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 FROM 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 REPLY BRIEF

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SUMMARY OF THE ARGUMENTS[1]

Michael Griffin is entitled to a new trial based upon the trial court's err in denying Mr. Griffin's claims of ineffective assistance of counsel based upon counsel's failure to investigate and present mitigation during penalty phase, his failure to object to the court's sentencing procedures, the cumulative effect of counsel's errors during the guilt phase, including counsel's concession of guilt during argument, and his failure to object to improper jury instructions. The lower court also erred by failing to independently weigh the aggravating and mitigating factors prior to sentencing, and by not conducting an appropriate sentencing proceeding.

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[1] In an effort to avoid endless repetition, the Answer Brief contains only the issues which require a response based upon the Brief of the Appellee. In doing so, Mr. Griffin is in no way waiving the issues presented in his Initial Brief.

ARGUMENT

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

In its answer brief, the State alleges Michael Griffin failed to prove either that his trial counsel was deficient for failing to present mitigating evidence or that counsel's deficiencies resulted in prejudice to Mr. Griffin, both of which are required to prove an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To support its contention, the State relies upon and quotes heavily from the order issued by the court which presided over the evidentiary hearing of this matter. However, both the lower court's order and the State's argument simply ignore the facts.

The issue is not whether or not Mr. Griffin's defense counsel could have proved he suffered from organic brain damage, or whether the evidence which was presented at Michael Griffin's evidentiary hearing proved he suffered from organic brain damage or mental illness. Rather, the issue is whether there was significant mitigating evidence regarding Michael Griffin's childhood and mental capabilities which could have been presented to the original sentencing tribunal, and whether it is reasonably likely that counsel's failure to investigate and offer the available

evidence deprived Mr. Griffin 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).

In this case, the answer to both questions is an emphatic affirmative. At the evidentiary hearing, Mr. Griffin presented the testimony of four witnesses who had not testified at the original sentencing hearing, all of whom provide a plethora of relevant information which was not heard at Mr. Griffin's sentencing hearing. One of the witnesses, Dr. Bordini, a well-respected clinical psychologist specializing in neuropathology, reviewed copious records, conducted hours of tests and interviews to support his opinion that Michael Griffin did indeed suffer neuropsychological impairment, including the inability to plan, organize and control his behavior.[2]

In its answer, the State makes much of the fact that its witness at the post-trial evidentiary hearing attempted to refute or discredit Dr. Bordini's findings, and buttresses its argument with the court's order denying this claim, but the issue here is not as simple as whether or not Dr. Bordini's findings were correct, although one might argue that, if only because of his more thorough and complete review

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[2] A more complete recitation of Dr. Bordini's findings is contained in Appellant's Initial Brief.

process, Dr. Bordini's opinion should be given greater weight.[3] Rather, as this Court held in Ragsdale v. State, 798 So.2d 713, (Fla. 2001) and Rose, supra, the issue is whether or not the failure to present this evidence deprived Michael Griffin of a meaningful penalty phase hearing, and whether or not defense counsel had a good reason for not presenting the evidence. No one can seriously doubt Dr. Bordini's testimony, even standing alone, was a kind of evidence not heard by the jury, and counsel's failure to present it was without a satisfactory explanation.

But counsel's failure to explore and present mitigation went beyond the absence of mental health mitigation from an expert. Two other witnesses who testified at the evidentiary hearing, Mr. Griffin's mother and half-brother, recounted startling events and details about Michael's childhood which went unheard at the penalty phase. Although the sentencing jury heard some, albeit limited testimony from Michael Griffin's father about Michael's upbringing, the picture painted by Tommy Griffin was contradicted by the many stories of abuse related by Marianne and Charles Griffin. Contrary to the state's assertion, the testimony of Marianne and Charles was not cumulative but instead revealed a side of Michael's life with Tommy Griffin which was not acknowledged or even alluded to during the elder

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[3] As detailed in Appellant's Initial Brief, none of the other mental health experts who testified reviewed the quantity of records examined by Dr. Bordini.

Griffin's original appearance on the witness stand.

To support its contention the testimony of Charles Griffin would have been cumulative, in its Answer Brief, the state cites the testimony of Betty Dobe, Randy Gage, and Brenda Waters. However, none of these witnesses were present in the Griffin household during Michael's childhood, and none of them were able to provide the kind of detailed picture of Tommy Griffin's brand of fatherhood. Common sense dictates there is a significant difference between the impact of merely conclusory testimony that Michael Griffin had a difficult childhood and the first-hand accounts provided by Charles Griffin.

The state also argues the lower court properly found the failure to present the testimony of Charles and Marianne was not ineffective assistance of counsel because neither was available at the time of trial. In fact, both Marianne Griffin and Charles Griffin testified they had not been contacted by defense counsel or his investigator prior to Michael Griffin's trial. Thus, counsel's claim that both were unavailable is contradicted by the evidence. As a result, the trial court's finding of unavailability of the witnesses, and its conclusion that the failure to call them during the penalty phase was not ineffective, cannot be upheld.

In Ragsdale, supra, this Court held "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible

mitigating evidence." Id., at 716, quoting State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000) (citation omitted). In Ragsdale, as in the present case, the testimony presented at the evidentiary hearing revealed "an abundance of potential mitigating evidence" about Michael Griffin's childhood environment which was not presented to the jury due to counsel's failure to conduct an adequate investigation. Id. Additionally, here, as in Ragsdale, defense counsel failed to present any evidence of Michael Griffin's mental state, i.e., mitigation, and did not call mental health expert during the penalty phase.

Just as in Ragsdale, in the instant case, there is no evidence that Michael Griffin refused to assist his counsel in finding or presenting potential mitigation. Both Charles and Marianne Griffin testified they had not been contacted by defense counsel, but would have been willing to testify if asked. Moreover, while testifying at the evidentiary hearing, defense counsel admitted he had not even contacted Marianne, Charles, or other relatives aside from Tommy Griffin because Tom Griffin told them Marianne and Charles would not be helpful. (RV4 - 810-11) Thus, it is difficult to credit counsel's tactical decision not to call other, available witnesses because he had not spoken to them and thus, had no way to evaluate their testimony and nothing upon which to base his decision not to use them during penalty phase. Accordingly, because his counsel failed to investigate and present

substantial mitigating evidence, Michael Griffin is entitled to a new penalty phase proceeding.

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

In its reply, the state suggests the lower court was correct to deny relief on this claim because there was no evidence of improper ex parte communication between the sentencing court and the prosecutor who prepared the state's sentencing memorandum. This is not entirely correct, however. At the evidentiary hearing, Assistant State Attorney Penny Brill testified she did not remember who asked her to prepare the sentencing memo. (RV4 - 895) Moreover, the issue is not merely whether or not there was ex parte communication between the court and the state. Rather, the issue is whether the court's whole-sale adoption of the state's sentencing memorandum, coupled with its failure to follow the procedures outlined in Spencer v. State, 615 So.2d 688 (Fla. 1993), created the appearance of partiality on the part of the sentencing court.

In State v. Reichmann, 777 So.2d 342 (Fla. 2001), the court examined a situation in which there was an ex parte communication between the judge and

prosecutor in which the judge asked the state to prepare the death penalty order. In its review of the line of precedent in this area, it is evident the decisions in which the Court granted relief were those in which there was not only a suggestion of an ex parte communication, but also where the court failed to either give the defendant an opportunity to heard prior to determining sentence or to independently weigh the aggravating and mitigating factors. It is the sentencing court's weighing process which is at issue, not merely a question of whether or not the court communicated with one of the parties outside the presence of the other. *See, e.g.,* Reichmann, at 351-52. To wit:

> In *Patterson v. State*, 513 So.2d 1257, 1261 (Fla. 1987), we specifically held that the trial judge improperly delegated to the state the responsibility of preparing the sentencing order because the judge did not independently determine the specific aggravating and mitigation circumstances that applied in the case before directing the preparation of the order. We further found that the trial judge's actions raised a serious question concerning the weighing process that must be conducted before imposing a death penalty. *See id.* at 1262.

Reichmann, at 351.

Here, the assistant state attorney who prepared the prosecution's sentencing memo does not recall who asked her to do so, the memo prepared by the State is quoted almost verbatim in the court's subsequent sentencing order, and the

sentencing proceedings reveal there was no argument on the aggravators or mitigators prior to sentencing and the sentencing order was prepared before Mr. Griffin even had the opportunity to speak to the judge. Thus, it would appear the court failed to given Mr. Griffin a fair opportunity to be heard, and failed to listen to all parties and independently weigh all factors before making the decision as to how to sentence Mr. Griffin. Consequently, Michael Griffin is entitled to a new penalty phase.

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

Although the State argues all of Michael Griffin's public records requests have been complied with, and supports its claim with a compilation of documents delineating the history of Mr. Griffin's public records requests, it is evident from the supplemental record submitted by the state that some of the documents requested by Mr. Griffin were not furnished to him. Specifically, the supplemental record contains a great many agency responses in which the request is denied in

whole or in part due to a claim privilege or statutory exemption under chapter 119, Florida Statutes. Additionally, although the supplemental record contains a seemingly vast amount of public records requests, a careful review of the record reveals many of Mr. Griffin's requests were duplicative in that they had to be resubmitted in a different form or to a different person in response to an apparent objection to the breadth or format of the original request. Finally, merely providing evidence that some records were produced does not mean all requested records have been previously provided to Mr. Griffin.

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

The gravamen of Michael Griffin's claim here is not only trial counsel's deficiencies in his cross-examination of two of the prosecution's primary witnesses, counsel's failure to advise his client that counsel possessed information suggesting possible judicial bias, and counsel's allegedly tactical decision to concede guilt without first consulting his client. The issue also includes the cumulative effect of these errors. Simply put, Michael Griffin should have been granted an evidentiary hearing on the issue of the effectiveness of his trial counsel.

The state cites State v. Williams, 797 So.2d 1235 (Fla. 2001), to support the court's dismissal of Mr. Griffin's claim of ineffectiveness concerning trial counsel's concession of guilt during opening statements. In Williams, however, counsel did not confess guilt on behalf of his client. Rather, according to the Court, counsel offered alternative theories: "If you believe my client's version of events, then you must find him not guilty; if you do not believe him, then he still is not guilty of first-degree murder, but only of a lesser-included offense." Id., at 1240. Thus, the case is factually inapposite and inapplicable to Mr. Griffin's situation.

Moreover, as the Court held in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), while there might be situations in which a defense attorney may make a strategic decision to admit guilt, such a strategy may only be done with the approval of the accused because, of course, only the accused may make the decision to plead guilty.

> We recognize that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. Of course, in such cases, the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy.

*   *   *   *

> Thus, the dispositive issue . . . is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial.

Nixon, at 623-24 (citations omitted). Thus, on a claim of ineffective assistance based upon counsel's choice to concede guilt, the issue for the court is whether or not counsel's decision received the approval of the defendant on trial.

Obviously, because the lower court denied Mr. Griffin an evidentiary hearing on this issue, there is no record evidence to refute the claim. Thus, Michael Griffin is entitled to an evidentiary hearing on the matter, and if the evidence demonstrates he was not consulted regarding counsel's argument, Michael Griffin must be given a new trial.

Finally, in a separate concurring/dissenting opinion in Williams, supra, Justice Anstead discussed the need for an evidentiary hearing whenever the court is presented with claims of ineffectiveness based upon counsel's strategic choices which acknowledge culpability and/or fail to offer a defense. In his opinion, Justice Anstead recognized there are situations in which the defendant's claims of ineffectiveness should be viewed as a whole. According to the Justice, in situations of this sort, an evidentiary hearing is the proper way in which to sift through the issues. "All of this simply illustrates the need for an evidentiary hearing to sort

these matters out. When all three assertions of incompetency are viewed together, it is apparent that an evidentiary hearing was required since Williams has asserted that he received virtually no defense, and that, in fact, his counsel affirmatively damaged his case in his confusing presentation to the jury. Williams, supra, at 1246.

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

As the state notes, the cold, calculated and premeditated instruction given at Mr. Griffin's trial was later held by the Court to be invalid. Jackson v. State, 648 So.2d 85 (Fla. 1994). Admittedly, trial counsel did not object to the instruction when it was given; the attorney who represented Mr. Griffin at trial also represented him for purposes of his direct appeal. Not surprising, trial counsel's failure to object to the instruction at trial also meant he did not raise the issue on direct appeal. Consequently, Mr. Griffin is caught in a kind of catch-22. An admittedly incorrect jury instruction was used at trial, it was not objected to and not addressed on direct appeal because the same attorney represented him throughout the trial and

appeal process. Thus, according to the State, Mr. Griffin cannot now complain of this error or his counsel's ineffectiveness for failing to preserve it.

As noted in Appellant's initial brief, Mr. Griffin's situation is not akin to the factual scenario found in Jennings v. State, 782 So.2d 853 (Fla. 2001). In that case, 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. Mr. Griffin's case, however, there is no evidence to support this aggravator and it cannot be relied upon to support the death sentence against Mr. Griffin.

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

During the penalty phase instructions in Mr. Griffin's case, the jury was told their role at sentencing was merely advisory. Although this was a correct statement of the law at the time, it allowed the jury to assume less responsibility for their recommendation. As the Court is undoubtedly aware, the United States Supreme Court recently authored an opinion, Ring v. Arizona, ___ U.S. ___, 122 S.Ct. 2428 (2002), which addresses the manner in which the death penalty is imposed in Florida and other states which allow a sentencing court rather than a jury to make

the final determination as to whether or not to impose the death penalty. In Ring, the Court examined the capital sentencing procedures used by Arizona in light of its earlier ruling in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and found Arizona's sentencing plan did not pass constitutional muster. According to the Supreme Court, "Capital defendants, no less than non-capital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Ring, at 2432. Thus, the Court held, Arizona's capital sentencing scheme, which required the judge to make the final determination as to the establishment of statutory aggravating and mitigating factors, violated the Sixth Amendment of the U.S. Constitution. Ring, at 2443.

The issue, according to the Court, turned on whether the statute in question allowed an increase in a defendant's sentence based upon factual findings which were made by a judge rather than a jury. Ring, at 2439. As noted in Ring, Arizona's sentencing procedures were indistinguishable from Florida's in that it is the sentencing judge who made the final determination as to whether or not to impose a capital sentence. Thus, the sentencing procedure employed in Michael Griffin's case should likewise be held to violate the Sixth Amendment to the U.S. Constitution, not only because the jury's role in the sentencing process was

diminished, but also because the final sentence was determined by the court rather than the jury.

CONCLUSION AND RELIEF SOUGHT

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 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 August, 2002.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

____
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