3 - 533) When asked about the "normal" result of an EEG given to

Michael, Dr. Bordini stated: “it was described as normal and not being able to rule out seizures, so they couldn’t rule out a seizure disorder.” (RV3 - 534)

A discussion of the tests administered by Dr. Eisenstein and Dr. Bordini established there is a phenomenon known as learned affect or practice affect. (RV3- 539-40) Dr. Bordini administered twenty-five tests to Michael. (RV3 - 541) The doctor did not administered the WAIS-III Full Scale IQ test to Michael; it was administered by Dr. Eisenstein and Dr. Bordini did not repeat it. (RV3 - 542) Michael’s IQ was 102 which placed him in the average range. Dr. Bordini acknowledged there were several tests in which Michael preformed in the average range. (RV3 543)

Dr. Bordini disagreed with the prosecution regarding Dr. Eisenstein’s TPT memory and localization test. Dr. Bordini repeated the test and both Dr. Bordini and Dr. Eisenstein’s test results showed Michael had great difficulty on the localization score which is often sensitive to brain damage. (RV3 - 552) The prosecution questioned Dr. Bordini regarding Mr. Griffin’s ability to plan, execute and escape crimes he had committed. The questions related to the doctor’s mental diagnoses, specifically, Michael’s difficulties with executive function tasks. (RV3 - 560)

On redirect, Dr. Bordini was questioned about the significance of Tom Griffin's refusal of a referral for family counseling. According to Dr. Bordini, Tom Griffin was not "taking good care of Mr. Griffin in terms of refusing recommendations made by the school and it is also a possible sign that he doesn't want the family looked at too closely... he may be avoiding scrutiny...."(RV3 - 583-584) During one period in which Michael lived with his father, school records indicated he had been absent anywhere from sixteen to forty six days in one year and tardy from 28 to 51 days in one year. (RV3 584) When asked if there were any school records indicating a head injury, the Doctor said the records showed problems with temper control, attention, staying in task, all of which could be diagnostic of attention deficit disorder and due to head injury. (RV3 - 586) There were also records of fainting episodes. (RV3 - 586)

According to Dr. Bordini, Tom Griffin's deposition revealed Michael had been hospitalized as a very young child because he was not healthy. The doctor explained, "he evidently was hospitalized for a week to built him back up, which I assume that the child was either malnourished or very ill and had to recover." (RV3 - 585)

DOC medical records referred to post traumatic seizures.

Dr. Bordini explained a post traumatic seizure is a type of seizure usually diagnosed after a head trauma. This was a diagnosis made in Michael's case at USI. (RV3 - 587) USI had done a brain scan but there were no reports of the results. (RV3 - 587) An EEG was done but did not rule out seizure disorder. Dr. Bordini explained an EEG will miss seizure disorders 30 to 40 percent of the time and has limited ability to definitively rule out the disorder. (RV3 -588)

When questioned about evidence of impulsivity or lack of plan by Michael leading up to and including the murder of the police officer, Dr. Bordini stated:

> I think there was impulsivity and lack of planning in a number of different areas. One is, from my understanding, much the event that involved the murder, one Mr. Griffin from the testimony of his codefendants, he didn't quite seem like they knew what or exactly what they were going to do and it seemed the way that they were attempting to operate, get in the car load up and see what happens, in fact, it was my understanding that they went to one place and abandoned that plan and that the planned to rob the Holiday Inn came up as a second thought, because the first plan didn't work, so they were frustrated in that incident and developed a spontaneous plan to do the other. Also there is clearly some lack of planning in terms of their escape route. It was very clear that Mr. Griffin was aware that that was a bad neighborhood to enter, that was a high risk neighborhood in terms of getting pulled over and obviously they hadn't planned an escape route at that point in time. There also seemed to be, I'm aware of testimony that indicated that there was a plan to have a shoot out if he was pulled over, but again he chose a bad weapon, the shotgun was in the trunk. It doesn't

seem like he had very good plans of how to survive a shoot out. (RV3 - 591-591)

To rebutt the testimony of Dr. Bordini, the State called Dr. Ansley, a clinical psychologist with a specialty in Neuropsychology.[10] To prepare to testify, Dr. Ansley reviewed material prepared by Dr. Bordini, Mr. Griffin's school and prison records, both Dr. Eisenstein's and Dr. Bordini's test data, and Dr. Eisenstein's deposition. (RV3 - 687) She used Dr. Eienstein's Halstead Reitan Neuropsychological Test battery in her assessment of the issue of brain damage. (RV3 - 687-688)

In her opinion, Mr. Griffin did not suffer from any major neuropsychological defects. (RV3 - 692) She found no history of hospitalization or neurological event or history of head injury. The only event she acknowledged a blow to the head with a fishing pole which, she felt, was not a brain injury. (RV3 693) A history of seizure disorder would be another

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[10] Dr. Ansley completed her post-doctoral training at the University of Miami Department of Neurology. (RV3 - 669-670) She was on the Epilepsy Team of the University of Miami for approximately one year, and spent nine months on the Head Injury Team within the Department of Neurology. (RV3 - 672)

Dr. Ansley is currently on the court approved clinical forensic list in Broward County. (RV3 - 673) 40 percent of her practice is forensic, and about 80 percent of that is criminal. (RV3 - 675) She has evaluated defendants death penalty cases for both the State and defense counsel. (RV3 - 676-77)

indicator for possible neurological deficits. Despite available D.O.C. records to the contrary, she had no information indicating he had a seizure disorder. “When somebody tells you that they fainted – had an EEG that was negative and have never been reported to have had a seizure it doesn’t take that kind of training to say, I don’t have a seizure disorder.” (RV3 - 694)

Similarly, she found no evidence of frontal lobe impairment and no evidence of executive functioning problems. (RV3 -699-700) She diagnosed a personality disorder not otherwise specified, with features of anti-social and narcissistic personality disorder. (RV3-701-02) Because she saw no history of a major depressive episode in Mr. Griffin’s life, Dr. Ansley did not believe he was bipolar. There was nothing in his history, testing, or the limited records she reviewed to suggest Mr. Griffin ever had recurrent hyper manic episodes. (RV3 - 706-707) Dr. Ansley disagreed with Dr. Bordini’s ADHD diagnosis: “I just wouldn’t--go back and review school records, and somehow, come up with a diagnosis second guessing the school system – one thing that they most definitely do very well is identify ADHD. If anything, people say that they over diagnose it.” (RV3 - 703) She did, however, diagnose a learning disorder not other wise specified. (RV3 -

708)

On cross-examination, Dr. Ansley admitted administering only eight to ten tests, spending approximately forty-five minutes-to-an-hour doing so. (RV34 - 743) Dr. Ansley's report was six pages long, while Dr. Bordini's was 45 pages. (RV4 - 748) She had not reviewed police reports of the homicide, (RV4 - 750), and did not discuss whether Mr. Griffin had difficulty sleeping, excessive energy, or was hyper at the time of the homicide. (RV4 - 766) Dr. Ansley reviewed Dr. Haber's report in which she diagnosed Mr. Griffin with Antisocial Personality Disorder severe. (RV4 - 769-70) Dr. Haber's report did not refer to any clinical examination of him. (RV4 - 771)

In an addendum to her report, Dr. Ansley listed the tests she administered and compared her results with the Rey-Osterreith test given by Dr. Eisenstein. (RV4 - 773-76) According to Dr. Ansley, the difference in the results was because Mr. Griffin became irritable when taking the Rey-Osterreith test. (RV4 - 778)

Dr. Bordini's conclusions regarding Mr. Griffin's violent and unhappy childhood were confirmed by the testimony of Charles Griffin, Michael's older, half-brother. Charles revealed he too had been a victim of sexual molestation at the age of four, by his paternal grandfather. When Charles told

his father about it, he was unconcerned and said it was bullsh--. (RV3 - 597-600) Charles' grandfather was also an alcoholic. (RV3 - 600)

Charles was about seven years old when he first saw Michael, he was six or seven months old. (RV3 - 601) Charles described Marianne and Tom Griffin's constant arguments about who should take care of Michael; she would tell Tom to take him to the babysitter because she wasn't going to care for him. (RV3 - 603) Charles and Michael also lived with their father and his girlfriend, Linda; Charles recounted a laundry-list of lurid behavior by Tom and Linda. They took drugs in front of the boys, and drank. (RV3 - 611) Tom Griffin frequently drove drunk, often with the boys in the car. (RV3 - 622) Linda was an alcoholic too, and, like his father, hooked on Vicodin. She would stay out drinking all night, and when she came home she would sleep for two or three days to recover. (RV3 - 633) Linda would not cook or wash clothes, and when Tom gave Linda money to buy food, she used it to go drinking. (RV3 - 634)

Because he was hung over from drinking and taking pills, Tom would not get up to take Michael to school. Of course, Michael did not have clean clothes to wear, and so, "started skipping school, not going because his clothes wasn't clean.

He didn’t have nothing to wear. My father wouldn’t get up and take him to school in the morning. Cause he was too hung over.” Michael was afraid to wake his father because he was of being hit. (RV3 - 635) Once, when he did try to wake Tom Griffin, after a night of drinking, he bloodied Michael’s face. He was 10 years old. (RV3 - 631) Tom spent all his money on drinking, gambling, and pills. After a back operation, Tom became addicted to Vicodin pain medication, which caused extreme mood swings. (RV3 - 632) Once, while drinking and fighting with Linda, Tom kicked down all the doors in her house. He then ordered Charles and Michael into the car. The boys were afraid to get in, but when they did, Tom hollered he was sick of them, sick of women, and wanted his life back. He drove away extremely fast, lost control of the car, spun out and almost landed in a ditch. He drove off again, sped through a turn and scraped the guardrail. Afraid they would end up in the water, Michael jumped in the back seat and tried to hide. (RV3 - 623) When they finally stopped to eat, Charles took the keys; he drove them home. (RV3 - 624)

Charles told of another drunk driving incident, when his father, drunk as usual and yelling at them, ran down some construction barricades. A police officer pulled them over,

but allowed Charles to drive them home. (RV3 - 624)

According to Charles, his father would leave them with a barmaid and go drinking elsewhere. Frequently, Tom did not return, and the barmaid would have no choice but to take the boys to spend the night. (RV3 - 625) Not surprisingly, women made derogatory comments about Tom, but Michael always stuck up for him. (RV3 - 626)

When the boys got tired and asked to go home, Tom would tell them to wait a minute. The minute would turn into hours. (RV3 - 626) Charles watched his father fondle women at the bar. “He would touch them in their private areas, and they would slap him. He would just laugh it off and we’d go somewhere else cause the barmaids would run him out. He was too drunk.” (RV3 - 627)

Once, when they were home alone without food, Michael, eight years’ old, snuck into Marianne’s room and took some of the food she hid for herself. When she found out, she started screaming. Because he was tired of Marianne’s constant harassment of Michael, Charles took the blame; she threw an ashtray at him.

Charles described another incident which happened when Michael was eight. He and Michael were hanging out around a pool hall when Marianne walked out of a massage parlor. A man

called to Marianne “show me your Marilyn Monroe” and she bent over and exposed her back side. (RV3 - 617-618) Charles and Michael found a brief case containing pornographic photos of Marianne and an unknown man, a vibrator and other stuff. (RV3 - 619-620)

Charles came home one night to find his father laying on the couch with a glass of whiskey next to him and a cigarette in his hand. The cigarette had become embedded in the couch and was smouldering. Charles poured water on it, checked to make sure it was no longer burning, and went to bed. In the middle of the night, he awoke to a crackling sound. He opened the bedroom door and a gust of flames shot through – the house was on fire. The upstairs neighbors threw a brick through his window to allow him to escape. Once outside, he saw a neighbor holding Michael, crying, his underwear covered with black smudge. (RV3 - 621)

At one point, conditions at home were so bad Charles’ mother, Geneva, took them to live with her. Michael was 10.(RV3 - 627) Geneva returned Michael to his father, however, because Michael would not listen to her. Michael wanted to return to the Montejos.(RV3 629-630) Michael would talk to himself in English and Spanish; apparently, he was conversing with his brother from the Montejo’s family. Michael would

speak aloud then move his lips without saying anything. (RV3 - 612-613)

Charles started drinking when he was twelve. He was often drunk around Michael and often did drugs in his presence. (RV3 - 636) He moved to Georgia when Michael was sixteen or seventeen, but would visit Michael and Tom. Michael began having trouble at school and with the police. (RV3 - 637) Charles began to live as his father did and was a poor example for Michael. (RV3 - 638) In 1990, their brother died from AIDS. They did not attend the funeral.(RV3 - 638)

Neither Michael's attorney or the investigator contacted Charles even though he was living at his father's house in Miami. If he had been called to testify, he would have told the jury what he told the court. (RV3 - 639) Charles admitted he was currently in prison. (RV3 - 639)

Marianne Griffin, Michael's birth mother, also appeared. On disability for depression and mental problems, Mrs. Griffin began seeing a psychiatrist at the age of twelve. She was under the care of the psychiatrist, on and off, until she met Mr. Griffin. Her symptoms included hearing voices, depression, crying and staying in her room all the time. (RV2 - 353) She had been diagnosed as a manic depressive and a schizophrenic. (RV2 - 370)

When she married Tom Griffin and got pregnant, he wanted her to have an abortion. (RV2 - 354) After Michael was born, she was depressed and heard voices telling her to kill herself. (RV2 - 356) Michael went to a babysitter because she would not come out of her room. (RV2 - 356) Tom did not help her care for little Michael because he was either working or drinking. (RV2 - 357)

Mr. Griffin was an alcoholic and drank everyday, quart bottles of beer and whiskey. He was drunk for days at a time, and when he drank, was verbally abusive to her. (RV2 - 358) Even when Michael was a small boy, Mr. Griffin would hit him in the face. (RV2 - 359) Apart from his drinking, Tom Griffin took pills and smoked marijuana in the house. According to Mrs. Griffin, Tom gambled away large sums of money, thousands of dollars, in Las Vegas. (RV2 - 361)

She left when Michael was about eight years old because she could no longer tolerate Tom’s drinking. She did not see Michael again until he was on death row. (RV2 - 362) At the time of his trial, Mrs. Griffin did not know Michael was accused of murder. (RV2 - 362) Neither Attorney Kassier nor Investigator Fuentes contacted her about Michael, but she would have testified if she had been asked to do so. (RV2 - 363, 389)

Jose Montejo testified he and his wife, Raquel, care for Michael for approximately nine years. They began taking care of him when he was six months old. (RV2 - 392) Michael's mother showed a lack of affection toward Michael, and in the first year they babysat, visits by Michael's mother and father went from once a week to once a month. (RV2 - 394)

According to Mr. Montejo, Michael was teacher's pet until they went to a PTA meeting and met his teacher. Michael introduced them as his parents. Mr. Montejo believed the teacher was prejudiced because after they met, the teacher changed drastically and tried to have Michael removed from her class. From that day forward, the Montejos received complaints from the teacher. Finally, Michael was assigned to another classroom.(RV2 - 400) When he was about nine, the Montejos sent Michael to his grandmother to be raised. His parents had stopped paying them but refused to let them adopt Michael. They saw him only once after that, about a year later. (RV2 - 401)

When Mr. Montejo was asked if he spoke with Michael's attorney before taking the witness stand, he said, "he asked me about three or four questions not more than that." (RV2 - 403) Mr. Montejo did not feel he was allowed to tell the jury about Michael's life. (RV2 - 404)

When asked if there were any other witnesses he would like to call for the evidentiary hearing, Michael Griffin requested the Court call Raquel Montejo, the woman who cared for him from the age of six months until he was eight.(RV4 - 885) She could recount the abuse Michael suffered and provide specific examples: (1)he had been tied to the back of a car and left; (2)his parents fought a lot, (3)were alcoholics and addicted to pills; (4) he was frequently left home alone; (5)he had been molested twice; and (6) his mother was a prostitute and once shook him so violently it broke his collarbone. (RV4 - 889-890)

Despite the plethora of mitigation evidence, both statutory and non-statutory, presented at the evidentiary hearing which would have been available to Kassier if he had properly investigated and represented Mr. Griffin, the court denied Michael Griffin’s post conviction motion. (RV2 - 257-62) A timely Notice of Appeal was filed. (RV2 - 263-64)

SUMMARY OF THE ARGUMENT

The trial court's order erred by denying a new penalty phase proceeding based upon trial counsel's failure to investigate and present mitigation evidence. As was apparent at the evidentiary hearing, there was substantial mitigation which was not presented to the sentencing jury, including expert testimony which would have established the mental mitigator that the felony was committed while Mr. Griffin was under extreme emotional distress. The court's order denying a new sentencing proceeding because the trial court failed to independently weigh the aggravating and mitigating circumstances was also in error. The court erred by denying Mr. Griffin an evidentiary hearing on the remainder of his claims for post-conviction relief.

I. THE TRIAL COURT ERRED BY NOT GRANTING A NEW SENTENCING PHASE HEARING BASED UPON TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATION EVIDENCE[11]

As the Court has previously held, all claims alleging ineffective assistance of counsel must be evaluated under the two-prong test propounded by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accordingly, in order to prevail on an ineffective assistance of counsel claim, a defendant must not only show that counsel's performance "fell below an objective standard of reasonableness" based upon "prevailing professional norms", Ragsdale v. State, 26 Fla. L. Weekly S682 (Fla. Oct 18, 2001), *quoting* Strickland, supra, 466 U.S. at 688, but must also demonstrate there is a "reasonable probability" the result of the proceeding would have been different if not for counsel's unprofessional performance. Id., at 694. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome [of the proceedings]. Id.

In death cases, the second prong of the Strickland test is applied to counsel's execution of his or her duties during the penalty phase as follows: the defendant must demonstrate

[11] Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate. (RV1 - 32-167)

"'counsel's errors deprived [defendant] of a *reliable* penalty phase proceeding.'" Rose v. State, 675 So.2d 567, 571 (Fla. 1996), *quoting* Hildwin v. Dugger, 654 So.2d 107, 110 (Fla.), *cert. denied*, 516 U.S. 965, 116 S.Ct. 420, 133 L.Ed.2d 337 (1995). One of the Court's primary concerns in a claim of ineffective assistance of counsel during the penalty phase is counsel's failure to investigate and present "available mitigating evidence ... along with the reasons for not doing so." Hildwin, at 109.

An ineffective assistance of counsel claim is "a mixed question of law and fact" subject to plenary review under the Strickland standard, Rose, at 571, with deference being given to the trial court's factual findings. Ragsdale, at ___. Notwithstanding the deference paid to the trial court's findings of fact, in both Ragsdale and Rose, this Court reversed the trial court's findings and ordered new sentencing hearings based upon trial counsel's failure to investigate and present evidence in mitigation.

In Ragsdale, supra, both defendants were charged with armed robbery and the subsequent murder of the victim, who had been badly beaten and died because his throat had been slit. Ragsdale's codefendant pled no contest and received a life sentence. Having admitted he had struck and cut the victim,

but insisting his codefendant inflicted the fatal blow, Ragsdale went to trial. At trial, three individuals testified Ragsdale admitted killing the victim. Id. Following the sentencing hearing, the jury recommended death by an eight-to-four margin. The trial court imposed the death sentence, finding three aggravating factors and no mitigation. This Court affirmed Ragsdale's conviction, but following the trial court's denial of Ragsdale's motion for post-conviction relief, remanded the case for an evidentiary hearing on the issue of defense counsel's failure to investigate and present evidence in mitigation. The circuit court held an evidentiary hearing and subsequently denied Ragsdale's motion for a new sentencing hearing.

Ragsdale appealed the denial of his post-conviction motion, and after reviewing the record, the Court found Ragsdale's counsel "was ineffective as a matter of law ... and ... essentially rendered no assistance to Ragsdale during the penalty phase of the trial. Thus, as the penalty phase of Ragsdale's trial was not subject to meaningful adversarial testing, 'counsel's errors deprived [defendant] of a reliable penalty phase proceeding.'" Id., *quoting* Hildwin, supra, at 110.

During the penalty portion of Ragsdale's trial, his

attorney called only one witness, Ragsdale's brother Terry, who provided little in the way of mitigating evidence. Ragsdale, at __. In contrast, during his post-conviction evidentiary hearing, Ragsdale presented testimony from several siblings to establish a truly wretched upbringing marked by physical violence against Ragsdale, his brothers, and mother. In addition to being physically abusive, Ragsdale's father was disabled and unemployed, forcing the family to move from trailer to trailer. Ragsdale's siblings also testified as to the defendant's extensive drug use and a variety of head injuries suffered during his childhood and adolescence.

Although this evidence was presented in a limited fashion at Ragsdale's sentencing through Terry, defense counsel presented no expert testimony to relate Ragsdale's childhood traumas to his mental state at the time of the murder. However, at the evidentiary hearing, Ragsdale was able to establish the existence of mental mitigation through the testimony of forensic psychologist Dr. Robert Berland, who administered various tests and reviewed the findings of the State's experts, Dr. Merin and Dr. Delbeato. Although Dr. Merin disputed some of Dr. Berland's conclusions, he did find Ragsdale had a personality disorder with paranoid feature. Thus, despite the experts' differences of opinion, there was

"available evidence" from the experts which would have supported "substantial mitigation but which was not presented during the penalty phase." Id. at __.

Additionally, in Ragsdale, the Court reviewed the explanations given by trial counsel as to his reasons for not investigating or presenting further mitigation. According to the Court, the case was counsel's first capital murder case, and following completion of depositions, his entire investigation consisted of several calls made by his wife to Ragsdale's family. Indeed, counsel did not even personally speak to any of Ragsdale's family members. At the evidentiary hearing, Ragsdale's family members testified they had not been contacted and would have in fact testified had they been permitted to do so. Thus, the Court found the witnesses, several of whom lived in the county where the trial was held, would have been available had counsel "conducted a minimal investigation." Id., at __.

Notwithstanding the trial court's denial of his claim of ineffective assistance at penalty phase, Mr. Griffin's situation parallels Ragsdale's in many significant ways. Initially, it must be noted that Mr. Griffin's trial counsel, Robert Kassier, although admitted to the bar for nine years prior to the trial, had only been in private practice for a

year-and-a-half.[12] Mr. Griffin's was the first penalty phase Kassier had personally conducted, and he chose to do so without the assistance of co-counsel even though he knew he could have requested the trial court appoint a second attorney. (RV1 - 134-5) Although Mr. Kassier did hire private investigator Al Fuentes to assist him, he had never before worked with Mr. Fuentes. Like Mr. Kassier, Mr. Fuentes had never before worked on the penalty phase of a capital case. (RV1 - 136)

Prior to trial, Mr. Kassier retained an expert, Dr. Mary Haber, to assist with mitigation. (RV1 - 82) However, the only records he provided Dr. Haber were Mr. Griffin's school records. (RV1 - 84) Apparently, Dr. Haber reviewed the school records, interviewed Mr. Griffin, briefly spoke on the telephone to his father, and concluded there was no mitigation to be had. (RV1 - 86) As a result, Mr. Kassier did not call Dr. Haber to testify, and did not seek any further opinions from other mental health experts.

Mr. Kassier did present several witnesses during penalty phase, ostensibly to establish mitigation, but his primary

[12] Although perhaps not strictly relevant, at the time of the evidentiary hearing, Mr. Kassier testified he had been suspended from the practice of law since 1997 for mismanagement and irregularities in his operating and trust accounts and failure to properly represent or properly handle a client's matter. R. 114.

witness was Mr. Griffin's father, the man who was the source of much of Mr. Griffin's unhealthy, unhappy childhood. Not surprisingly, Tommy Griffin minimized Michael's miserable upbringing, as well as his responsibility for his son's welfare.

At trial, Tommy Griffin testified his son had been hospitalized when he was six months old, because he had not been properly cared for. (AR - 3643) Tommy Griffin did not acknowledge any physical or emotional abuse suffered by Michael at the hands of either his mother or father, but did testify that when Michael was less than a year old when he was taken to a babysitter because his mother was incapable of caring for him. (AR - 3645) Eventually, Michael came to live with the babysitter's family, and stayed with them until he was about seven years old. (AR - 3645) Michael then returned to his father's household.

Although Tommy Griffin acknowledged some minor school difficulties, there was no evidence which corresponded to Michael's brother's descriptions of life in Tommy's house. The portrait painted by Tommy Griffin of his and Michael's life was a bland, innocuous representation of minor problems with Michael's mother, life in a loving home at a babysitter's, and not-untypical rearing by a single parent who worked a great

deal.

In contrast, Charles Griffin, Michael's older brother, told a story of an alcoholic father who ignored the sexual abuse of Charles by an alcoholic grandfather, (RV3 - 597-600) and later in life, bought marijuana for Charles to sell. According to Charles, his father and his father's girlfriend, Linda, frequently took drugs and drank in front of the kids,(RV3 - 611), and drove drunk with them in the car. (RV3 - 622). Charles also testified his father would take him and Michael out to bars, deposit them with a barmaid, and go to another place to drink. Occasionally, the boys would not be retrieved but would wind up going home with one of the barmaids and sleeping there. (RV3 - 625) Tommy Griffin did not get up to take Michael to school because he was often hung over from drinking or drugging the night before, and did not bother to provide clean clothes so that Michael could go to school. (RV3 - 635)

Charles also testified briefly about Marianne, Michael's mother. He recalled Marianne and Tommy arguing about Michael when he was about six months old; she insisted Michael go to the babysitter's because she could not handle him.(RV3 - 610). Later, when Michael was about eight, he and Charles saw Marianne expose herself to a man as she left the massage

parlor where she worked. He and Michael found lewd pictures of Marianne and another man. (RV3 - 617-20)

Charles also recalled strange behavior by Michael, including talking to himself while claiming to be talking to his brother from the Montejos, and moving his lips while not speaking aloud. (RV3 - 612-12) Charles also testified he had not been contacted by trial counsel at the time of Michael's trial. (RV3 - 629)

Charles' depiction of Michael's childhood was confirmed by Marianne Griffin, Michael's mother. Mrs. Griffin acknowledged a long history of mental illness from the age of 12 to the present and admitted she was disabled due to depression and other mental health issues, including manic depression and schizophrenia. (RV2 - 353, 370) She described her severe depression after Michael's birth, and provided a grim image of life in Tommy's house, including his alcoholism, drug use, gambling, and physical abuse of Michael from an early age. (RV2 - 335-370) Tommy Griffin was also verbally abusive to Mrs. Griffin in front of the children. Like Charles, Marianne Griffin had not been contacted by defense counsel prior to trial. (RV2 - 363, 389)

Clinical psychologist Dr. Ernest Bordini testified as to

the effects of all of the above and more.[13] One of Dr. Bordini's specialities is neuropsychology; he was accepted as a qualified neuropsychologist. Prior to authoring a 46-page report in the instant case, Dr. Bordini reviewed the same material which was available to Attorney Kassier at sentencing. The material included medical, school, and Department of Corrections records, police reports, witness statements, and the depositions of Mr. Griffin's family members. (RV2 - 281) Unlike Dr. Haber, Dr. Bordini conducted an extensive clinical interview with Mr. Griffin and spent hours completing a 24-page questionnaire of Michael's background and childhood experiences. (RV2 - 281) Dr. Bordini also reviewed the results of Dr. Hyman Eisenstein, another expert who tested Mr. Griffin. (RV2 - 288)

According to Dr. Bordini, although Michael's IQ test results were within the normal range, 101 to 102 points, (RV2 - 286), there was evidence of right brain dysfunction. Specifically, Mr. Griffin had difficulty with his left hand motor skills performance and had a visual memory impairment that ranged from moderate to severe in some areas. (RV2 - 287-291) Specifically, Dr. Bordini found Michael Griffin performed

[13] Because Dr. Bordini's *Curriculum Vitae* was admitted into evidence as Defense Exhibit A, and the State stipulated to his qualification as an expert, his background will not be reviewed at length here.

worse than 99 percent of the population on the construction of complex figures and executive planning, the ability to plan, organize, and control behavior. (RV2 - 294-95) Michael was also impaired in his ability to perform abstract reasoning. (RV2 - 296-97) Dr. Bordini compared the test results to Mr. Griffin's school records and confirmed his assessment of neuropsychological impairment. (RV2 - 299)

Interestingly, Dr. Bordini found Michael's family history, that is, his mother's diagnosed mental disorders and his father's alcoholism, along with reports of head injuries, including a possible skull fracture as a small child and shaken baby syndrome, reinforced his diagnosis of Michael Griffin's mental impairment. He also found evidence Michael suffered from Attention Deficit Hyperactivity Disorder (ADHD) and was at one time prescribed an anti-seizure medication, Dilantin. Michael's mother's severe psychiatric illness, coupled with Michael's ADHD placed him in the high risk category for bipolar disorder. Finally, Dr. Bordini indicated Michael's school records long-standing concerns about Michael's mental and emotional state, efforts to reach out to Michael's father to request he authorize testing and/or counseling for his son. Nothing ever came of their efforts, although Michael was eventually placed in a classroom for the

emotionally handicapped, albeit without proper psychiatric or psychology testing.

It is abundantly apparent from Dr. Bordini's testimony that he would have been able to establish the statutory mitigator found in Section 921.141(6)(B), Florida Statutes, that is, the felony was committed while the defendant was under the influence of extreme mental or emotional distress.[14] Dr. Bordini's commendably thorough review of all of the available medical and historical data on Michael Griffin would also have assisted defense counsel in establishing several non-statutory mitigators, including child abuse and neglect, childhood sexual abuse,[15] and learning disabilities.

All of the material, the bankers box of documentation, was available to Michael Griffin's trial attorney and to Dr. Haber. School records, extensive medical records, D.O.C. records, multiple tests, and police and investigative reports

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[14] Although Dr. Eisenstein did not testify at the evidentiary hearing, it may be presumed he would also be able to testify as to Michael Griffin's neuropsychological impairment since Dr. Eisenstein's testing formed, in part, the basis of Dr. Bordini's opinion.

[15] Apparently, among the police records reviewed by Dr. Bordini was a report of Michael having been the victim of sexual abuse at the age of 12 by an unidentified man. According to Dr. Bordini, the police report revealed Michael's family did not want him to report the incident or participate in the investigation. No other witness related this information and it was never presented to the trial court or jury at the time of sentencing.

could have been provided by Kassier to Dr. Haber. Instead, Kassier provided Dr. Haber only a smattering of school records. There is little wonder that, by failing to adequately perform as defense counsel by not providing Dr. Haber the extensive materials later reviewed by Dr. Bordini, Kassier's performance during penalty phase was inadequate.

Two other witnesses briefly testified at the evidentiary hearing regarding Michael's relationship to his parents and their lack of concern for his welfare. Mario Montejo, patriarch of the Montejo family, the man Michael knew as "Poppy", testified to Mrs. Griffin's lack of affection and the infrequency of his parents' visits during his first year of life. Mr. Montejo refuted Tommy Griffin's contention that Michael never lived with his grandmother, as well as other details about Michael's life. Mr. Montejo felt he was not given an adequate opportunity at the sentencing hearing to explain or describe Michael's life.

Finally, there is the testimony of Stephen Minnis. Mr. Minnis was a friend who recalled Michael didn't like his home life and felt his father did not care about him. Mr. Minnis' testimony is important not only for the insight he would have provided, but also the evidence of the atmosphere at the courthouse during Michael Griffin's trial and the incompetency

of defense counsel. Mr. Minnis received a call from by Mr. Kassier, who wanted him to testify. When he arrived, he was told to wait in the hall. While waiting, he was approached by several officers who told him to “get the hell out of here right now or we’ll make it f---ing living hell if you don’t” Mr. Minnis never spoke to Mr. Kassier again and did not return to testify because he was not under subpoena and was not required to do so.

It is difficult to adequately quantify the disparity between the evidence adduced at the evidentiary hearing and the paucity of information actually presented during the penalty phase. Although the jury got a brief glimpse of a rough upbringing by a single father and a mother who was incapable of caring for Michael, this image was nothing like the reality described by Charles and Marianne Griffin, and Dr. Ernest Bordini. It is not the quantity of evidence not presented, but the quality of it, and the horrible significance it had Michael’s life.

At trial, there was no evidence of child abuse, physical, sexual or emotional, or the simple child neglect Michael experienced from birth. No evidence of the continued alcoholism of his father, and its affect on Michael’s daily life, the beatings, drunken car rides or trips to the bars and

exposure to drugs was provided to help the jury understand Michael's life.

Having been abandoned by his mother at birth, and his father before the age of one, with the exception of an all-too-brief interlude with the Montejos, Michael lived life on fringe of society, dependant upon the proverbial kindness of strangers, playmate for barmaids and easy prey for perverted older men. His mother's manic depression and schizophrenia was not related to the jury, nor his father's careless enkindling of the family home in the middle of the night. No doctor appeared to enlighten them about Michael's mental faculties and capacity. Indeed, the only statutory mitigator found by the trial court was that of remorse; however, the true story revealed much more.

In Rose, supra, another similar case, the defendant's penalty phase counsel (for resentencing) had never defended a capital case and was completely unfamiliar with aggravating and mitigating factors. Id., at 572. Among the potential mitigation not presented were the following: (1) a childhood of poverty; (2) emotional abuse and neglect throughout his childhood; (3) his mother's cruelty and abandonment of the defendant; (4) learning disabilities; (5) a lower than average I.Q.; (6) a severe head injury followed by chronic blackouts,

dizziness, and blurred vision; (7) the defendant's chronic alcoholism; and (8) a previous diagnosis as a schizoid. Id., at 571. As in the present case, there was also substantial, largely undisputed clinical and forensic psychological evidence which would have established extreme mental or emotional disturbance. Id.

Although Rose's counsel explained his failure to investigate and present mitigation as the result of an accidental death theory "urged upon him by an appellate attorney who had previously represented Rose", Id., at 572, the Court found the explanation unsatisfactory in light of the compelling evidence which would have been available. "In evaluating the harmfulness of resentencing counsel's performance, we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order ... and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." Id., at 573 (citations omitted).

In reviewing the testimony presented at Mr. Griffin's sentencing hearing and the wealth of additional information provided at the evidentiary hearing, it is clear there was substantial evidence of statutory mental mitigation not presented, as well as abundant non-statutory mitigation which

would have been extremely important to the jury's sentencing recommendation. Moreover, it is apparent from defense counsel's testimony that he did not do an adequate investigation; his explanations as to why he chose not to call Michael's mother and brother are belied by the testimony they had not been contacted and, although Mrs. Griffin's mental deficiencies may have been evident during her testimony, they would only have reinforced the truth of her testimony and tragedy of Michael's childhood.

Under the standard of review established for mixed questions of law and fact, the Court must find, as a matter of law, the performance of Michael Griffin's counsel was deficient and he was prejudiced as a result. Thus, the Court must reverse the trial court's order denying Mr. Griffin a new sentencing hearing.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT THE SENTENCING COURT DID NOT INDEPENDENTLY CONSIDER AND WEIGH THE AGGRAVATING AND MITIGATING FACTORS; ADDITIONALLY, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AT THE TIME OF SENTENCING[16]

At the evidentiary hearing, Ms. Brill testified she was responsible for preparing for Judge Snyder a sentencing memorandum listing the statutory aggravators the State felt

[16] Michael Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate. (RV1 - 32-167)

were applicable, along with a detailed factual basis in support of each factor. Ms. Brill did not recall whether or not she had discussed the memo with anyone, or who asked her to prepare it. She admitted a copy of the memorandum was not provided to defense counsel, but indicated she believed counsel had obtained a copy prior to the date of the pronouncement of sentence. RV4 - 905

A review of the record reveals the trial proceeded directly from the guilt phase to the presentation of evidence on the issue of sentencing. Penalty phase evidence was heard on February 13 and 14, 1991, but there was little, if any, legal argument on the issue of which aggravators and/or mitigators might be applied to the case. Michael Griffin did not address the court on that date. (AR - 3629-3841)

On about February 26, 1991, Ms. Brill’s memorandum was sent directly to Judge Snyder. On March 4, 1991, defense counsel, via a letter to Judge Snyder, submitted his list of mitigating factors to be considered. A copy was also sent to Assistant State Attorney Kevin DiGregory. On March 7, 1991, the parties reconvened and, immediately following Mr. Griffin’s statement to the court, (AR - 3845 - 3862), sentence was announced and the court’s written order was filed. When pronouncing sentence, the court simply read its sentencing

order, word for word, into the record. (AR - 3865-84)

There is no indication of any argument following the presentation of the sentencing phase evidence. Both sides argued their respective positions to the jury, but after the jury returned its recommendation, there was no further discussion by or before the court on the issue of the appropriateness of the various statutory aggravators propounded by the State, nor was there any meaningful argument by defense counsel as to which of the statutory and non-statutory mitigators he believed he had established. In fact, there is no evidence defense counsel had an opportunity to consider the State's arguments, much less attempt to counter them before the court imposed sentence.

Moreover, even a cursory reading of the State's memorandum and the court's sentencing order reveals the language used by the court to justify its finding as to each of the aggravators is identical to that found in the State's memo. Indeed, the initial factual basis recited by the court is clearly the same language found in its analysis of each applicable aggravators, although the descriptions of the events have been slightly rearranged to allow for a more chronological recitation.

Simply put, the facts show a lack of meaningful

discussion of the possible aggravators and mitigators which may have been applicable to Michael Griffin, much less any purposeful independent weighing by the court of the evidence supporting the aggravators and mitigators.

The first issued to be examined is whether or not there is evidence of an improper, *ex parte* communication between the State and the trial court prior to the rendering of the sentence. Although the record does not conclusively establish an impermissible *ex parte* communication between the court and the State, it does not conclusively refute the allegation.

In Rose v. State, 601 So.2d 1181 (Fla. 1992), the Court considered a factual scenario similar to the present one, and found the appearance of improper communications between the judge and the State was sufficient to remand for resentencing. In Rose, prior to an evidentiary hearing on the defendant's Rule 3.850 motion, the State submitted to the court a proposed order, but did not serve opposing counsel. The State's order, which denied all relief to the defendant, was later adopted in its entirety, even though defense counsel had no opportunity to object to it. Id., at 1182. The Court held:

> We are not here concerned with whether an ex parte communication *actually* prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the

> appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

Id., at 1183.

The seminal case regarding the procedure to be followed in sentencing proceedings is found in Spencer v. State, 615 So.2d 688 (Fla. 1993). In Spencer, due to flagrant ex parte communication between the prosecutor and the trial judge, the Court announced a preferred procedure to be used in penalty phase proceedings.

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

Id., at 690 - 91. Citing Rose, the Court noted there is "nothing 'more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a

judge and a single litigant.'" Id., *quoting* Rose, at 1183.

More recently, in State v. Reichmann, 777 So.2d 342 (Fla. 2000), the Court again found a lack of confidence in the sentencing proceedings when the trial court spoke briefly with prosecutor in a courtroom hallway and ordered the State to prepare the sentencing order. Even though the conversation was no more than a brief comment, the Court found the ex parte communications, coupled with the State's preparation of the order, which omitted any mention of mitigation, was sufficient to nullify the penalty phase proceedings and to require a new sentencing hearing.[17] Id., at 351 - 52. In upholding the grant of a new sentencing hearing, the Court noted further evidence of the sentencing court's lack of independent findings: "the trial transcript reflects that at the sentencing hearing, the trial judge merely read from the order and articulated no specific findings for this Court to review." Id., at 352.

In addition to the appearance of partiality, the use of prosecutorial resources to prepare sentencing orders raises the issue of the failure of the trial court to independently weigh both the mitigators and aggravators prior to pronouncing sentence. In Patterson v. State, 513 So.2d 1357(Fla. 1987),

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[17] In Reichmann, as in the instant case, there was also an issue of ineffective assistance of counsel due to the inadequate presentation of mitigatory evidence.

the Court found it necessary to order a new sentencing proceeding not only because the State prepared the sentencing order, but because, in doing so, it appeared the trial court did not make an independent determination of the specific aggravators and mitigators which were applicable based on the evidence presented.

Finally, in Phillips v. State, 705 So.2d 1320 (Fla. 1997), the Court upheld the death sentence due to the defense's failure to object at trial. Nevertheless, Justice Anstead, writing in concurrence, expressed his dismay at the trial court's failure to follow the procedure announced in Spencer. One of Justice Anstead's concerns was the compounding of the trial court's error (prematurely preparing the sentencing order) through the adoption "almost verbatim [of] the State's earlier-filed sentencing memorandum...." Phillips, at 14. According to Justice Anstead,

> While the trial court may not have actually abdicated its sentencing responsibility to the State ... its failure to follow the procedure set out in Spencer, coupled with its adoption of the State's sentencing memorandum, create both an appearance of partiality and a failure to carefully consider the contentions of both sides and to take seriously the independent judicial obligation to think through [the] sentencing decision." Id., at 15 (footnotes and citations omitted).

In the instant case, the evidence clearly suggests an

improper, impermissible communication between the State and the sentencing court. Moreover, it is clear the trial court did not provide an opportunity to argue or comment on the sentencing factors proffered by the opposition. The trial court did not hear from Michael Griffin until the day the sentence was announced and the sentencing order had already been prepared. The court's sentencing order, at least as far as the facts, aggravators, and factual basis for them, was a verbatim regurgitation of the State's sentencing memorandum. When pronouncing sentence, the judge merely read the written order. There was no meaningful discussion of the factors, and no indication as to how they were weighed, or why the judge sentenced Mr. Griffin to death.

In fact, the judge called Mr. Griffin's personal statement a confession and said:

> If I had known what you were going to say before you said it, I would have given you your full constitutional rights right from the bench here ....
>
> But, it is my legal opinion that if you get this trial reversed and you're tried again on this charge, all the State will have to do is introduce what you said here today and you will be convicted of felony murder, which applies the exact penalty that you're facing today.
>
> I have never heard a better confession for the State. You have confessed to everything that requires felony murder in this case.

> That's all it takes. Someone gets killed during the commission of a felony, it's felony murder. If it's a police officer, it's felony murder of a police officer. That's all it takes. AR - 3862-63.

Immediately thereafter, the judge read his order imposing the death sentence.

The court's order denying Michael Griffin's claim after the evidentiary hearing cited Phillips, supra, for the proposition "there is no prohibition against a trial court's use of a party's sentencing memorandum, even if it is verbatim. *Phillips v. State*, 70[5] So.2d 1320 (Fla. 1997)" The Phillips opinion, however, did not address a trial court's use of the State's sentencing memorandum. Although it was one of the issues raised by the defendant in the case, it was not discussed in the opinion; the language cited by the trial court is found in the concurrence. Thus, the trial court's order is both facially and legally insufficient because a "concurring opinion has no binding effect as precedent" Lendsay v. Cotton, 123 So.2d 745 (Fla. 3d DCA 1960).

When the sentencing proceedings is considered in its entirety, along with Ms. Brill testimony at the evidentiary hearing and a close examination is made of the sentencing order and the State's sentencing memo, it is evident there was no independent weighing of the facts and factors in

aggravation and mitigation. This Court cannot have confidence in the trial court's sentencing order, and the order denying Michael Griffin's claim on this point cannot be sustained. Mr. Griffin must be allowed a proper sentencing hearing before an impartial judge.

III. THE COURT ERRED IN DENYING APPELLANT'S CLAIM REGARDING POST-CONVICTION COUNSEL'S INABILITY TO PROPERLY INVESTIGATE AND PREPARE POST-CONVICTION PLEADINGS DUE TO UNPRECEDENTED WORKLOAD AND A LACK OF FUNDING AS WELL AS PUBLIC RECORDS REQUESTS WHICH REMAIN OUTSTANDING AND WHICH ARE LIKELY TO LEAD TO NEWLY DISCOVERED EVIDENCE NOT KNOWN AT THE TIME OF TRIAL AND WHICH WILL RESULT IN PROOF REGARDING ACTUAL INNOCENCE[18]

Michael Griffin's convictions were affirmed by the Court in July 1994; the United States Supreme Court denied certiorari in 1995. Mr. Griffin was originally represented, for post-conviction purposes, by the office of Capital Collateral Representation Counsel-South. In August 1999, due to the overwhelming workload of CCRC-South and its lack of funding, Kenneth Malnik was appointed to represent Mr. Griffin during post-conviction proceedings. An initial Motion to Vacate was filed by CCRC - South in March 1997, an amended

[18] Due to the close relationship between the issues raised in claims one, two, five, and eleven of Michael Griffin's Second Amended Motion to Vacate, they will be presented and argued jointly. Michael Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate. (RV1 - 32-167)

motion followed, and on December 10, 1999, less than six months after his appointment, Mr. Malnik filed a Second Amended Motion to Vacate.

Among the claims which continue to be uninvestigated are possible ***Brady - Giglio***[19] claims against the investigating officers, including Detectives Crawford and Garafolo, the men who interrogated Mr. Griffin's codefendants, Mr. Velez and Mr. Tarallo, as well as the lead investigator, Detective King, and the decedent's partner, Officer Crespo.

Detective Garafolo initially interrogated Nicholas Tarallo. At his suppression hearing, Mr. Tarallo told the trial court his confession was not freely and voluntarily given, but was made because Tarallo was "scared" and felt he "didn't have a choice." AR 2524, ***et seq.*** Tarallo acknowledged having been beaten and threatened by other officers prior to speaking to Detective Garafolo, and chose to talk to Garafolo only because Tarallo did not want to be again chained to the floor and/or beaten and denied the right to make a phone call.

Presumably, codefendant Velez endured similar treatment;

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[19] ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); ***Giglio v. United States***, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

the decedent was a brother police officer, after all, and law enforcement was understandably zealously intent upon finding and punishing the killer or killers. The records sought by Michael Griffin's counsel, interdepartmental records of possible police misconduct, not only contain potentially exculpatory information regarding the interrogations of Mr. Griffin's codefendants, but are also public records which should have been available under chapter 119, Florida Statutes.

The records of Officer Crespo concern two gun shot holes in the interior of the door of Officer Crespo's squad car, evidence which may support Michael Griffin's contention that Officer Crespo fired first. This evidence would be both exculpatory and would tend to impeach Officer Crespo's trial testimony that the first shots came from the direction of Mr. Griffin. Although defense counsel was aware of the bullet holes on the inside of the car door, there was no further information provided. Further information likely exists, however, but none was provided during the discovery process before trial or post-conviction proceedings. Under the doctrines of Brady and Giglio, as applied in Florida jurisprudence, Michael Griffin is entitled to any information which may be exculpatory and which would negate the State's

allegations of premeditation.

An individual whose conviction and sentence have been affirmed on direct appeal is entitled to records pertaining to the investigation of the offense because the records are no longer "criminal investigative records" and do not fall within the exception to the Public Records Act, chapter 119, Fla. Stat. *et seq. See, e.g.*, Muehleman v. Dugger, 623 So.2d 480 (Fla. 1993); Walton v. Dugger, 634 So.2d 1059 (Fla. 1993).

When Mr. Griffin filed his Second Amended Motion to Vacate, the trial court had the authority to extend the time period in which to allow defense counsel to perfect the motion due to the requested public records which had not – have not – yet been disclosed. In Ventura v. State, 673 So.2d 479 (Fla. 1996), and Jennings v. State, 583 So.2d 316 (Fla. 1991), the Court provided appellants with additional time to amend post-conviction motions based upon newly-discovered information derived from Chapter 119 disclosures. Likewise, Mr. Griffin should have been provided with the public records he requested, and he should be allowed an opportunity to amend his motion to vacate once the records have been disclosed.

Accordingly, the trial court erred by not ordering the disclosure of the Metro-Dade police records previously requested, and by not permitting Mr. Griffin a reasonable

amount of time to amend his post-conviction motion following the disclosure of the requested records.

IV THE TRIAL COURT ERRED BY DENYING APPELLANT'S CLAIM OF CUMULATIVE INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON DEFENSE COUNSEL'S OVERALL PERFORMANCE AT TRIAL AND HIS FAILURE TO PROPERLY ADVISE APPELLANT OF POSSIBLE JUDICIAL BIAS AND TO MOVE TO RECUSE THE TRIAL JUDGE[20]

Among the most significant rights guaranteed to an accused under both the Florida and U.S. Constitutions are the right to counsel and the right to an impartial tribunal. Although the right to counsel is not accompanied by a guarantee the accused will receive an error-free trial, it does require counsel meet some minimum standards for effective representation. While each of the errors discussed below, when considered individually, may not rise to the level of ineffective assistance of counsel, they cannot be considered separately, for it is their combined effect which denied Michael Griffin his constitutional right effective representation and his right to a fair trial before an impartial judiciary. Thus, although the lower court chose to address the claims individually, as subsections of Mr. Griffin's claim for relief, counsel's errors, and the claims derived from those errors, cannot be understood and properly

[20] Claim three of Mr. Griffin's motion for post-conviction relief. Michael Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or are presented elsewhere herein.

evaluated in a vacuum; they must be measured in totality.

Michael Griffin's recollection of the events that he fired the shots that caused the death of Officer Martin. However, Michael's side of the story, that he fired wildly after being first fired-upon by the police, was never adequately and completely conveyed to the jury because trial counsel was inept in his cross-examination of Officer Crespo and (codefendant) Nicholas Tarallo. As any first-year law student knows, cross-examination is done for one of two purposes, either to cause the jury to question the credibility of the opposition's witnesses and thus, their version of the facts, or to elicit evidence helpful to the presentation of your case. The cross-examination of Crespo and Tarallo did neither.

Perhaps because he did not attend Nicholas Tarallo's suppression hearing, Mr. Griffin's trial counsel did not confront Tarallo with the significant discrepancies between Tarallo's sworn testimony at the suppression hearing and his later trial testimony. Counsel did not question Tarallo as why, at the suppression hearing, he testified his statement had not been given voluntarily, but rather, was given because he was scared, nor did he highlight for the jury the portion of Tarallo's plea agreement which specifically required him to

testify consistently with the statement he gave to Detective Garafolo rather than merely a requirement to tell the truth. Indeed, instead of using available ammunition to suggest Tarallo's version of the truth was determined by a specific desired outcome, defense counsel's questions sound like an attempt at rehabilitation. To wit:

Q: How old were you when the crime was committed?

A: I was 19 years old.

Q: You were 19?

A: Yes, I was.

Q: Anything like this ever happen to you before? Did you ever get in this much trouble before in your life?

A: No, sir.

Q: The thought of dying for what somebody else did, in your mind was not fair, was it?

A: No, sir. (AR - 2545-46)

In addition to presenting Tarallo in a sympathetic light, which should not have been counsel's intent because Tarallo was the vehicle by which the prosecution hoped to establish premeditation, the questioning not only allowed the jury to infer Tarallo was not responsible for the shooting, but conceded another individual's greater guilt for the murder. Thus, counsel not only failed to damage Tarallo's credibility, but implied Tarallo was not as guilty as his own client.

During cross-examination of Officer Juan Crespo, defense counsel failed to elicit several important facts, including Crespo's state of mind immediately after the shooting, the amount of time which passed between the events and Crespo's formal statement to the police, and Crespo's consultation with his attorney prior to giving a statement. These facts gain further significance when considered in conjunction with the two bullets fired by Crespo into the interior of the door of his squad car. At trial, however, Crespo was not cross-examined about the discharge of his gun in the interior of his vehicle. If he had been, his explanation might have supported Michael Griffin's claim that he did not fire until fired upon by the police. AR - 3080 *et. seq.*

Under Strickland, supra, a defendant must not only demonstrate deficient performance by counsel, but also the reasonable probability that, but for counsel's errors, the outcome of the trial might have been different. Obviously, the failure to ask a question or two during cross-examination does not ordinarily rise to the level of ineffective assistance of counsel, but when the questions damage the credibility of a witness, particularly a witness who is being used to establish a specific, required element of the charged offense, or when the questions will help to impeach a crucial eye-witness,

their omission can in fact change the outcome of the trial.

Although the question remains as to whether Michael Griffin would have been completely acquitted, he might have been convicted of a lesser offense, and thus spared the imposition of a death sentence, if defense counsel had plied his trade more effectively. Again, the result of the errors described above cannot be evaluated separately, for it is the overall impression conveyed to a jury that results in a conviction for a specific offense, and each fact which establishes or eliminates an element of the offense is critical to the final outcome. Here, a bare minimum of skill might have prevented a miscarriage of justice.

In addition to counsel's failure to effectively cross-examine witnesses, he also failed to challenge apparent judicial bias, and the court erred by not granting an evidentiary hearing on the issue of counsel's failure to recuse the trial judge. Under Florida law, "a judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." W.I. v. State, 696 So.2d 457, 458 (Fla. 4th DCA 1997), citing In re Code of Judicial Conduct, 659 So.2d 692 (Fla. 1995), commentary to

Canon 3(E).

In the present case, evidence suggests Judge Snyder was a friend of the slain officer's father, Larry Martin. The record indicates defense counsel may have been aware of the relationship, as evinced by his comment to his investigator, Al Fuentes, to the effect that they didn't stand a chance ... because the judge was friends with the father. (RV4 - 858) The trial record also reveals Mr. Martin and Judge Snyder had a conversation in chambers prior to the start of the trial. (AR - 740) Additionally, there is evidence of possible bias against Mr. Griffin; he appeared before the judge on prior occasions during which Judge Snyder commented he did not believe Mr. Griffin was going to straighten out, but would keep on "what you're doing", i.e., committing crime.

As stated in Section 38.10, Florida Statutes, "Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge ... against the applicant ... the judge shall proceed no further." Recusal is warranted if the facts alleged in the motion would cause a reasonably prudent person to fear he or she will not receive a fair trial. Gates v. State, 784 So.2d, 1235, 1237, (Fla. 2d DCA 2001), citing

Livingston v. State, 441 So.2d 1083 (Fla. 1983). Thus, the truth of the allegations are not at issue and the "party moving for disqualification does not need to establish that the judge is actually biased" in order to prevail on a motion to disqualify. Gates, at 1237.

Because a motion to recuse reflects the reasonable impressions of the party [to the action], Mr. Griffin's counsel had an affirmative duty to disclose to Mr. Griffin any knowledge he possessed concerning possible judicial bias against Mr. Griffin and to assist Mr. Griffin's evaluation of the situation by advising him of the legal standard and the effects of filing the motion. Thus, although the record clearly does not contain enough evidence to determine whether or not a motion to disqualify would have succeeded, the issue here is not whether or not the motion would have been successful, but whether or not defense counsel was ineffective for failing to properly disclose his information to Mr. Griffin and to advise him accordingly.

The trial court's order denying Mr. Griffin's claim on this issue is clearly erroneous, because rather than evaluate counsel's performance, the order does what a court is not permitted to do, it weighs the evidence and forecasts the failure of a motion Mr. Griffin was not aware could be filed.

It is counsel's failure to give proper advise which is the subject of the claim, and on that basis, it must be granted and Mr. Griffin should have been given the opportunity to consider whether or not to file a motion to recuse Judge Snyder. As with the errors complained of above, it is not merely counsel's failure to file an appropriate motion, but counsel's failure to adequately advocate his client's interests in a trial in which his client's life was at stake which resulted in ineffective assistance of counsel.

Moreover, assuming, *arguendo*, there were sufficient indicia of bias to proceed on a motion to disqualify, the result of the motion would more than likely have affected the outcome of the trial. Thus, this claim satisfies both prongs of Strickland, and the trial court should have granted an evidentiary hearing.

Trial counsel was also ineffective because he conceded guilt in opening argument but failed to argue an alternative theory of defense under which the jury could have found Mr. Griffin guilty of a lesser offense. Rather than attempting to minimize Mr. Griffin's participation or explain matters from Michael Griffin's point of view, the police shot first, Michael Griffin was wounded and merely firing wildly, Kassier chose to attack the State's witness, Nicholas Tarallo, as

unreliable (“a deal with a devil”), but did not follow through at trial with aggressive questioning of Tarallo which would have supported the theory announced in Kassier’s opening argument.

If Kassier had adequately investigated the case prior to trial, and if he had understood his client was a man who had never gotten a break from the moment of birth, and if he had full command of the facts, he might have been able to depict for the jury the facts as seen by Michael Griffin rather than stand up during opening statements and concede Michael’s guilt.

Moreover, because the trial court did not grant an evidentiary hearing on the issue of trial counsel’s ineffectiveness during the guilt phase of Mr. Griffin’s trial, there is no record as to whether or not Michael Griffin was informed of counsel’s strategy prior to trial, and whether or not Mr. Griffin assented in such strategy. If, however, counsel’s concession of guilt was done without the permission of his client, it is a constitutional error, a “complete denial of his right to counsel” and per se evidence of ineffectiveness of counsel. Nixon v. State, 572 So.2d 1336, 1339 (Fla. 1991), *cert. denied*, 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991) (citations omitted). Accordingly, the

trial court erred by not granting an evidentiary hearing on this claim. *See, e.g.,* Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995).

Assuming, *arguendo*, the errors described in claim three of Michael Griffin's motion for post-conviction relief, when considered separately, do not rise to the standard necessary for the Court to grant Mr. Griffin a new trial, their cumulative effect certainly resulted in the denial of his right to a fair trial. In DeFreitas v. State, 701 So.2d 593 (Fla. 4th DCA 1997), the appellate court examined a series of improprieties by a prosecutor and found the defendant had been denied his right to a fair trial: "Furthermore, we are equally persuaded that the cumulative effect of the numerous acts of prosecutorial misconduct herein were so prejudicial as to vitiate Appellant's entire trial." Id., at 596. Here, Kassier's inept cross-examinations, his failure to advise his client of his right to file a motion to recuse the trial judge, his concession of guilt, and his general inability to adequately mount a defense abrogated Michael Griffin's right to effective assistance of counsel and to a fair trial. Consequently, the trial court not only erred when denied an evidentiary hearing on the issues, but the errors are so significant Mr. Griffin should be granted a new trial.

V THE COURT ERRED BY NOT GRANTING AN EVIDENTIARY HEARING ON THE ISSUE OF PREJUDICIAL PRETRIAL PUBLICITY AND DEFENSE COUNSEL'S FAILURE TO MOVE FOR A CHANGE OF VENUE[21]

There is no doubt Michael Griffin's case generated extensive pretrial and trial publicity. There was a "shootout" and the decedent was a police officer. In fact, there is anecdotal evidence Michael Griffin was used as a election campaign "poster child" for Bob Martinez. Despite the community outcry over the death of a Metro-Dade police officer, counsel's failure to move for a change of venue resulted in a lack of a record from which to argue this claim. That counsel failed to at the very least make a motion for a change of venue, and thus preserve the issue for appellate review, cannot be anything other than ineffective assistance of counsel.

In Rhue v. State, 603 So.2d 613 (Fla. 2d DCA 1992), the court was presented with a claim of ineffective assistance of counsel based on defense counsel's failure to properly object to the testimony of a child witness who might have been found to be incompetent to testify. Due to the failure to object, the issue was not preserved for appellate review. The

[21] Michael Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or are presented elsewhere herein.

defendant filed a motion for post-conviction relief on the issue, and the trial court denied relief. On appeal of the denial of the post-conviction claims, the appellate court held: "The failure to preserve issues for appellate review can constitute ineffective assistance of counsel." Id., at 615 (citations omitted). "Of course, the so-called '*Strickland* test' would apply ... as with any other claim of ineffective assistance." Id. Because the record was insufficient to deny the claim, the appellate remanded the case for an evidentiary hearing.

In the instant case, the court's order denying relief on this claim indicates it was denied because in codefendant Velez's case, the issue was addressed on appeal and was denied. (RV1 - 253) Obviously, Mr. Velez and Mr. Griffin are not the same person, and it cannot be said the effect of the extensive pretrial publicity had the same impact on Mr. Velez as it did on Mr. Griffin because not only were their roles in the alleged offenses different, but also, because Mr. Velez was not convicted of the same offense. Moreover, the court's opinion, Velez v. State, 596 So.2d 1197 (Fla. 3d DCA 1992), does not directly address the issue of pretrial publicity or the failure to raise or grant a change of venue. Id. Rather, the appellate court's opinion addresses only the issue of the

use of two juries at the joint trial. Thus, the court's order denying relief on this ground is erroneous.

Consequently, the issue of trial counsel's failure to move for a change of venue based upon pretrial publicity has not been considered by any appellate court; the issue was not raised in Mr. Griffin's direct appeal, and was not specifically addressed in codefendant Velez's direct appeal. Thus, the court has not considered the issue as it relates to Michael Griffin. Because trial counsel failed to preserve the issue, and because the trial court did not grant an evidentiary hearing on the matter, there has been no judicial determination on the merits. Accordingly, the trial court erred in denying relief on this ground and Michael Griffin is entitled to an evidentiary hearing on it.

VI THE TRIAL COURT ERRED BY DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BASED UPON COUNSEL'S FAILURE TO OBJECT TO THE USE OF SHACKLES DURING TRIAL[22]

Michael Griffin was shackled during his trial, and at least one member of the jury saw the shackles. (AR - 3094) The Court has consistently held "a defendant in a criminal trial has the right to appear before the jury free from physical

[22] Claim six of Second Amended Motion to Vacate. Michael Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or are presented elsewhere herein.

restraints, such as shackles or leg and waist restraints." Bryant v. State, 785 So.2d 422, 428 (Fla. 2001), citing Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). This is because an accused's right to the presumption of innocense is detrimentally affected when that person appears before the jury in restraints. Bryant, at 428.

Of course, there are situations in which the dictates of security and safety outweigh a defendant's rights and it is necessary to shackle an accused even as he is tried before a jury. In those situations, however, the Court has established the "requirement that a hearing on necessity must precede the decision to shackle if a defendant timely objects and requests an inquiry into the necessity for restraints. Bryant, at 429, *citing* Bello v. State, 547 So.2d 914 (Fla. 1989). Shackling is an "inherently prejudicial practice" which should not be allowed without proof of some necessity. Bello, at 918.

Bello, the case in which the Court first established the requirement of a hearing on the issue of shackling before an accused is compelled to appear before the jury in restraints, addressed shackling in the penalty phase, after the accused had been found guilty of first-degree murder and other offenses. Id., at 918. Under the circumstances, the Court noted, "it may be that a lesser showing of necessity is

required to permit shackling ... in the penalty phase than in the guilt phase." Id. However, even during penalty phase, there must be a showing of necessity before a defendant can be restrained in front of the jury. Because the trial court did not hold a hearing or make an inquiry into the need for such "inherently prejudicial" measures, the Court granted Bello a new sentencing hearing, noting "there is no evidence in the record to support the need for such restraint." Id.

In both Bello and Bryant, the defendant objected to the shackling and the trial court overruled the objection without further inquiry. In the instant case, defense counsel did not object and there is no record as to whether it was truly necessary for Mr. Griffin to appear in restraints at his trial. Again, the failure to object to preserve an issue may be considered ineffective assistance of counsel. Rhue, supra, at 615. Accordingly, because counsel failed to object and because there was no hearing on the matter, Mr. Griffin is entitled to an evidentiary hearing on the issue of being forced to appear before the jury in shackles.

VII THE TRIAL COURT'S ORDER DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON TRIAL COUNSEL'S FAILURE TO ADEQUATELY VOIR DIRE PROSPECTIVE JURORS[23]

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[23] Claim seven of the Second Amended Motion to Vacate. Michael Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second

As noted earlier, substantial pretrial publicity accompanied this case prior to and during trial. Thus, it was incumbent upon defense counsel to thoroughly examine each member of the jury venire to ensure that none of the jurors had been tainted by the press coverage. Additionally, because this was a death penalty case, counsel had an affirmative obligation to explore the jurors' attitudes not only toward the death penalty, but also, their feelings about the types of mitigation which would be presented if the jury returned a verdict of guilt.

During voir dire, defense counsel failed to ascertain whether any of the prospective jurors was biased in favor of the death penalty. Counsel also failed to inquire as to whether or not any of the venire had any misgivings about particular mitigation, specifically mental mitigation. Additionally, the record indicates at least one prospective juror, Ms. Cabrera, admitted she might be subconsciously biased against Michael Griffin because of her personal circumstances: she had interned in the Office of the State Attorney and had many friends there; her fiancee was an FBI officer, and she was friendly with many FBI agents and police officers.

Amended Motion to Vacate (RV1 - 32-167) or are presented elsewhere herein.

When questioned as to whether this might affect her ability to be fair and impartial, she said: "Well, subconsciously, I don't know, maybe it will have some bearing." (AR - 1360) Notwithstanding her admission, defense counsel did not attempt to challenge Ms. Cabrera for cause or use a peremptory challenge to remove her from the jury.

As with all allegations of ineffective assistance of counsel, a claim of ineffective voir dire must be evaluated under the Strickland test; it must be shown counsel's performance was deficient and that the alleged errors or omissions were prejudicial to the defense and deprived the defendant of his right to a fair trial. Thompson v. State, 796 So.2d 511, 515 (Fla. 2001). In Thompson, the defendant claimed counsel was ineffective because during voir dire, he failed to question the jurors about possible racial prejudice, he did not discuss jurors' notions of the credibility of police officers, he did not adequately question the venire about their feelings on either the death penalty or mental mitigation, and he did not excuse a juror who had difficulty with the concept of the defendant's right not to testify. Id., at 516.

On appeal of the trial court's denial of post-conviction relief on this issue, the Court noted the trial court's

summary dismissal was inappropriate because, “the real issue is whether, as a result of counsel’s performance, the panel which made that ultimate determination” was composed of jurors who were troubled by Thompson’s exercise of his fundamental constitutional right. Id., at 517. As a result, the Court remanded the matter for an evidentiary hearing.

Here, although the trial court did not summarily deny the claim, its analysis, focusing on the likelihood that in the end, Ms. Cabrera was able to put aside her personal life and feelings and be fair rather than defense counsel’s failure to excuse her, is the same type of objectionable analysis used by the trial court in Thompson. Indeed, the trial court’s order concedes Ms. Cabrera’s equivocation (RV - 254) but states: “it is too much to ask of our jurors that they be mandated to express their fairness in terms of absolute.” Clearly, the trial court’s ruling begs the real issue, that is, defense counsel’s ineffectiveness and its effect: a biased juror or jury. Accordingly, the trial court erred by denying an evidentiary hearing on this issue.

VIII THE TRIAL COURT ERRED BY DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF DEFENSE COUNSEL’S FAILURE TO OBJECT TO IMPROPER ARGUMENTS MADE BY THE PROSECUTION; THE USE OF NONSTATUTORY AGGRAVATORS AND OTHER IMPROPER PROSECUTORIAL ARGUMENT DEPRIVED MR. GRIFFIN OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH,

EIGHTH AND FOURTEENTH AMENDMENTS [24]

The record reflects the prosecution was intent upon securing a conviction and obtaining a death sentence. According to codefendant Velez's counsel, Assistant State Attorney Penny Brill said she would rather "risk reversal than risk acquittal..." (AR - 3100) Throughout pretrial and trial proceedings, the tone of the prosecution was sarcastic, belligerent, and vindictive, their arguments inflammatory and improper.

Assistant State Attorney Kevin DiGregory told the jury:

> Officer Crespo's testimony to you is the same as it was on April 28, 1990, when he talked to Detective King. It will be the same tomorrow and the next day and the next day and the day after that ...
>
> His partner died in his arms. He was there. This is a nightmare with which he will live forever. And if Juan Carlos Crespo is asked 25 years from this date what happened on that early morning of April 27, 1990, it's not going to change. (AR - 3536)

During the penalty phase, DiGregory mischaracterized the purpose of the mitigation evidence by arguing:

> Are you reasonably convinced that this murderer's father's alcoholism led him to kill Officer Joseph Martin?

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[24] Claim eight and 20 of the Second Amended Motion to Vacate. Michael Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or are presented elsewhere herein.

> * * * * *
>
> Are you reasonably convinced that this murderer had an emotional handicap that caused him to shoot and kill Officer Joseph Martin? (AR - 3797)
>
> * * * * *
>
> Recommend that I be allowed to live out my natural life, not because I am truly remorseful not because I committed a terrible crime, but because, because this murderer, not Jose Martin, is the victim in this case.
> (AR - 3812)
>
> * * * * *
>
> All of this evidence presented in mitigation has suggested to you is that the killing of Officer Joe Martin is everyone's fault by the murderer's. It's his mother's fault for leaving, it's his father's fault for being an alcoholic, it is the fault of the Blue Moon Motel; it is Brenda Water's fault. (AR- 3901)

In order to stir up the jury, to ignite their passion against Michael Griffin and to confuse them, the prosecutor purposefully suggested the mitigation evidence was somehow about fault, about shifting the blame from Mr. Griffin to someone else. Moreover, the prosecution's arguments left the impression the jury could only find mitigation if they believed Michael Griffin and thus, improperly shifted the burden of proof. *See, e.g.,* Gore v. State, 719 So.2d 1197 (Fla. 1998).

Finally, the prosecution improperly argued nonstatutory aggravation and an inflammatory *Golden Rule* argument:

> Yes, they are different. And the killer of a police officer is different because when this murderer fired those controlled shots into the body of Officer Joseph Martin, he wasn't just firing at Officer Martin. He was firing at society's most familiar and accessible representative of its lawful authority.
>
> In fact, when this murderer fired at Officer Joseph Martin, he fired at everyone who chooses to live lawfully in this society. (AR - 3911)

Clearly, the prosecution implied the shots were fired at members of the jury as representatives of society.

Although so-called golden rule arguments are no longer considered to be per se prejudicial, Florida courts have repeatedly held they are improper in the context of a criminal trial and have no place there. DeFreitas, 701 So.2d at 601. Additionally, the disparaging and personal tone of the prosecutor's attacks on Michael Griffin's personal circumstances, his father's alcoholism and his mother's abandonment of him, are utterly unprofessional and improper. Gore, at 1201. Moreover, the cumulative effect of the improper prosecutorial arguments resulted in the denial of Michael Griffin's right to a fair trial.

None of the prosecution's improper arguments were objected to; by failing to object, defense counsel was deficient, particularly in light of the repeated impermissible

arguments from the State. Under Strickland, it is clear there was deficient performance on the part of defense, and those deficiencies, in conjunction with the prosecution's inflammatory and inappropriate comments and improper burden shifting, resulted in an unfair trial. Therefore, the trial court erred in denying an evidentiary hearing on this issue.

IX THE TRIAL COURT ERRED BY DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF DEFENSE COUNSEL'S FAILURE TO MOVE TO SUPPRESS STATEMENTS OF MR. GRIFFIN WHICH WERE INVOLUNTARILY MADE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS[25]

It is axiomatic that a defendant's statement to law enforcement officers must be the product of a knowing, intelligent, and voluntary waiver of his rights under the Fourth and Fifth Amendments to the United States Constitution, and Article 1, sections 9 and 12 of the Florida Constitution. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The statements made by Michael Griffin were given while he was suffering from substantial gunshot wounds which occurred on the night of Officer Martin's death, as well as injuries Mr. Griffin sustained at from the teeth of K-9 dogs employed by the officers who tracked Mr. Griffin. He was weak,

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[25] Claim ten of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or are presented elsewhere herein.

injured, likely in shock, and not able to comprehend the rights he was waiving at the time he made his statements.

The officers took advantage of his condition to secure a waiver of his *Miranda* rights, but the waiver was not knowing, intelligent, and voluntary. Mr. Griffin's physical condition was further compounded by the emotional duress[26] and organic brain dysfunction from which he suffered. Despite evidence of an involuntary surrender of Mr. Griffin's constitutional rights, defense counsel made no attempt to suppress Mr. Griffin's statements.

In Florida, the threshold test for admission of an accused's statements is one of voluntariness. Before a confession may be admitted, the court must first determine whether or not the statement was freely and voluntarily made. Traylor v. State, 596 So.2d 957, at 964 (Fla. 1992). Voluntariness is to be judged by examining the totality of the circumstances surrounding the statement, Id., and it is the State's burden to establish voluntariness by a preponderance of the evidence. DeConingh v. State, 433 So.2d 501 (Fla. 1983) (citation omitted).

Once a suspect is advised of his or her rights pursuant to *Miranda*, law enforcement may not proceed with questioning

[26] See, e.g., testimony of Dr. Bordini, RV2-334, et. seq.

unless and until a valid waiver of these rights has been obtained. In order to be valid, it must be shown that the waiver was knowing, voluntary, and intelligent. Traylor, at 966. An invalid waiver of one's *Miranda* rights may result in the suppression of the defendant's statements. Sliney v. State, 699 So.2d 662, 668 (Fla. 1997) (citations omitted).

Pursuant to the Court's opinion in Sliney, "To determine if a waiver is valid a court must make two inquiries. First, the court must determine if the waiver was voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception.... Second, the court must determine whether the waiver was executed with a full awareness of the nature of the rights being abandoned and the consequences of their abandonment." Id., at 668 (citations omitted). As with the due process test of the voluntariness of a confession, courts are directed to use a totality of the circumstances test when assessing the validity of a waiver of rights, and it is the State's burden to prove the voluntary nature of the waiver by a preponderance of the evidence. Id. Of course, coercion may psychological as well as physical. DeConingh, at 503.

In DeConingh, supra, the Court found the defendant's written waiver of rights to be invalid based upon the

circumstances under which the form was signed. Following the shooting of Susan DeConingh's husband, a physician hospitalized Mrs. DeConingh and treated her with Valium and Thorazine. While she was in the hospital, Mrs. DeConingh was visited by a deputy sheriff who was also a personal friend. He asked her to sign an advice of rights form, then inquired what had happened. Although Mrs. DeConingh's attorneys prevented her from responding, two days later, the deputy again questioned the still-hospitalized Mrs. DeConingh and she gave an inculpatory statement. DeConingh, at 502.

Although not specifically addressing the waiver of *Miranda* rights, the Court found Mrs. DeConingh's confession was not voluntary because the deputy "took impermissible advantage of the situation" and psychologically coerced her. DeConingh, at 503. Similarly, in Breedlove v. State, 364 So.2d 495 (Fla. 4th DCA 1978), the appellate court found a defendant's waiver of her Fifth Amendment right to silence could not have been knowing and voluntary based upon her emotional state when the waiver was executed. In both DeConingh and Breedlove, the accuseds' statements were suppressed because of the circumstances under which the statements were given, and the courts' analysis including consideration of the accuseds' physical and mental state at

the time the statements were made.

Under the Strickland analysis, defense counsel's failure to suppress Michael Griffin's statements was not only inadequate representation, but it materially affected, that is, prejudiced Mr. Griffin's defense. There was a factual and legal basis upon which the statements could have been suppressed, and defense counsel failed to attempt to do so. Thus, the trial court erred in denying an evidentiary hearing on this issue.

X THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF MR. GRIFFIN'S INNOCENCE AND INELIGIBILITY FOR THE DEATH PENALTY AND THE INSTRUCTIONS GIVEN THE JURY WERE AN INCORRECT STATEMENT OF FLORIDA LAW, SPECIFICALLY THE INSTRUCTION FOR THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR, WHICH WAS UNCONSTITUTIONALLY VAGUE AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS[27]

The Court has allowed claims of innocence to be presented in a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. *See, e.g.,* Johnson v. Singletary, 647 So.2d 106 (Fla. 1994). The Court has also permitted a separate claim for innocence of the death penalty. Scott v. Dugger, 604 So.2d 465 (Fla. 1992). The United States

[27] Claims twelve, fourteen, and 23 of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or are presented elsewhere herein.

Supreme Court has held if a person convicted of first degree murder and sentenced to death can show either innocence of the murder or the death penalty, he is entitled to relief of the conviction or death sentence. Sawyer v. Whitney, 112 S.Ct. 2514 (1992). Here, Mr. Griffin can show his innocence of the death penalty because he is ineligible for a death sentence.

Under Florida law, an individual is eligible for the death penalty if he is convicted of first degree murder and if the jury finds at least one aggravating factor sufficient to warrant imposition of the death penalty. In this case, the trial court relied upon four aggravating factors: 1) previous conviction of a violent felony; 2) the murder was committed while the defendant was engaged in the commission of a burglary; 3) the murder was committed to avoid or prevent a lawful arrest; and 4) the murder was cold, calculated and premeditated. (AR 3879-84)

However, the instructions given to the jury regarding the aggravator of cold, calculated and premeditated (CCP) were unconstitutionally vague. Jackson v. State, 648 So.2d 85, 90 (Fla. 1994). In Jackson, the Court adopted limiting instructions which should be given whenever this aggravator is considered. The limiting instruction was not given at Mr. Griffin's trial. Unlike the situation in Jennings v. State,

782 So.2d 853 (Fla. 2001), in which the Court found the erroneous CCP instructions to be harmless error because the crime was cold, calculated, and premeditated under any definition, Id., at 862, in the present case, there is little evidence to support this aggravator and it cannot be relied upon to support the death sentence against Mr. Griffin. Likewise, the jury instruction on the aggravator "committed to avoid or prevent arrest" was vague and overbroad and cannot pass constitutional muster under either the Florida or United States Constitutions.

The Court has also held the aggravating circumstance the felony was committed in the course of a burglary to be insufficient, when standing alone, to justify the imposition of the death penalty. Rembert v. State, 445 So.2d 337 (Fla. 1984); Proffitt v. State, 510 So.2d 896 (Fla. 1987). Finally, the validity of the aggravator that the defendant had previously been convicted of a crime of violence depends, of course, upon the validity of the prior conviction. Here, Mr. Griffin has disputed the validity of the prior conviction, so this aggravator is insufficient to justify the death sentenced imposed.

The death sentence is also disproportionate not only because of the insufficiency of the aggravators, but also due

to defense counsel's failure to adequately present and argue statutory and non-statutory mitigators to the trial court and jury. The Court has held: "The people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions, 'the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious of crimes.'" Jones v. State, 705 So.2d 1364, 1366 (Fla. 1998) (footnote and citation omitted).

Under Florida jurisprudence, a jury considering whether or not to impose the death penalty must be "[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed.... Such a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances." State v. Dixon, 283 So.2d 1 (Fla. 1973); Mullaney v. Wilbur, 421 U.S. 684 (1975). The Griffin jury was not so instructed. (AR - 3829-35)

In addition to the misstatement of law as to the aggravators and mitigators, the trial court, while providing instructions to the jury, invaded their province and advised they could only vote once: "your first vote is your only and

last vote." (AR-3833-34). This was not only an improper statement of law, but the court incorrectly told the jury to how to do its job.

Mr. Griffin did not receive effective assistance of trial and appellate counsel because none of the afore-mentioned errors were raised and preserved in previous proceedings. He is therefore entitled to an evidentiary hearing on these issues.

XI THE TRIAL COURT ERRED BY NOT GRANTING AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER MR. GRIFFIN WAS DENIED HIS RIGHT TO A FAIR TRIAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BECAUSE HE WAS ABSENT FROM CRITICAL STAGES OF THE TRIAL[28]

Under both federal and Florida law, an accused has the right to be present at all critical stages of judicial proceedings. Faretta v. California, 422 U.S. 806, 819, n.15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Francis v. State, 413 So.2d 1175 (Fla. 1982); d v. State, 653 So.2d 1009 (Fla. 1995); Fla. R. Crim. P. 3.180. The right is derived in part from the confrontation clause of the sixth amendment and the due process clause of the fourteenth amendment of the U.S. Constitution.

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[28] Claim thirteen of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or are presented elsewhere herein.

Here, Mr. Griffin was effectively absented from critical stages of his trial, in part due to the physical arrangements and courtroom acoustics, and also because of the then-novel procedure of seating two juries, each of which would hear some of the evidence. Trial counsel did nothing to remedy the situation, and as a result, Michael Griffin was denied effective assistance of counsel. The trial court erred in summarily denial this claim without an evidentiary hearing.

XII THE TRIAL COURT ERRED BY DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF AN ERRONEOUS JURY INSTRUCTION REGARDING THE STANDARD FOR JUDGING EXPERT TESTIMONY[29]

By application of the sixth and fourteenth amendments to the U.S. Constitution, an accused is guaranteed the right to present a meaningful and complete defense. Crane v. Kentucky, 476 U.S. 683, 690 (1985)(citation omitted); Ake v. Oklahoma, 470 U.S. 68, 79 (1985). To ensure this right, most states, and the federal government require indigent accused persons be provided with not only legal counsel, but the assistance of experts. Ake, at 79-80. This is because experts are an indispensable part of presenting a complete defense. Ake; McFarland v. Scott, 114 S.Ct. 2568, 2571-72 (1994).

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[29] Claim fifteen of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or are presented elsewhere herein.

Here, the court instructed the jurors "an expert's opinion is only reliable when given on a subject about which you believe him or her to be an expert." (AR - 3612) The instruction was an erroneous statement of the law and allowed the jury to accept or reject the qualifications of the expert, a question of law reserved for the trial court. By its instructions, the trial court violated Michael Griffin's fundamental right to present a defense guaranteed to him by the U.S. and Florida Constitutions. Again, because counsel did not object, an evidentiary hearing is warranted on the issue.

XIII THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON ISSUES OF INADEQUATE AND CONSTITUTIONALLY INFIRM JURY INSTRUCTIONS ON AGGRAVATING AND MITIGATION FACTORS; MR. GRIFFIN'S DEATH SENTENCE IS PREDICATED UPON AN AUTOMATIC AGGRAVATOR; THE SENTENCING COURT REFUSED TO CONSIDER MITIGATORS FOUND IN THE RECORD, ALL OF WHICH VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION[30]

In Florida, the law requires all aggravating factors be proved beyond a reasonable doubt. Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989). Each element of each circumstance must also be proven beyond a reasonable doubt. Banda v. State, 536 So.2d 221, 224 (Fla. 1988). Instructions given to the jurors

[30] Claims sixteen, seventeen, and eighteen of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or presented elsewhere herein.

in Mr. Griffin's case did not comport with these requirements and because the instructions were incorrect, fundamental error resulted.

Also, under Florida law, the sentencing jury may reject or give little weight to any particular aggravator, and a binding life sentencing may be returned if the jury determines the aggravators are insufficient. Hallman v. State, 560 So.2d 223 (Fla. 1990). Thus, if the jury is properly instructed as to the State's burden of proof and their ability to evaluate the aggravating circumstances, a jury may decide to impose a life sentence. However, Mr. Griffin's jury was not accurately instructed as to the proof necessary to establish an aggravator and the failure violated Mr. Griffin's eighth amendment right.

The United States Supreme Court, in Maynard v. Cartwright, 486 U.S. 356 (1980), ruled that in order to avoid the arbitrary imposition of sentence, it is necessary to channel and limit "the sentencer's discretion in imposing the death penalty . . ." Id., at 362. The limiting of discretion is fundamental right, because there must be a "principled way to distinguish [the] case in which the death penalty is imposed from the many cases in which it was not." Id., at 363.

The sentencing court's failure to adequately and accurately instruct the jury left them with total discretion and no way to distinguish the circumstances in Michael Griffin's case from one in which the limitations were applied and the death penalty was not imposed. A properly instructed jury would have had no more than one aggravator to consider and weigh against the mitigation presented by the defense. When improper aggravators are weighed by the jury, the "scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So.2d 1225 (Fla. 1987). As a result, Mr. Griffin's jury was left with the open-end discretion disapproved by the U.S. Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972).

One of the many problems with the instructions given to the jury in Mr. Griffin's trial is their instruction to consider the aggravator "committed while he was engaged in the commission of . . . a burglary." (AR -3830) The jury's consideration of this aggravator violated Michael Griffin's eighth and fourteenth amendment rights because it allowed the jury to consider an aggravating circumstance which automatically applied once Mr. Griffin had been convicted of felony murder.

The use of the underlying felony of burglary as a basis

for an aggravator not only violated Mr. Griffin's constitutional right to be protected from double jeopardy, but resulted in an illusory aggravator. Stringer v. Black, 112 S.Ct. 1130 (1992). Thus, the jury was allowed to consider an automatic aggravator as a basis for the imposition of the death penalty. (AR-3839) Again, defense counsel failed to object or preserve the issue for review, and the resulting prejudice is the sentence of death. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

In addition to the improper jury discretion and their consideration of an impermissible automatic aggravator, during the sentencing hearing, the trial court refused to acknowledge mitigation presented by the defense. The trial court's sentencing order failed to consider, to weigh the unrefuted mitigation presented and Mr. Griffin was thus deprived of the individualized sentencing required by the eighth and fourteenth amendments. As a result, he is entitled to a new sentencing hearing. Skipper v. South Carolina, 476 U.S. 1 (1986).

Because the court failed to follow established precedent and weigh mitigation evidence, the court's death sentence was imposed arbitrarily and capriciously and is constitutionally infirm. Thus, Michael Griffin is entitled to an evidentiary

on the issue of the constitutional defects listed above.

XIV THE SENTENCING JURY'S INSTRUCTIONS WERE UNCONSTITUTIONAL AND INAPPROPRIATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY FOR ITS ROLE IN THE SENTENCING PROCESS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION[31]

During jury instructions, the jurors were repeatedly and unconstitutionally instructed their role was merely advisory. AR -3729. The jury's sense of responsibility for their role during the sentencing process was further diminished by other extraneous and misleading comments and instructions in violation of Mr. Griffin's eighth amendment rights. Caldwell v. Mississippi, 472 U.S. 320 (1985).

The United States Supreme Court has repeatedly held a capital sentencing jury must be properly instructed as to its role in the process,[32] and therefore, instructional error, even when not accompanied by contemporaneous objection warrants a reversal of the sentence. Meeks v. Dugger, 576 So.2d 713 (Fla. 1991). Because defense counsel failed to object, request a curative instruction or move for a mistrial, his performance is deficient and the resulting prejudice evident. Thus, Mr.

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[31] Claim 21 of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or presented elsewhere herein.

[32] Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell.

Griffin is entitled to a new sentencing hearing.

XV THE RULES WHICH PROHIBIT INTERVIEWS OF THE SENTENCING JURY ARE UNCONSTITUTIONAL; BOTH THE COURT AND THE JURY WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF A CONSTITUTIONAL MAGNITUDE, AND AS A RESULT, MR. GRIFFIN HAS BEEN DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE FIRST, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION[33]

Under Florida law,[34] counsel is prevented from contacting jurors or otherwise investigating misconduct or bias which may have contributed to the jury's verdict and recommendation of death. This is particularly significant where, as here, Michael Griffin is black but there were no African-Americans on his jury, and there was a plethora of mitigating evidence not presented. Additionally, due to the impediments described in issue III herein and claims one and two of Mr. Griffin's Second Amended Motion to Vacate, counsel has been unable to adequately investigate and present this claim.

XVI FLORIDA'S CAPITAL SENTENCING STATUTE IS FACIALLY UNCONSTITUTIONAL AND AS APPLIED BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND DEFENSE COUNSEL WAS

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[33] Claim 22 and 24 of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or presented elsewhere herein.

[34] Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar.

INEFFECTIVE BY FAILING TO OBJECT ACCORDINGLY[35]

Florida's capital sentencing statute is unconstitutional on its face because it constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. Further, the sentencing scheme does not prevent the arbitrary imposition of the death penalty because it does not narrow the application of the death sentence to only the worse offenders, Proffitt v. Florida, 428 U.S. 242 (1976), and violates the guarantees of the Eighth Amendment. Richmond v. Lewis, 113 S.Ct. 528 (1992).

Further, Florida's capital sentencing statute does not provide a standard of proof for determining when the aggravating circumstances outweigh the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances nor the jury's consideration of each aggravator listed in the statute." Godfrey v. Georgia, 446 U.S. 420 (1980). Florida's sentencing scheme does not contain the independent reweighing of factor envisioned in Proffitt, and creates a presumption of death in cases in which a single aggravator applies. Thus, every felony murder case and almost every premeditated murder case carries

[35] Claim 26 of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or presented elsewhere herein.

with it the presumption of the death penalty. This violates the Eighth Amendments' requirement the death penalty be imposed only upon the worst offenders. Richmond v. Lewis, 506 U.S. 40 (1992); Furman, supra; Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

XVII MR GRIFFIN RECEIVED INEFFECTIVE REPRESENTATION DURING THE DIRECT APPEAL OF HIS CONVICTIONS IN VIOLATION OF FLORIDA LAW AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION[36]

Specifically, there is evidence in the trial record of several unrecorded sidebar conferences and the trial transcript is riddled with obvious typographical errors which render it nonsensical in places. Additionally, there are pretrial proceedings which have not been transcribed; in short, there was an inadequate record from which to prosecute an appeal.

An incomplete record is particularly problematic in a death penalty case because it effects a defendant's constitutional right to review, Dobbs v. Zant, 113 S.Ct. 835 (1993), and impacts not only the direct appeal of conviction and sentence, but also the ability to collaterally attack the

[36] Claim 27 of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or presented elsewhere herein.

conviction, the right to counsel and to equal access to the courts as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. *See, e.g.,* Hardy v. U.S., 375 U.S. 424, 427 (1964).

XVIII THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. GRIFFIN'S CLAIM HIS TRIAL CONTAINED SIGNIFICANT PROCEDURAL AND SUBSTANTIVE ERROR WHICH RESULTED IN THE DENIAL OF HIS RIGHT TO A FAIR TRIAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS[37]

This claim concerns the cumulative effect of the countless errors which occurred at Mr. Griffin's trial and which, when considered in their entirety, deprived him of his right to a fair trial under the Eighth and Fourteenth Amendments of the U.S. Constitution. *See, e.g.,* Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); State v. Gunsby, 670 So.2d 920 (Fla. 1996).

Cumulative errors during the penalty phase can also be the basis for remanding for resentencing, Jones v. State, 569 So.2d 1234 (Fla. 1990), and the cumulative effect of prosecutorial misconduct is sufficient to award a new trial, Nowitzke v. State, 572 So.2d 1346 (Fla. 1990). The Court's concern is that even though each of the errors, standing

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[37] Claim 28 of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or presented elsewhere herein.

alone, may be harmless, their cumulative effect denied the defendant the fair and impartial trial "which is the inalienable right of all litigants in this state and this nation." Jackson v. State, 575 So.2d 181, 189 (Fla. 1991).

Here, the record is replete with errors committed by defense counsel, the prosecution, and the court during both guilt and penalty phases of the trial. Addressing the errors on an individual basis will not remedy the harm done in this case because the death penalty has been imposed. The results of the trial are not reliable and Michael Griffin is entitled to an evidentiary hearing.

XIX THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF INADEQUATE AND CONSTITUTIONALLY INFIRM JURY INSTRUCTIONS ON THE AGGRAVATING FACTOR OF AVOIDING ARREST IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION[38]

The argument here parallels that of the improper jury instruction of cold, calculated and premeditated; aggravating factors must operate to narrow the jury's discretion, and if an instruction does not do so, it is constitutionally infirm. Stringer, supra. The aggravator the murder was committed for the purpose of avoiding or preventing a lawful arrest, like

[38] Claim 29 of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or presented elsewhere herein.

the aggravator committed during the course of a burglary, is nothing more than an automatic aggravator when, as here, the decedent is a police officer. "When the sentencing body is told to weigh an invalid factor... a reviewing court may not assume it would have made no difference... When the weighing process itself has been skewed, only constitutional-harmless error analysis or reweighing at the trial or appellate level suffices to guarantee... an individualized sentence." Stringer, 112 S.Ct. at 1137.

Proof of the requisite intent to avoid arrest and detection must be very strong if the decedent is not a law enforcement officer. Robinson v. State, 610 So.2d 1288 (Fla. 1992). Here, the decedent was a law enforcement officer, and thus, the use of this aggravator was unconstitutional not only due to its vagueness but also because its consideration resulted in an impermissible doubling of factors in violation of the constitution prohibition against double jeopardy. Because the issue was not raised by counsel, Mr. Griffin is entitled to an evidentiary hearing.

XX MR. GRIFFIN IS INSANE TO BE EXECUTED[39]

Recognizing this issue is not ripe for consideration at

[39] Claim 30 of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or presented elsewhere herein.

this time, Mr. Griffin raises the argument to preserve it for review in future proceedings. In Ford v. Wainwright, 477 U.S. 399 (1986), the U.S. Supreme Court held the Eighth Amendment protects individuals who are insane from the cruel and unusual punishment of being executed.

XXI THE TRIAL COURT ERRED BY DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF THE STATE'S INTRODUCTION OF GRUESOME PHOTOGRAPHS IN VIOLATION OF MR. GRIFFIN'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS AND THE ANALOGOUS PROTECTIONS OF THE FLORIDA CONSTITUTION[40]

At trial, the State was permitted to introduce numerous gory photographs which were inflammatory, cumulative and prejudicial. The sole purpose of the photos was to ignite the jury's passions and prejudice them against Mr. Griffin. The photographs did not independently establish any material element of the State's proof and their prejudicial effect undermined the reliability of Mr. Griffin's conviction and sentence. The court's error in admitting them cannot be consider harmless beyond a reasonable doubt. Chapman v. California, 87 S.Ct. 824 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION AND RELIEF SOUGHT

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[40] Claim 31 of the Second Amended Motion to Vacate. Mr. Griffin incorporates all of the claims, facts and arguments on this issue which are contained in his Second Amended Motion to Vacate (RV1 - 32-167) or presented elsewhere herein.

Based upon the foregoing facts, arguments, and citations of authority, Mr. Griffin prays for the following relief:

1. That he be granted an evidentiary hearing on each of the issues for which relief was denied by the trial court following its consideration of Mr. Griffin's Second Amended Motion to Vacate;

2. That he be granted a new trial;

3. That he be granted a new sentencing proceeding;

4. That he be allowed leave to supplement this brief should new claims, facts, or legal precedent become available to counsel; and, on the basis of the reasons presented herein;

5. That his convictions and sentence be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to the following: Assistant General Sandra S. Jaggard, Office of the Attorney General, 444 Brickell Avenue, Ste. 950, Miami, Fl. 33131; Assistants Attorney General Penny H. Brill, and Jay H. Novick, Office of the Attorney General, 1350 N.W. 12th Avenue, Miami, Fl, 33136-2111; Michael Allen Griffin, DC No. 182543, Union Correctional Institution, P1425, P-Dorm P.O. Box 221 State Rd. 16, Raiford, Florida 32083-0221, on this _____ day of April, 2002.

Respectfully submitted,

_MICHAEL V. GIORDANO
Florida Bar #216666
Giordano & Luchetta
412 East Madison Street
Suite 824
Tampa, Florida 33603
(813) 228-0070
(813) 221-2603

CERTIFICATE OF COMPLIANCE

THE UNDERSIGNED hereby certifies Appellant's Initial Brief complies with Rules 9.100(1) and 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: _____
Michael V. Giordano
Florida Bar Number 216666