IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1

LOWER COURT CASE NO. 95-18753-CFANO

MICHAEL J. GRIFFIN,

Appellant – Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee – Cross-Appellant.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

Mr. Griffin has presented several issues which involve mixed questions of law and fact, and as such are subject to a mixed standard of review. For example, as this Court recently held, "Brady claims are mixed questions of law and fact. When reviewing Brady claims, this Court applies a mixed standard of review, "defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] *de novo* the application of those facts to the law." Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005) (citations omitted). Likewise, this Court has applied a similar standard of review for ineffective assistance of counsel claims. Evans v. State, 946 So. 2d 1, 24 (Fla. 2006).

REQUEST FOR ORAL ARGUMENT

Mr. Griffin has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Griffin lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Griffin, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On November 29, 1995, a grand jury in the Circuit Court of Pinellas County returned an indictment charging Michael J. Griffin with two counts of first-degree murder for the deaths of Thomas and Patricia McCallops (R. 1-2). The indictment also charged Juan Antonio Lopez as a co-defendant (R. 1). Mr. Griffin's family retained Dwight Wells and Roger Mills as defense counsel.

The State filed a notice of intent to seek the death penalty against both Mr. Griffin and Mr. Lopez (R. 5). Soon thereafter the State informed defense counsel for Mr. Griffin that the victims' families were amenable to a life sentence if both he and Mr. Lopez pleaded guilty to the murders. However, in January 1996 co-defendant Lopez was declared incompetent, and admitted to Chattahoochee State Hospital for psychiatric care; he was therefore unavailable to enter into a joint plea with Mr. Griffin and the State for a life sentence.

On June 13, 1997, despite Mr. Lopez's continued incompetency, Mr. Griffin entered pleas of guilty to the two capital offenses (R. 1595, 1598-1607, 2114-15). He did this with the expectation, perpetuated by his attorneys, that by doing so he would avoid a death sentence and instead receive a life sentence with the possibility of parole (R. 2016). The Honorable Brandt Downey presided at the plea colloquy (R. 1595).

During the plea hearing, Judge Downey stated that the possible sentences were life imprisonment without the possibility of parole, or the death sentence (R. 1604). However, the plea form, which was signed by Mr. Griffin and accepted by Judge Downey, indicated that Mr. Griffin was eligible for life with the possibility of parole in twenty-five years (PCR. 304). However, the law at the time actually mandated that the only possible sentences available for the offenses were natural life or the death sentence. No one present at the plea hearing corrected this mistake.

Mr. Griffin's penalty phase began on December 8, 1997 (Supp. R. 1). It was only at this time, six months after he changed his plea, that Mr. Griffin learned for the first time that he was not in fact eligible for parole (Supp. R. 22-25). Following a brief recess, Mr. Griffin stated that he would keep his plea, and his original plea and plea form were modified to reflect that a life sentence without parole was the only possible alternative to a death sentence (Supp. R. 25-27). On the advice of counsel, Mr. Griffin waived his penalty phase jury (Supp. R. 8-13). Defense counsel also waived closing arguments, the Spencer[1] hearing, and a presentence investigation report (Supp. R. 346, 510-11; R. 2222-26). Sentencing memoranda were filed by both the State and the defense (R. 2045-50, 2051-61).

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

On July 10, 1998, the trial court conducted a sentencing hearing, at which time the court imposed the death penalty upon Mr. Griffin (R. 2250-51; 2082). The court's written sentencing order was entered that same day (R. 2062-75).

Trial counsel timely filed a notice of appeal on July 29, 1998 (R. 2087). An amended notice of appeal was filed on August 11, 1998 (R. 2090-91). On appeal, this Court affirmed Mr. Griffin's convictions and sentences. See Griffin v. State, 820 So. 2d 906 (Fla. 2002). Direct appeal counsel did not file either a motion for rehearing or a petition for a writ of certiorari with the United States Supreme Court.

On March 20, 2003, Mr. Griffin filed records requests pursuant to Fla. R. Crim. P. 3.852(g) and (i). However, because the trial of co-defendant Juan Anthony Lopez had not yet been completed, there were voluminous records in his case to which Mr. Griffin was entitled that were filed under seal. On August 27, 2003, without having the benefit of all public records to which he was entitled, Mr. Griffin filed his motion for post-conviction relief pursuant to Fla. R. Crim. Pro. 3.851 (PCR. 1).

Following the receipt of some of the records to which he was entitled, Mr. Griffin filed an amended Rule 3.851 motion on September 18, 2003 (PCR. 350-431). The State filed a response on October 29, 2003 (PCR. 432-81). Although records from Mr. Lopez's trial were still outstanding, the circuit court held a

case management conference on February 13, 2004 (PCR. 482-569). The circuit court granted an evidentiary hearing on three of Mr. Griffin's claims[2], reserved Mr. Griffin's cumulative error claim, and denied the remaining claims outright (PCR. 599-605).

On April 22, 2005, Mr. Griffin filed a motion to continue the evidentiary hearing, as records from Lopez's trial had still not been received by his counsel, and because the State had not yet turned over the report of its mental health expert (PCR. 606-91). The circuit court granted the motion (PCR. 689-90).

On July 22, 2005, based upon records received from the Lopez trial, Mr. Griffin filed a second amended 3.851 motion which amended the three claims for which he had been granted a hearing (PCR. 692-717). The State filed a response and simultaneously objected to the amendment; that objection was denied (PCR. 718-29).

On March 22, 2006, Mr. Griffin filed a motion to disqualify Judge Brandt Downey (PCR. 734-52). The motion was granted the next day, and the case was reassigned to the Honorable Robert Morris (PCR. 753-54).

Mr. Griffin's evidentiary hearing commenced on December 20, 2006 (PCR. 4150). Due to Judge Morris' busy schedule as

[2] Claim III (ineffective assistance of guilt phase counsel); Claim VIII (claim of inadequate assistance of mental health expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985); and Claim X (ineffective assistance of penalty phase counsel).

administrative judge for the circuit, as well as the large number of witnesses, the hearing was held over the course of fourteen months, ultimately concluding on February 11, 2008. On September 25, 2007, Mr. Griffin filed a third amended 3.851 motion, which amended Mr. Griffin's existing lethal injection claim (Claim V), and also added another claim relating to the creation of Florida's lethal injection protocols (PCR. 779-994). Also on that date, Mr. Griffin filed a Motion to Withdraw Guilty Plea pursuant to Fla. R. Crim. Pro. 3.170 (PCR. 945-58). The circuit court accepted both motions for consideration.

On October 1, 2007, based upon the testimony of witnesses during the evidentiary hearing, Mr. Griffin filed a supplemental claim to his third amended 3.851 motion, alleging a Brady[3] violation (PCR. 978-989).

At the circuit court's request, both parties filed written closing arguments, with a separate closing argument specifically addressing Mr. Griffin's Motion to Withdraw Guilty Plea (PCR. 1168-1253; 1258-1358; 1359-1392).

On November 26, 2008, Judge Morris entered an order granting in part Mr. Griffin's 3.851 request for post-conviction relief (PCR. 1395-1415). Specifically, the court granted Mr. Griffin's claim of ineffective assistance of penalty phase counsel (PCR. 1409-10). The court denied Mr. Griffin's

[3] Brady v. Maryland, 373 U.S. 83 (1963).

remaining 3.851 claims, as well as his motion to withdraw his plea. Both the State and Mr. Griffin timely filed notices of appeal (PCR. 2569-70; 2571-72).

STATEMENT OF FACTS

On the morning of October 8, 1995, the bodies of Thomas and Patricia McCallops were found in a freezer at Service America Corporations, a vending machine company (R. 37). Lockers containing change and bills had been cut open, and approximately $11,300 had been removed (Supp. R. 38, 223-24). Police found seven 9 mm. casings near or inside the freezer, as well as shotgun wadding and bullet fragments (Supp. R. 230-37). An autopsy revealed that Mr. McCallops had been shot by both a shotgun and a 9 mm.; one of the shotgun wounds and one of the gunshot wounds would both have been life-threatening, but it was not clear of those wounds caused his death (Supp. R. 168-99). In contrast, Mrs. McCallops suffered only two wounds, both from a handgun; a shot to her head was fired in close proximity and would have quickly caused her death (Supp. R. 175-194).

Based upon a tip from an informant, lead investigator Robert Snipes of the Pinellas County Sheriff's Office began investigating Mr. Griffin and his co-defendant, Juan Anthony Lopez (Supp. R. 48-52). Mr. Griffin and Lopez bought and sold drugs from Nicholas Kocolis, a well-known drug dealer (Supp. R. 79). The police soon learned that Mr. Griffin had a dependent

relationship with Kocolis because of his drug addiction, and would therefore do anything Kocolis requested (Supp. R. 79). Various witnesses implicated Mr. Griffin and Lopez in the commission of the crime (Supp. R. 86-94; 325-33). However, numerous witnesses also gave statements and testimony indicating that Kocolis provided the shotgun and the handgun that were used in the robbery, was instrumental in the planning and commission of the robbery, and that he received money from the crime (Supp. R. 81, 90; 100-01; 116; 137; 143-45).

On November 29, 1995, a grand jury returned an indictment charging Mr. Griffin and Lopez with two counts of first-degree murder. Kocolis, however, was never charged with a crime as to the robbery of Service America or the murders of the McCallops.

Soon thereafter, trial counsel was informed by the State Attorney's office that the victims' family was amenable to a life sentence for Mr. Griffin and his co-defendant, Juan Anthony Lopez, if both defendants entered a guilty plea (PCR. 4167). However, in early 1996, Mr. Lopez was declared incompetent. Nevertheless, on June 13, 1997, Mr. Griffin pled guilty to the indictment, with no guarantee from the court, written or otherwise, as to his sentence (R. 1595-1612). Mr. Griffin changed his plea based upon the advice of his counsel, who told him and his family repeatedly that if he pleaded guilty, the court would impose a life sentence rather than death (PCR. 4267-68; 4507-08). Specifically,

counsel advised Mr. Griffin and his family that if he took the plea, he would receive a sentence of 25 years to life (PCR. 4214-15; 4268-69). Unfortunately, this option was actually no longer available to Mr. Griffin, as the law had been changed several years previously and Mr. Griffin was in fact eligible only for life without parole or the death penalty. However, Mr. Griffin was not aware of that change in the law, and relied upon his attorney's mistaken advice that he would be eligible for parole when he entered his plea. Moreover, he had no idea of the aggravating circumstances the State would choose to pursue or what available defenses he had as to his guilt phase issues because no investigation had been completed (R. 1609; PCR. 4512-18, 4576).

For months, trial counsel advised Mr. Griffin that he would receive a life sentence, even when it became clear that Lopez was not going to be restored to competency before Mr. Griffin's penalty phase hearing. Mr. Griffin's penalty phase commenced on December 7, 1997 (PCR. 4219-20). That day was the first time he and his family learned he was not eligible for parole (see id.). Trial counsel never informed Mr. Griffin that he could move to withdraw his guilty plea (PCR. 4281, 4510). Rather, they pressured him to keep his guilty plea, and after the conclusion of a "brief recess," counsel informed the Court that Mr. Griffin would keep his guilty plea (PCR. 4510).

During the penalty phase, the defense called eight witnesses, including mental health expert Dr. Michael Maher. Counsel did not retain an investigator, because lead attorney Dwight Wells considered himself an experienced capital litigator who could work up his own mitigation case (PCR. 4535). However, Wells did not prepare a social history of any kind (PCR. 4520). Dr. Maher was hired late in the case, and was never provided any records relating to Mr. Griffin's medical, educational, or mental health history (R. 268, 278-80). He did not meet with family members or collateral witnesses, based most of his opinion upon Mr. Griffin's self-reporting, and conducted absolutely no testing (R. 278-93). As a result, he was severely impeached (see id.).

In its sentencing order, the trial court found that Mr. Griffin deserved a death sentence because no mitigation existed that outweighed the aggravating circumstances. In finding the aggravating circumstances more compelling, the court specifically found that Mr. Griffin alone had been responsible for the planning of the crime because he had previously worked at the company and knew the employees would recognize him (R. 2965). The Court also determined that Mr. Griffin should be sentenced to death because of his purported planning of the crime, his knowledge of the company, the fact that he and he alone "procured the weapons," and because he "needed money" (R. 2966, 2970). The court also found that there

had been "no testimony that the Defendant committed the crime while under the influence of any narcotic drug" (R. 2971). The court concluded that no mental health mitigation had been established and gave those mitigators "no weight" (R. 2972).

Mr. Griffin, his family, and his attorneys were "in shock" when the court pronounced the death sentence (PCR. 4280). Mr. Griffin never expected that a death sentence would be imposed, as his attorneys "had led him to believe that [they] felt very confident that it was going to be a life sentence" (Id.). His attorneys told him to "'hang in there'" and 'be tough," but they never advised him that he had the right to move to vacate his plea (PCR. 4281). See Argument I.

In post-conviction, Mr. Griffin was granted an evidentiary hearing on three claims: Claim III (ineffective assistance of guilt phase counsel); Claim VIII (claim of inadequate assistance of mental health expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985); and Claim X (ineffective assistance of penalty phase counsel). In support of these claims, Mr. Griffin presented a wealth of compelling evidence that was available at the time of his guilty plea and penalty phase. This included evidence establishing: His significant history of drug addiction, mental illness, and brain injury; his family history of addiction and mental illness; and the fact that Nicholas Kocolis, and not he, was the mastermind of the Service America crimes. Mr. Griffin

also presented evidence establishing that the State failed to disclose immunity deals that it had struck with Kocolis and several other key witnesses. See Argument II.

Mr. Griffin presented evidence that he came from a family with a long history of addiction. However, while growing up, Mr. Griffin shunned drugs, and even as a teenager and young adult would only "occasionally" have a drink at a party (PCR. 4205-06). His aunt, Nancy Price, described him as a "normal teenager" who rarely drank and was never into drugs (PCR. 4237). William Schnitzler, his childhood friend, testified that during high school, he never knew Mr. Griffin to drink, use drugs, or smoke cigarettes (PCR. 4370). Mr. Schnitzler never knew Mr. Griffin to be violent or get in fights (Id.). His uncle, Robert Saline was also very close to Mr. Griffin, and testified he never knew his nephew to be aggressive before using drugs; rather, Mr. Griffin was "complacent" and very easy to get along with (PCR. 4342). According to friend Downey Connolly, who knew Mr. Griffin from 1993 to before his arrested, Mr. Griffin hardly ever consumed alcohol when they first met because "[h]e couldn't handle the alcohol... Two drinks and he was done. He just wasn't a drinker [then]" (PCR. 4341-42).

However, as post-conviction defense experts Drs. Deborah Mash and Thomas Hyde explained, Mr. Griffin's traumatic brain

injury at age nine and history of depression were essential elements in understanding how and why Mr. Griffin became so severely addicted to cocaine over a seven month period in 1995 (PCR. 4823-24, 4834-35, 4848-50, 4954-57, 4981).

When Mr. Griffin was 21 years old, he married his first wife, Calli. They had three children in rapid succession. Mr. Griffin now had four children to support. For several years, he was a "very much a family man" who worked "from night to day" (PCR. 4341-42). He worked for the family refrigeration repair business and took pride in supporting his children financially and emotionally; he "never neglected his children" (PCR. 4204-06). Mr. Griffin enjoyed spending time with his children, his parents and brother and extended family (See id.). He was particularly close to his mother, whom he saw "every day"; he would regularly confide in her (PCR. 4197, 4204-06).

By late 1994, however, Mr. Griffin's life began to change as his marriage to Calli fell apart. According to family friend, Downey Connolly, Mr. Griffin was "very depressed...He would come home from work...[and] cook his own dinner and wash his own clothes and take care of the kids" (PCR. 4344). Connolly visited their home a number of times, and it was always in "[t]otal disarray. I mean, little baby crawling around with a dirty diaper on, food on the table...just very much disarray and

not the type of home that a child should be raised in" (PCR. 4345). Mr. Griffin tried to maintain the home, but his wife would not help. Mr. Griffin became more and more despondent, and by early 1995, "he wasn't himself. He was very depressed. His demeanor was just totally different. He was a totally changed person" (PCR. 4342).

According to Connolly, when Mr. Griffin began using cocaine in late 1994, he did so because he was "working a lot of hours, trying to stay awake... trying to take care of his family, pushing himself" (PCR. 4344). He also began selling the cocaine in order to earn much-needed extra money (PCR. 4239-40).

By early 1995, according to Connelly and Price, Mr. Griffin's cocaine consumption evolved into recreational usage, "maybe two or three times on a weekend" totaling "maybe a gram over a weekend" (PCR. 4239, 4343). Mr. Griffin's parents noticed a change in his behavior in March 1995, after they sold the family business, and Mr. Griffin left his wife (PCR. 4207). By April 1995, his parents and brother were aware that Mr. Griffin was using cocaine (PCR. 4208-09). Mrs. Griffin testified that she and her husband came home from an extended vacation in April 1995 to find a "complete change" in their son. He had lost "at least 30 to 40 pounds" and his pallor was unhealthy (PCR. 4208). Mrs. Griffin usually saw or spoke with her son every day, but

that stopped with his addiction (see id.). He stopped visiting and avoided his mother's phone calls, and his family no longer knew his circle of friends because he was spending time with different people (PCR. 4208-09).

Mr. Griffin's new friends were Nicholas Kocolis and his associates, who were all fellow drug dealers and users (PCR. 4345-46). Although Mr. Griffin still saw and used cocaine with Connolly and Price on occasion, by the summer of 1995, he was becoming closer to Kocolis and his "entourage" (PCR. 4347-48). At the same time, Mr. Griffin's drug use escalated. By late May or June of 1995, Mr. Griffin was using cocaine on a daily basis (PCR. 4242, 4347). According Connolly, he was using up to seven grams of "very high quality" cocaine a day (PCR. 4347). "[Y]ou could tell by the way his appearance was, his demeanor, everything about him, that he had really gone off the deep end.... It went from recreation to addiction" (PCR. 4345). Mr. Griffin also starting smoking cocaine as well as snorting it, and began using methamphetamine and alcohol (PCR. 4350).

The speed with which Mr. Griffin went from recreational user to addict surprised everyone. Nancy Price said, "[i]t was probably maybe three months at the most, two months I would say, into what we were doing and how we were handling it to the point where he was extremely addicted to it" (PCR. 4242). By August

1995, he became "very despondent to me, which wasn't normal.... He quit seeing his children completely" (PCR. 4241-42).[4]

At this time, Mr. Griffin had a new girlfriend, Tracey Tellis, who attempted to get him off of drugs. But every time she would broach the subject of quitting cocaine, Mike would get "aggressive" and "paranoid." Id. at 93. Ms. Price had never seen Mr. Griffin act that way before cocaine. Mr. Griffin soon lost his job and his home. He "pretty much forgot everything that was important to him" (PCR. 4349). He began staying with his drug dealer, Nicholas Kocolis, and became "one of his boys" (Id.). He stayed occasionally at Tracey's house, and sometimes he "[slept] in his van" (Id.). He occasionally saw his Aunt Nancy or Connolly, who went to Mr. Kocolis' house to try to get Mr. Griffin to come home (PCR. 4348). But he never returned to his family.

Nicholas Kocolis also noticed serious changes in Mr. Griffin. Kocolis testified that when he first met Mr. Griffin in early 1995, he was buying cocaine primarily to sell for extra cash, and using the drug himself only recreationally (PCR. 4407). At first, Mr. Griffin was still working and "carrying on some semblance of a normal lifestyle" (PCR. 4413). At some

[4] Connelly and Price provided this information to defense counsel and offered to testify at the trial, but were told by Mr. Wells that their testimony was not needed (PCR. 4248, 4253, 4352-53).

point, however, Kocolis noticed that Mr. Griffin was using all of the drugs he was purchasing – in the weeks before the crime, it was up to seven grams of cocaine at least every other day, if not every day (PCR. 4408, 4454). In the beginning, Mr. Griffin was able to pay Kocolis for the drugs, but when he lost his job and began using all of the cocaine he was buying, he became heavily indebted to Kocolis (PCR. 4408; 4454).

Kocolis confirmed that Mr. Griffin progressed from snorting cocaine to freebasing on a regular basis (PCR. 4410). By September and October of 1995, Mr. Griffin was basically a "baser" and a "crackhead": "[H]is demeanor was becoming more paranoid, more consumed with getting... more drugs and alcohol and, certainly, going in a direction that would become dangerous" – i.e., desperate, and he was "willing to do anything it takes to get the cocaine" (PCR. 4413).

In the days prior to the crime, Mr. Griffin's drug use was "continual" – he and Kocolis did cocaine "the night before [the crime] and the day before and the day before that, too, continually" (Id.). Also, shortly before the crime, Mr. Griffin stopped to get nine or ten grams of cocaine at Heather Henline's house (PCR. 4415). Kocolis did some of that cocaine with Mr. Griffin just before he left for Service America (PCR. 4416).

Steven Montalvo, Kocolis's cocaine supplier, knew Mr. Griffin in the summer and early fall of 1995[5] (PCR. 4449). He testified that once Mr. Griffin was indebted to Kocolis, he was obliged to "work off some of his money" that he owed by selling drugs and acting as a runner for Kocolis when necessary, and if Mr. Griffin didn't bring the money back to Kocolis, "they better not come back" (PCR. 4450). Mr. Griffin "stayed in debt, literally" to Kocolis (PCR. 4461). Montalvo was at Kocolis's house on a daily basis, and in the two months prior to the crime he observed Mr. Griffin buying cocaine there "every day," anywhere from 2 to 4 "eight-balls" (about 3.7 grams) a day (PCR. 4453). Montalvo described Mr. Griffin as "really ate up on cocaine... it took total control of him" (PCR. 4454). He went from being "a real nice guy" to "mentally unstable" and "desperate" (Id.).

State's witnesses Melissa Clark Williams and Mary Hall agreed. Williams was Kocolis's live-in girlfriend in September and October of 1995. Hall was a friend of Kocolis and his sister who knew Mr. Griffin for a number of months before the crime and began dating him in October 1995. Both of these women

[5] Montalvo was originally recruited by Kocolis to commit the Service America robbery, but Montalvo turned him down (PCR. 4455). In Montalvo's opinion, Kocolis was in charge of planning the crime (PCR. 4467). See Argument II.

spent considerable time with Mr. Griffin in the weeks before and after the crimes and thus had critical evidence of Mr. Griffin's drug use. Yet trial counsel never asked them about it in their depositions or investigated anything outside their statements.

Williams knew Mr. Griffin for six weeks before the crime, and observed Mr. Griffin's cocaine use get "worse and worse and worse... he used cocaine all the time... [on] a daily basis" (PCR. 5114). After the crime, Mr. Griffin used all of his money for drugs, and his drug use "got worse" after the crime: "He was... up for days, you know. It just got increasingly worse as if – as if he was, you know, using the drugs to deal with the issue that he had done something wrong" (PCR. 5122).

Williams observed Mr. Griffin buy an ounce of cocaine from Montalvo right after the crime, and soon thereafter, another ounce from Kocolis (PCR. 5123). Mr. Griffin became considerably more aggressive after the crime as his cocaine use increased (PCR. 5124). In her opinion, Mr. Griffin's aggression and threats were due to his drug addiction: "Definitely. I think that had everything to do with his behavior" (PCR. 5144).

Mary Hall also watched Mr. Griffin change from a kind, funny, warmhearted person to someone whose entire life was dominated by cocaine addiction. According to Hall, Mr. Griffin used cocaine daily, and their entire relationship was basically

about "drug use." Like Williams, she believed that the cocaine had overtaken Mr. Griffin's life to such an extent that, but for the cocaine addiction, he would not have committed the crime.

Williams, Hall, Montalvo, and Kocolis were all listed as State's witnesses for trial, and with the exception of Kocolis, all of them were deposed by defense counsel for Mr. Griffin or co-defendant Lopez.[6] Montalvo, Williams, and Hall testified for the State against Mr. Griffin at trial. However, none of the information they had regarding Mr. Griffin's drug addiction and relationship with Kocolis was presented to the trial court.

Melvin Greene also testified at the evidentiary hearing. On the night of October 7, 1995, Lopez came to Greene's hotel room to loan Greene a van (PCR. 4394). Greene was instructed that he had to return the van to Mr. Lopez within one hour. See State Ex. 1 (deposition of Melvin Greene). During this time, Lopez paged Mr. Griffin to meet him (PCR. 4394). While waiting, Lopez showed Greene a 9-mm pistol he was carrying and asked if he wanted to accompany Lopez, but Greene declined (PCR. 4395). When Mr. Griffin arrived at the gas station where Lopez and Greene were waiting, he was "acting sketchy. . .as though he was

[6] No one representing Mr. Griffin appeared at the deposition for Chad Neeld. This omission prejudiced Mr. Griffin in that Neeld saw Mr. Griffin the day of the crime smoking cocaine. Neeld was also recruited by Kocolis to commit a robbery for him before Kocolis sought out Mr. Griffin and Mr. Lopez.

on some sort of drug. [He] was paranoid. He was scratching himself [and] looking around constantly" (Id.). Mr. Griffin was clenching his jaw, his hands were twitching, and his eyes appeared "bug-eyed" (Id.).

Lopez and Mr. Griffin left, and Greene did not see them again until they returned the van an hour later. Mr. Griffin was still acting "very paranoid, edgy, jumpy" (PCR. 4396). He was hyper and sweating. Greene said he had frequently been around people who were using cocaine, as well as "pot" (marijuana) and he believed Mr. Griffin was high on drugs both times he saw him (PCR. 4395-96).[7]

At the evidentiary hearing, the defense also put on witnesses Heather Henline, Kimberly Ally, and Chad Neeld. These witnesses were known to trial counsel at the time of the penalty phase, but none of them were approached by trial counsel. They testified that Mr. Griffin's cocaine addiction was out of control by the time of the Service America crime. All watched Mr. Griffin become a desperate addict whose life was dominated by his need for cocaine.

[7] Trial counsel deposed Greene on September 11, 1996. State Ex. 1. Although Greene acknowledged seeing Mr. Griffin an hour before the crime, Mr. Wells never asked Greene about Mr. Griffin's drug use, demeanor or behavior. Id. Although Greene was available at the time of Mr. Griffin's penalty phase, he was never contacted by defense counsel and would have made himself available to testify for the defense (PCR. 4397).

Chad Neeld was an associate of Kocolis who regularly saw Mr. Griffin in the late summer and early fall of 1995, also testified (PCR. 4610-11, 4615-16). Kocolis asked Neeld to help commit a robbery in September 1995, before he sought out Mr. Griffin and Lopez (PCR. 4618-20).[8]

In the four months before the crime, Neeld saw Mr. Griffin several times a week at Kocolis' home. He observed Mr. Griffin's cocaine use become "very progressive" to where he was both snorting and smoking the drug in "massive amounts" (PCR. 4615-16). Neeld recalled seeing Mr. Griffin smoking cocaine at Kocolis' house on the day of the crime (PCR. 4620-21).

Unfortunately, no one from Mr. Griffin's defense team reached out to Mr. Neeld for the information he had about Kocolis, Mr. Griffin's addiction, or his drug use the day of the crime.[9] At the evidentiary hearing, Mr. Neeld testified that he

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[8] "...Nick stopped selling drugs for awhile, and that was the only way of making money, and he was asking me about something, and he wants me to get into doing something for him . . . He wouldn't tell me [the specifics]. He just said you have got to be brave for it." Def. Ex. 10 (deposition of Chad Neeld) at 39.

[9] Neeld was listed as a State's witness and was deposed by counsel for Lopez on May 30, 1996. Def. Ex. 10 (deposition of Chad Neeld). No one representing Mr. Griffin attended this deposition. In that deposition, Neeld admitted that he knew Mr. Griffin and Lopez through Kocolis, and had observed cocaine and other drugs being used in Kocolis's home. Id. at 4. Neeld also stated that he had "part[ied]" (i.e., used drugs) with Mr. Griffin and Lopez before. Id. at 12. While Lopez's attorneys

would have been available to meet with defense counsel if asked, and would have testified on behalf of Mr. Griffin in the same way he did for Mr. Lopez (PCR. 4623).

Dr. Deborah Mash, a neuropharmacologist and a professor of neurology and molecular and cellular pharmacology at the University of Miami, and a nationally recognized expert on cocaine addiction, testified during the evidentiary hearing about Mr. Griffin's addiction (PCR. 4781-84). In addition to volumes of background medical and school records, Dr. Mash relied on information from Steven Montalvo, Nick Kocolis, Sandra Griffin, Nancy Price, and Downey Connolly. Dr. Mash was aware of and relied upon Dr. Hyde's diagnosis of cocaine dependence disorder, and his findings of brain damage (PCR. 4809-15).

Dr. Mash also conducted her own clinical evaluation of Mr. Griffin. Based upon this extensive background, Dr. Mash determined that Mr. Griffin's cocaine dependence disorder was "severe" to the point of controlling his entire existence:

> [I]t is my expert opinion that Mr. Griffin... suffered from a cocaine dependence disorder; that it was **extremely severe**; that it was aggravated by his

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asked specific questions of Neeld regarding his knowledge of Lopez's drug use and role in the Kocolis gang, they never asked specific questions about Mr. Griffin because he was not their client. Id. at 12, 41-43. Neeld testified on behalf of Lopez at his trial, and was relied upon to establish drug usage immediately before the crime to support Lopez's voluntary intoxication defense and for mitigation. See Lopez Trial at 514-21. Lopez received a life sentence.

> traumatic brain injury which he incurred as a youth; that the family carries significant genetic load, very significant for family history for alcohol dependence disorder; **that Mr. Griffin, because of the rapidity and escalation of his cocaine dependence disorder which was, in my expert opinion, one of the most severe that I've seen in evaluating individuals for the last 16 years. . . .I have not seen any one dose escalate, to go from exposure [to] powder cocaine to smoked freebase cocaine, and to evidence the type of behavioral disturbance that he did in a short time frame is, in my expert opinion, atypical.**
>
> **He was under [in] my expert opinion. . .extreme mental and emotional duress from his dependence.** This is a man who was so dependent on cocaine that he had lost a significant amount of weight. He exhibited, according to his family members and other associates, complete fragmentation of his personality and a disruption of his personality. This is a man who had no criminal activity in his past and overnight changed. **I believe that he was under the influence of duress in the sense that he was addicted to the cocaine and, as such, spent every moment of his waking day and hour in pursuit of that drug.**

(PCR. 4823-24) (emphasis added)).

Dr. Mash found that Mr. Griffin could not conform his conduct to the requirements of the law due to his severe addiction (PCR. 4871-72). She also found that the reason Mr. Griffin committed the crime was because of his desperate need for cocaine: "I think the cocaine was what got him to do it. It was the cocaine, [and] if not for the addiction" he would not have committed the crime (PCR. 4900). As found by Dr. Mash, as well as Dr. Hyde, Mr. Griffin's ability to conform his conduct to the requirements of the law was substantially impaired

whether he was acutely intoxicated at the time of the crime, *or* whether he suffered from acute withdrawal symptoms, *or* whether his behavior was based on his cocaine addiction.

Mr. Wells acknowledged that he would have wanted to present information that Mr. Griffin had been using cocaine right before the crime (PCR. 4516). He tried to explain his failure to do so by claiming "[i]t was hard for me to determine how that, in time, reflected as to the actual crime" (Id.).

Evidence adduced at the evidentiary hearing also established that Mr. Griffin comes from a family with a lengthy history of addiction. When assessing the severity of a person's cocaine addiction, it is necessary to be informed about relatives who have also struggled with addiction and/or substance abuse, according to Dr. Mash (PCR. 4806-07). She found the extent of addiction throughout generations of his family "highly significant" as it was crucial to explaining the severity of his addiction, as manifested by both his genetic load and "his progression and rate of use and the way he reacted to the cocaine over a very short period of time" (Id.; PCR. 4845). Mr. Griffin's family history of mental illness and depression is also crucial to understanding his addiction and behavior (PCR. 4835, 4858).

Mr. Griffin's maternal grandfather was an alcoholic who drank daily and was "always drunk" (PCR. 4182-83). He eventually died of emphysema and pancreatitis caused by his alcoholism (PCR. 4183). Sandra Griffin, Mr. Griffin's mother, testified that all of her maternal and paternal uncles were alcoholics (PCR. 4183-85). Her paternal uncles each died of cirrhosis of the liver due to alcoholism (see id.). Mrs. Griffin's sister and two brothers were also addicts (see id.). Mr. Griffin's maternal uncle, Kenny Saline, was a severe alcoholic who died of bladder cancer related to alcoholism (see id.). His uncle, Bobby Saline, is a cocaine addict and alcoholic who battled substance abuse for ten years (PCR. 4233-35). Mr. Griffin's aunt, Nancy Price, was addicted to cocaine by the age of 19 and is also an alcoholic (PCR. 4233-38). In Mr. Griffin's generation, his cousin Teresa is addicted to crack cocaine, and his cousin Kenneth is an alcoholic (PCR. 4183-92).

Mental illness also plagues generations of Mr. Griffin's family. Mr. Griffin presented evidence of the serious depression he has experienced in his own life, including after his gunshot accident as a child; as a teenager when his girlfriend became pregnant and when he attempted suicide; as a young man after the death of his best friend; and in his mid-20's just prior to the crime (PCR. 4195-96, 4199-4200, 4344).

His mother Sandra experienced crippling depression after the loss of her first-born child, who died from a genetic defect. Mrs. Griffin became so depressed she could barely get out of bed or leave her home (PCR. 4190). Sandra Griffin's brother, Bobby, has also suffered from severe depression over the course of his life, and attempted suicide before getting treatment (PCR. 4235-36). His aunt, Nancy Price, has struggled with depression for years and is currently in treatment for the disease (see id.). Mr. Griffin's cousin, Teresa, suffers from bipolar disorder, and also attempted suicide on at least one occasion (see id.).

According to Dr. Mash, the family history of mental illness and addiction significantly impacted Mr. Griffin, and was a key contributing factor in her expert opinion that his cocaine dependence disorder was "one of the most severe that I've seen in evaluating individuals for the last 16 years..." (PCR. 4823).

When questioned about this available evidence at the hearing, Mr. Wells could not even recall working up a social history, let alone getting information about mental illness -- even though he was responsible for that element of penalty phase preparation (PCR. 4520). Mr. Wells tried to defend this omission by claiming that he was in "pretty constant contact" with the family and thought because of that, they would have told him the things he needed to know, although he admitted that

the family was “always” cooperative with his efforts to get information (PCR. 4519-20). Yet according to the family, neither Mr. Wells nor Mr. Mills ever asked them about the family’s history of addiction or mental illness (PCR. 4216, 4246). Mr. Wells admitted at the evidentiary hearing that he would have presented information on Mr. Griffin’s family history of drug addiction, alcoholism, and mental illness to Judge Downey had he obtained such evidence (PCR. 4519-20).

Evidence presented at the hearing also demonstrated that Mr. Griffin suffers from brain damage. When Mr. Griffin was nine years old, he was accidentally shot with a pellet gun at close range in the right posterior frontal region of his brain (D-Ex. 16 (Mr. Griffin’s medical records)). He was rushed to the hospital for emergency surgery to repair the “pellet wound entry” and remove fragments which had penetrated his brain (Id.). He stayed in the hospital for nearly a month following the surgery. Mr. Griffin had language difficulties and blurry vision following the accident, and was treated with a protracted course of medications to ward off seizures and brain swelling commonly associated with such a traumatic brain injury (Id.).

For the next two years, Mr. Griffin received regular medical check-ups to determine how he was recovering from the injury (PCR. 4193-96). Mr. Griffin and his family were told by

his doctors that he could never play contact sports again, because another injury to his head could kill him (see id.). Following the injury, Mr. Griffin experienced significant depression and had trouble returning to his regular activities, "[I]f he played for over an hour, he would get headaches, very bad migraines"; these "awful" headaches would come on "any time he was overtired; he couldn't overdo it at all" (Id.). The headaches have continued to the present day, and are occasionally accompanied by olfactory hallucinations prior to the onset of pain (PCR. 4944).

Although Mr. Griffin seemed to recover from his injury, problems still plagued him. He experienced repeated bouts of depression which, according to Dr. Thomas Hyde, are very common in persons with right hemisphere brain damage (PCR. 4954-55). One of Mr. Griffin's most serious bouts with depression occurred after his girlfriend, Tammy Young, became pregnant, and he attempted suicide by overdosing on pills (PCR. 4198-4200). He also experienced a serious depression in his late teens, after the death of his best friend and his rejection by the Army due to his traumatic brain injury (PCR. 4202-03). He joined his family's refrigeration repair business and managed to get along for a few years until another bout of depression overwhelmed him in 1994, one year before the crime (PCR. 4338-39).

Family members told Mr. Wells about Mr. Griffin's traumatic brain injury, his lingering headaches, and his struggles with depression following his injury (PCR. 4502-03). However, trial defense expert Dr. Maher was never given jail records that showed Mr. Griffin was receiving pain medication for constant headaches (see id.). He did no testing to assess brain damage or any other mental disorder, nor did he analyze the relationship between Mr. Griffin's addiction and brain damage.

In contrast, Dr. Thomas Hyde was retained by post-conviction counsel to examine Mr. Griffin for the presence of brain damage, and for his opinion regarding Mr. Griffin's cocaine addiction and the interplay between those two issues. Dr. Hyde is a neurologist with a subspecialty in behavioral neurology and psychiatry (PCR. 4927-28). As part of his clinical practice, he routinely diagnoses and treats patients "dealing with the aftermath of head injury," and a large number of his patients present with "co-morbid substance abuse," such that he "often [makes] a diagnosis of either substance abuse or substance dependence" (PCR. 4925). In evaluating Mr. Griffin, he reviewed school and medical records obtained by collateral counsel, as well as affidavits from persons familiar with Mr. Griffin's addiction and drug use (4932-34). He also spoke with Mrs. Griffin at length about her son's social and family history (PCR.

4934). Finally, Dr. Hyde conducted a "detailed neurological examination" of Mr. Griffin, as well as a clinical interview covering his substance abuse history and his social, medical, and family history (PCR. 4933). Dr. Hyde testified that this information and documentation are the types of items he typically relies upon in order to conduct a thorough evaluation of a patient or client (PCR. 4936).

Based upon his review of the medical records and his discussions with the family about the close-range pellet wound, Dr. Hyde concluded:

> [It was] a fairly significant brain injury. Any time you have a gunshot wound to the skull that hits the skull and is powerful enough to fracture the skull and put bone fragments into the underlying brain, that is a significant brain injury. It's hard to imagine how someone could have that degree of a brain injury both from the direct effects of the pellets, the secondary effect of the bone fragments being propelled by the shock of the blast and the shock wave from the blast itself, as well as any swelling that comes from the brain injury, and not produced some underlying permanent brain damage.

(PCR. 4937-38).

Regarding other head injuries Mr. Griffin had sustained (including one instance where a refrigeration unit fell and hit him on the side of his head), Dr. Hyde felt they were significant to his overall understanding of his brain functioning: "[Y]ou put all these together and the more head injuries that somebody has, it's not good for the brain. And I

would say that you can't rule out when I saw him and evaluated him in 2003 that at least some of the findings that I found on exam might not have been due or enhanced by these minor head injuries in concert with his preexisting major head injury from the gunshot" (PCR. 4945).

Dr. Hyde's neurological exam results revealed that Mr. Griffin has brain damage to his right hemisphere, including his right frontal lobe (PCR. 4954-56). He testified that the tests he administered were part of the standard neurological exam that was readily available in 1995-1997, during the time of Mr. Griffin's pretrial and penalty phase proceedings (PCR. 4952, 4947). The tests are designed "to look for both strong and more subtle abnormalities that might point to organic brain dysfunction in an individual" (PCR. 4952).

Mr. Griffin exhibited clear indications of "enduring. . . right frontal [lobe] damage following his brain injury" (PCR. 4950-54). The "primitive reflexes" exhibited by Mr. Griffin indicated without question "that there is something wrong with the frontal lobes" (Id.). In Mr. Griffin's case, the persistence of abnormalities long after his trauma occurred "suggests some degree of underlying brain defect" (PCR. 4953).

Additional evidence, such as Mr. Griffin's history of depression, substantiated Dr. Hyde's neurological findings of

right hemisphere and right frontal lobe damage. Dr. Hyde acknowledged that, due to Mr. Griffin's extensive family history of mental illness, as well as his own severe cocaine addiction, it was impossible for him to determine whether the depression was solely attributable to the residual effects of the brain injury (PCR. 4954). However, he emphasized that right hemisphere damage can "absolutely" manifest in depression, and adversely affect mood regulation, judgment, and reasoning (Id.). It was necessary for him to consider Mr. Griffin's history of depression as part of his analysis regarding brain damage, since people who suffer from right hemisphere injuries are "much more prone to post traumatic depression," (PCR. 4955), and "are more likely to have psychiatric and behavioral problems in their life [sic]" (PCR. 4971).

In Dr. Hyde's opinion, State's expert Dr. Sidney Merin was incorrect in his conclusion that Mr. Griffin did not suffer from brain damage (PCR. 5008). Indeed, some of the tests conducted by State's expert Dr. Sidney Merin supported Dr. Hyde's findings of right hemisphere and right frontal lobe brain damage. For example, Mr. Griffin's processing speed subscore was in the 27th percentile, "much lower" than his other subtest scores (PCR. 5004). Dr. Hyde explained that he "always pay[s] attention to this subtest spread, particularly in someone who's had a right

hemisphere lesion," as those scores "highlight to me a possible inference that his right hemisphere is not functioning on all eight cylinders, so to speak" (Id.).

Dr. Hyde testified that, "many people with right-sided brain damage may have evidence of impulsive or out of control or violent behavior, but not within every situation, not within every context of their life" (PCR. 4980). Thus, it was essential to consider Mr. Griffin's response to stressful situations, his history of depression, and his cocaine addiction in evaluating brain damage (PCR. 4937-38).

Dr. Hyde also considered Mr. Griffin's cocaine addiction to "certainly [meet] the DSM-IV criteria for cocaine dependence" during the six months prior to the crime (PCR. 4956). Because people with right hemisphere brain injuries are much more susceptible to addiction and self-medication, it is crucial to consider substance abuse and brain damage together – something that Dr. Maher failed to do during penalty phase[10] (PCR. 4957-58). In Dr. Hyde's opinion, the depression and cocaine abuse Mr. Griffin experienced in 1995 amounted to the tragic "bumpy road" which led to his dysfunction and the commission of this crime.

[10] Dr. Deborah Mash relied on Dr. Hyde's diagnosis of cocaine dependency disorder and brain damage in her analysis of Mr. Griffin's addiction, and her findings are supported by, and provide support for, the existence of such brain damage.

In addition to the powerful mitigating evidence described above, Mr. Griffin also established that he was not in fact the "mastermind" of the crimes, in contrast to the findings of the trial court. See Argument II. Rather, it was Kocolis who planned the crime, provided the guns to Mr. Griffin and Lopez, and received the bulk of the proceeds from the crime (PCR. 4455-57, 4461-63, 4465-68). Kocolis needed to commit the crime to get some money while he "laid low" to avoid a likely bust by police (PCR. 4464, 4618-20). He originally recruited two other men (Steven Montalvo and Chad Neeld) to execute the robbery for him (PCR. 4455, 4618-20). However, when those plans fell through, Kocolis turned to Mr. Griffin and Lopez, who were completely dependent upon him in order to sustain their cocaine addictions. Kocolis used threats of violence and a cut-off from the drug supply in order to get Mr. Griffin to commit the crime (PCR. 4465). Mr. Griffin was so addicted, desperate, and fearful of Kocolis that "whatever Nick wanted Mike to do, Mike did" (Id.).

Melissa Williams was present when Kocolis told Mr. Griffin and Lopez that they either committed the Service America crime, or "they would not have anywhere to live and . . . the supply of drugs would end" (PCR. 5121). Williams described Kocolis as "very controlling, very evil and manipulative," and that people,

including Mr. Griffin, were "scared of him because of the things he would say and the actions he took toward people" (PCR. 5116). After the crimes, Kocolis was "prideful and boastful," though he complained about his "take" because he thought "it was going to be more" (PCR. 4465-66, 5124). Mr. Griffin, meanwhile, continued his spiral of addiction and desperation, consuming ever increasing amounts of drugs in the days after the crime until his arrest in October 1996 (PCR. 5122-24).

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. GRIFFIN RELIEF ON HIS CLAIMS REGARDING HIS INVALID AND UNCONSTITUTIONAL GUILTY PLEA. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PREPARE FOR GUILT PHASE BEFORE ADVISING MR. GRIFFIN TO PLEAD GUILTY. AS A RESULT, MR. GRIFFIN'S GUILTY PLEA WAS NOT KNOWING, VOLUNTARY, OR INTELLIGENT, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"A plea of guilty is constitutionally valid only to the extent it is 'voluntary'' and 'intelligent.'" Bousley v. United States, 523 U.S. 614, 618 (1998).

Fla. R. Crim. Pro. 3.170(l) sets forth the standards that a defendant must meet when he wishes to withdraw a guilty plea. Where a motion to withdraw a guilty plea pursuant to Rule 3.170 occurs after sentencing, the defendant bears the burden of proving that a "manifest injustice" has occurred. See Snodgrass v. State, 837 So.2d 507, 508 (Fla. 4th DCA 2003). Manifest

injustice can take many forms, and can include, *inter alia*: evidence of ineffective assistance of counsel; mistake or misapprehension about the sentence; or that the defendant entered the plea involuntarily, without knowledge of the charge, or without knowing the sentence received could be imposed. See DeMartine v. State, 647 So.2d 900, 902 (Fla. 4th DCA 1994); see also Molina v. State, 942 So.2d 1036 (Fla. 2nd DCA 2006).

A defendant may also challenge the validity of his guilty plea by raising a claim of ineffective assistance of counsel in a Rule 3.851 motion. See Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding that challenges to guilty pleas may be considered under the two-part test of ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984)); see also Grosvenor v. State, 874 So. 2d 1176, 1179 (Fla. 2004). When a defendant raises a claim that his plea was infirm due to the ineffectiveness of his trial counsel, he must establish both deficient performance and prejudice according to the Strickland calculus. See Hill, 474 U.S. at 58. However, when assessing prejudice, the defendant must specifically show that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and instead would have insisted on going to trial." Grosvenor, 874 So.2d at 1179 (citing Hill, 474 U.S. at 59). A reasonable

probability “is a probability sufficient to undermine confidence in the outcome” of the case, and is determined by examining the totality of the circumstances surrounding the plea. Id. at 1181-1182.

In the proceedings below, Mr. Griffin first challenged the validity of his guilty plea in his initial 3.851 motion, wherein he alleged that his plea was not voluntary, knowing, or intelligent due to trial counsel’s ineffective and unreasonable representation and advice (PCR. 1-215, Claim III). Specifically, Mr. Griffin alleged that because trial counsel did not adequately investigate his case before counseling him to take the guilty plea, he was not fully informed as to his possible defenses, thereby invalidating his plea. Moreover, trial counsel repeatedly advised him that if he would take the plea, he would receive a life sentence. The circuit court granted Mr. Griffin an evidentiary hearing on this claim (PCR. 599-605). Following the disclosure of additional public records, Mr. Griffin amended that claim to include additional evidence relating to the case which was available to trial counsel, but never properly investigated or presented to Mr. Griffin prior to his change of plea (PCR. 692-717).

Because trial counsel never informed Mr. Griffin that he had the right to move to withdraw his plea, Mr. Griffin

subsequently filed a post-sentencing motion to withdraw pursuant to Rule 3.170(l) on September 25, 2007 (PCR. 945-58). The circuit court accepted the motion for consideration. At the request of the court, both parties filed separate written closing arguments – one specifically addressing Mr. Griffin's motion to withdraw his plea; the other addressing his 3.851 motion (PCR. 1168-1253; 1258-1358; 1359-1392).

In the 3.851 order, the circuit court denied Mr. Griffin's challenges to his plea under Rule 3.170(l) and Rule 3.851 (PCR. 1397-1407). Regarding the motion to withdraw, the court did not address the substance of the motion, but rather held that because Mr. Griffin filed his motion nine years after his sentencing, "the Court does not have the authority to consider the Defendant's involuntary-plea claim under rule 3.170(l)" (PCR. 1397 (citing Gafford v. State, 783 So.2d 1191 (Fla. 1st DCA 2001)). The circuit court then reviewed Mr. Griffin's 3.851 Strickland challenge to his plea and denied relief, ruling that the claim was "without merit" (PCR. 1400).

As Mr. Griffin will demonstrate in detail below, the circuit court erred by denying his motion to withdraw his plea, as it was within the court's jurisdiction to review the motion on the merits, and Mr. Griffin met the burden of establishing that a manifest injustice had occurred. The circuit court also

erred by denying his claim of ineffective assistance of trial counsel relating to his plea, as Mr. Griffin demonstrated both egregiously deficient performance by his trial counsel, and that he would not have pleaded guilty but for counsel's errors. Under either standard, it is clear that Mr. Griffin's plea was involuntary and unconstitutional, such that the plea must be vacated and a trial granted.

Because review of the validity of both a 3.170(l) motion and a 3.851 ineffective assistance of counsel claim require an assessment of the totality of circumstances surrounding the plea, Mr. Griffin presents those facts below first. He will then separately present argument on each of his claims.

A. THE CIRCUMSTANCES SURROUNDING MR. GRIFFIN'S PLEA

Trial counsel Dwight Wells and Roger Mills were retained by Mr. Griffin's family to represent him within days after his arrest in November 1995. Roger Mills had known the Griffin family for years, as he had previously represented them in some business-related matters (PCR. 4255). Mr. Mills also engaged in criminal defense work, and had even served as co-chair on two capital defense cases early in his legal career; however, those cases never went to penalty phase (Id.). Therefore, Mr. Mills referred Mr. Griffin and his family to Dwight Wells, with whom he shared office space at the time (PCR. 4256). Mr. Mills

strongly recommended that the family retain Mr. Wells, who he described as "a very well-known defense lawyer who had done many, many capital cases" (Id.).

At the time of his arrest, Mr. Griffin had no criminal history, and was completely unfamiliar with the court system (Id.; see also 4498-99). Both Mr. Wells and Mr. Mills described Mr. Griffin as an unsophisticated client (see id.). As such, Mr. Mills acknowledged, Mr. Griffin was "probably very dependent upon my advice and counsel" (PCR. 4557). Mr. Wells agreed that Mr. Griffin relied heavily upon the recommendations of his attorneys, and described Mr. Griffin as "extremely" cooperative about taking their advice (PCR. 4499).

At some point early in Mr. Griffin's case, trial counsel was informed by the State Attorney's office that the victims' family was amenable to a life sentence for Mr. Griffin and his co-defendant, Juan Anthony Lopez, if both defendants entered a guilty plea (PCR. 4167). According to the evidentiary hearing testimony of Assistant State Attorney Glenn Martin, the State was clear in its position that any plea arrangement had to involve both defendants (PCR. 4167-68). Thereafter, Roger Mills approached Mr. Griffin and his family about the possibility of Mr. Griffin pleading guilty (PCR. 4214; 4260-61). Mr. Griffin's attorneys strongly advised him to plead guilty so that he would

receive a life sentence (PCR. 4267-68; 4507-08). Specifically, Mr. Mills advised Mr. Griffin and his family that if he took the plea, he would receive a sentence of 25 years to life (PCR. 4214-15; 4268-69). Unfortunately, this option was actually no longer available to Mr. Griffin, as the law had been changed several years previously and Mr. Griffin was in fact eligible only for life without parole or the death penalty. However, Mr. Griffin was not aware of that change in the law, and relied upon his attorney's mistaken advice that he would be eligible for parole.

Mr. Mills also repeatedly told Mr. Griffin's parents and family that if he pleaded guilty, he would receive a life sentence with the possibility of parole (PCR. 4220). Mr. Wells testified that he and Mr. Mills actively enlisted the family to encourage Mr. Griffin to change his plea (PCR. 4508). As a result, his family strongly advised him to plead guilty. According to his aunt, Nancy Price, she and the rest of the family counseled Mr. Griffin that if pleading guilty would keep him from getting the death penalty, then "it was the best thing to do. And that's what the lawyers were saying was the best thing to do" (PCR. 4247). According to Mr. Griffin's mother, Sandra Griffin, the family would "absolutely not" have

recommended Mr. Griffin plead guilty if they had known that parole was not an option (PCR. 4215).

Meanwhile, co-defendant Juan Anthony Lopez became incompetent in early 1996, and was placed in Chattahoochee State Hospital for treatment of his mental problems. According to both trial counsel and Assistant State Attorney Glenn Martin, for many months there were numerous discussions on and off the record regarding the possibility of a plea agreement to a life sentence for Mr. Griffin, even after Mr. Lopez was declared incompetent[11] (PCR. 4165, 4261-62, 4265, 4508). Mr. Mills testified that there were "multiple continuances. . .to determine if Mr. Lopez would become competent," and that Circuit Court Judge Brandt Downey "was always part and parcel of those bench conferences with us explaining why the delay was necessary" (PCR. 4264-65).

However, according to Mr. Wells, Mr. Mills, and ASA Martin, after about a year, Judge Downey announced that the case needed to move forward, and that he would no longer wait to see if Mr. Lopez would regain his competency (PCR. 4173-74, 4265, 4511). Yet despite the State's representation that "they would not take

[11] Mr. Lopez was never declared competent during Mr. Griffin's trial proceedings. He ultimately went to trial in 2003, was convicted of two counts of first-degree capital murder, and sentenced to life without the possibility of parole. State v. Lopez, Circ. Ct. No. CRC95-18753CFANO-K.

the death penalty off without Mr. Lopez's concurrence" – and despite the fact that Mr. Lopez remained incompetent – trial counsel continued to assure both Mr. Griffin and his family that the State's "plea deal" would work out, and that he would receive a sentence of life with the possibility of parole (PCR. 4266-69; 4507-08).

From the State's perspective, however, there was never any "plea deal" on the table because defense counsel ultimately did not abide by the requirements of plea negotiations in Pinellas County. As Assistant State Attorney Glenn Martin testified at the evidentiary hearing:

> It's not the policy in our office to make offers. I have no authority whatsoever to make an offer to defense attorneys. It is our policy here in the Sixth Circuit that if there's an offer to be made, it is to be made by the defense attorneys. It is a firm offer. . . . The victim's family were of agreement that in the event that there was a firm offer from both defendants, a guilty plea, that they would have no objection, if Mr. McCabe felt it was appropriate, to agree to a sentence of life. [S]ince we never had a firm offer from the two counsels, that was as far as it went. . . . I believe what both defense teams understood was that both of them had to come in with a firm offer of guilty and plead to life. . . .They never did. . . . There was no plea deal in this case.

(PCR. 4166-69). Therefore, according to Mr. Martin, as there was never a firm offer from **both** clients, a death sentence was still a very real possibility, regardless of Mr. Griffin's guilty plea (PCR. 4168-69). Mr. Martin insisted that Mr.

Griffin's attorneys never approached with him with an acceptable plea offer, and it was clear the State was seeking the death penalty (PCR. 4173-74).

In contrast, trial counsel Dwight Wells recounted a different version of events at the evidentiary hearing. He denied that the burden was on the defense to approach the State with a plea deal, and instead insisted that it was the State who came to him about life, because he had no power to make that sort of offer (PCR. 4507). "So that flow was from the state attorney's office to us" (Id.). While Mr. Wells acknowledged that "it needed approval [and] wasn't a done deal," he felt that the situation was "encouraging" and that he was "pretty excited" that Mr. Griffin would receive a life sentence (Id.). Mr. Wells admitted that he knew a plea deal would have to involve both defendants (PCR. 4511). Nevertheless, he continued to encourage Mr. Griffin to plead guilty, even without Mr. Lopez on board, and with no guarantee as to sentence (PCR. 4508-09). He did so, he testified, because of an "intuitive kind of feeling. . . I felt I was seeing from Judge Downey" (PCR. 4575-76). However, even after Judge Downey insisted on going to penalty phase, Mr. Wells never advised Mr. Griffin that he could withdraw his plea (PCR. 4510). Instead, he continued to counsel Mr. Griffin that

he believed he would receive a life sentence if he pled guilty, even without Lopez as part of the arrangement (PCR. 4508-10).

Co-counsel Roger Mills recounted still another version of events. During the evidentiary hearing, Mr. Mills testified that he and Mr. Wells first approached the State about a plea deal (PCR. 4261-62). According to Mr. Mills, Mr. Martin informed them that if a joint plea could be entered with both defendants, then he felt confident a life sentence could be arranged (see id.). Mr. Mills recounted that there were numerous continuances in the case while the parties waited to see if Mr. Lopez would be reinstated to competency (PCR. 4263-65). Yet even when the court insisted on moving the case forward to penalty phase, Mr. Mills testified that he and Mr. Wells persisted in encouraging Mr. Griffin to keep his plea, despite knowing that the State "would not take the death penalty off without Mr. Lopez's concurrence" (PCR. 4266-67). Even as the penalty phase approached, and it was clear Mr. Lopez was not going to be restored to competency, trial counsel never advised Mr. Griffin that there was a chance that a death sentence could be imposed (PCR. 4271-73, 4280). Mr. Mills testified that "probably right up until the first witness was called, I felt like there was a chance that [the plea deal would work out]," although he was concerned that the demeanor in the pre-trial

proceedings had “changed pretty dramatically” (PCR. 4271-72). However, Mr. Mills never conveyed his apprehensions about the case to Mr. Griffin (PCR. 4272). Like Mr. Wells, Mr. Mills never counseled Mr. Griffin that he could withdraw his guilty plea after the court demanded that the case go to penalty phase (PCR. 4281).

The testimony adduced at the evidentiary hearing demonstrates that there was – at the very least – significant confusion on the part of trial counsel about what they needed to do in order to get Mr. Griffin a plea deal for a life sentence. This confusion infected Mr. Griffin’s understanding of his situation and contributed to his decision to plead guilty. Despite the State’s “steadfast” position that death was still on the table, trial counsel repeatedly assured Mr. Griffin that he would receive a life sentence even without Mr. Lopez as part of the “deal.” Mr. Wells testified that he specifically advised Mr. Griffin that because the State had offered up a possible agreement, it was in his best interest to plead guilty, even though there was no guarantee as to penalty (PCR. 4505-09). Yet in the same breath, Mr. Wells admitted during his testimony that he was aware that the life sentence “wasn’t a done deal” (PCR. 4507). Unfortunately, according to Mr. Mills, that crucial information was never fully explained to Mr. Griffin (PCR. 4266,

4272-73, 4280). As a result, on the misguided advice of his trial counsel and without a complete understanding of his situation, Mr. Griffin entered a guilty plea on June 13, 1997.

In addition to not giving Mr. Griffin a complete and accurate understanding of his sentencing possibilities prior to entering his change of plea, Mr. Wells and Mr. Mills had counseled him to plead without adequately informing him of his possible defenses. In the two years prior to Mr. Griffin's guilty plea, trial counsel had spent less than three hours investigating Mr. Griffin's case (PCR. 4501). While they had attended some depositions of the state's witnesses, they had not had their client evaluated by a mental health expert at that point, nor had they begun a mitigation investigation[12] (PCR. 4501-03). Incredibly, trial counsel admitted that they were aware that Nicholas Kocolis, Mr. Griffin's drug dealer, was the leader in the planning and implementation of the crime – yet they made no effort to try and contact or even investigate him prior to counseling Mr. Griffin to change his plea[13] (PCR. 4500-01, 4580-81, 4592).

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[12] Had trial counsel performed these basic tasks, they would have learned of evidence which strongly supported a voluntary intoxication defense based upon Mr. Griffin's extreme cocaine addiction at the time of the crime. See *infra* at Part (B)(2).

[13] Evidence which was available to counsel at the time of trial, and further developed during Mr. Griffin's evidentiary

Neither did they obtain any of the available records chronicling Mr. Griffin's traumatic brain injury, school performance, or history of mental illness, which would have been relevant both to a guilt phase defense and in mitigation for sentencing phase[14] (PCR. 4515-16). Counsel also never spoke with any of the numerous available witnesses who had specific information about the severity of Mr. Griffin's cocaine addiction, the large amounts that he was consuming in the months before the crime, and the fact that he had ingested cocaine just prior to going to Service America (PCR. 4573-81). In fact, Mr. Griffin's guilty plea was entered before penalty phase witnesses had been disclosed by either party, or discovery depositions taken by the State (R. 1609). Therefore, at the time Mr. Griffin pleaded guilty, he had no idea about the aggravating circumstances the State would pursue.

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hearing, established that Mr. Kocolis was in fact the mastermind behind the crime, who ordered the severely drug-addicted Mr. Griffin to commit the robbery or risk being cut off from Mr. Kocolis' crack and cocaine supply. Additionally, three witnesses testified that Mr. Griffin feared violent retaliation from Mr. Kocolis if he did not commit the robbery as ordered (PCR. 4346-47; 4580-81; 5117-19). None of these persons were interviewed by Mr. Griffin's trial counsel during the entirety of his trial proceedings, despite being listed in the State's discovery submissions.

[14] According to trial counsel's billing records, the total amount of investigative time spent on Mr. Griffin's case, including preparation for the penalty phase, was 3.6 hours (PCR. 4501).

As a result, before advising Mr. Griffin to plead guilty, his counsel never informed him of possible guilt phase defenses, nor did they discuss the strategy of using the guilt phase to set up his penalty phase defense (PCR. 4512-18, 4576). Such information was vital to Mr. Griffin having a complete understanding of the charges against him, the aggravation the State planned to use during penalty phase, and all the possible options for his defense to capital murder. Counsel thus failed in their duty to inform Mr. Griffin of "all pertinent matters bearing on the choice of which plea to enter...as well as any possible alternatives that may be open to the defendant." Fla. R. Crim. Pro. 3.171; see also Rompilla v. Beard, 545 U.S. 374 (2005) (holding that defense counsel must investigate the State's case in aggravation).

Further compounding these errors was the fact that Mr. Mills had mistakenly advised Mr. Griffin that his life sentence would include the possibility of parole in 25 years, when the only sentencing possibilities actually available to Mr. Griffin were life without parole or a sentence of death. Mr. Mills was not aware of this change in the law, and incorrectly counseled his client for months that parole was an option (PCR. 4268-70). Dwight Wells, who was lead counsel, was apparently unaware of Mr. Mills' mistaken advice, as he was actually practicing in

Louisiana at that time and had not spoken with Mr. Griffin in months (PCR. 4509-10). Mr. Griffin and his family specifically relied upon that information in deciding to plead guilty (PCR. 4215). The result was that on the day Mr. Griffin entered his change of plea, he and his family believed that he would ultimately receive a life sentence with the chance of parole.

To make matters worse, **even the plea form signed by Mr. Griffin, and accepted by Judge Downey, stated that Mr. Griffin's possible sentences were either life with the possibility of parole in 25 years, or a death sentence** (PCR. 304-05). Both Roger Mills and Dwight Wells were present for this change of plea. Yet no one – not trial counsel, not the State Attorney, and not Judge Downey – ever informed Mr. Griffin that the plea form was incorrect.

The colloquy conducted by Judge Downey served only to exacerbate the problems with Mr. Griffin's guilty plea. At the time of Mr. Griffin's change of plea, the procedure for accepting a guilty plea was controlled by Fla. R. Crim. Pro. 3.172, which clearly establishes how a trial court shall determine whether a defendant's plea is voluntary. See Fla. R. Crim. Pro. 3.172(c) (listing specifically what actions a trial judge must take in order to determine voluntariness). As the record below demonstrates, Mr. Griffin's plea colloquy was

littered with contradictions, and not remotely in accordance with the explicit mandates of Rule 3.172. [15] For example, Judge Downey made the following inquiry:

> THE COURT: [. . .] Mr. Griffin, you have had an opportunity to discuss changing your plea with your attorneys?
>
> MR. GRIFFIN: Yes, I have.
>
> THE COURT: And do you understand **what's in the change of plea form that you have signed?**
>
> MR. GRIFFIN: Yes, sir.
>
> THE COURT: Do you understand that by entering a change of plea that you are giving up your right to have a jury trial as it relates to your guilt on these two charges? [. . .] **Do you understand that by changing your plea you are giving up your right at the penalty phase, *should there be one*,** to contest any of the facts that relate to your guilt or innocence on this charge? [. . .] And do you understand that **if there is a penalty phase** there is still a possibility that **a jury upon hearing aggravating circumstances could recommend to me that I impose a death sentence against you** and that I could impose a death sentence against you after a penalty phase? [. . .] **And you're giving up your right to contest the fact that your lawyers might not necessarily have done the best job for you as it relates to your guilt phase of the trial?**

[15] This Rule was adopted in 1977, with amendments in 1988 and 2005, and remains substantially the same today as it was at the time Mr. Griffin changed his plea.

(R. 1602-04 (emphasis added)). Mr. Griffin, following his attorneys' instructions to respond to the Court in a manner which would ensure that the plea was accepted, answered these questions in the affirmative (Id.).

As Mr. Griffin alleged in his 3.851 motion for post-conviction relief, Judge Downey's characterization of the role of the penalty phase jury violated the most basic tenet of capital sentencing law, which mandates that the sentence be individualized and focused on the particular characteristics of the defendant, including evidence presented in mitigation. Penry v. Lynaugh, 488 U.S. 74 (1989); Gregg v. Georgia, 428 U.S. 153 (1976).

Judge Downey's pronouncement that Mr. Griffin would be precluded from challenging the work done by his trial attorneys was inaccurate. Fla. R. Crim. Pro. 3.172(c)(4) explicitly requires the judge to inform the defendant that a plea of guilty "does not impair the right to review by appropriate collateral attack." Judge Downey failed in his duty to instruct Mr. Griffin that he would still have to right to collaterally challenge the work done by his attorneys. However, neither Mr. Griffin's trial counsel nor the two state attorneys present during the plea colloquy made any attempt to inform Mr. Griffin

of that right, or to request that the judge correct his erroneous instruction.

Judge Downey next inquired whether Mr. Griffin's attorneys had made any promises about what the sentence was going to be, and Mr. Griffin dutifully answered no[16] (R. 1604). Judge Downey then asked Mr. Griffin:

> THE COURT: Do you understand at this point by your entering a plea of guilty to murder in the first degree that there are only two sentences that can be imposed to you? Do you understand?
>
> MR. GRIFFIN: Yes, sir.

[16] District courts have held that asking a defendant about any "promises" made by his attorney during a plea colloquy is not an inquiry into misadvice of counsel, and does not alone suffice to establish that no mistaken advice was given. See, e.g., Fisher v. State, 824 So. 2d 1050, 1051-52 (Fla. 3rd DCA 2002). As the Florida Supreme Court held in State v. Leroux, 689 So.2d 235, 237 (1996):

> there may ... be a difference between a 'promise' as commonly understood, and an attorney's expert advice to his client based upon the attorney's computation and estimate of the actual amount of time a defendant may serve on a sentence. Supplying such advice is not necessarily a promise of an outcome. Rather, providing such advice is a legitimate and essential part of the lawyer's professional responsibility to his client in most plea negotiations, where often the bottom line for the defendant is the amount of time he will serve.

Here, Mr. Griffin was assured time and again by his attorneys that the Court would grant him life. But for their mistaken advice about sentencing, Mr. Griffin would not otherwise have entered the guilty plea.

THE COURT: One is the sentence of life imprisonment without the possibility of parole and the other one is the death sentence. Do you understand that?

MR. GRIFFIN: Yes, sir.

THE COURT: **Do you understand that life imprisonment is the ultimate sentence because there are two counts conceivably those life sentences can run consecutive, one against the other?** Do you understand that?

MR. GRIFFIN: Yes, sir.

(R. 1604-05 (emphasis added)).

Judge Downey's convoluted statement that "life imprisonment is the ultimate sentence because there are two counts conceivably those life sentences can run consecutive, one against the other" contradicted his earlier pronouncement that Mr. Griffin could serve life without parole (R. 1604). If there was no parole, it would not matter whether the sentences ran consecutively, because just one of the sentences would equal life. Consecutive sentences only matter if parole is actually an option – in which case it would be possible that the minimum mandatory sentences could run back to back, amounting to a sentence less than life. Whether or not this is what Judge Downey meant by his statement, it is inherently confusing, and further compounded the errors in Mr. Griffin's plea colloquy.

ASA Glenn Martin then stated for the record that the State was still seeking the death penalty Id. At that point, Judge Downey found Mr. Griffin had "freely and voluntarily agreed to a change of plea" and that he "understands...the potential sentences that he would receive at a sentencing" (R. 1606). Without asking what Mr. Griffin's motivation was for changing his plea, Judge Downey made the pronouncement that Mr. Griffin was pleading guilty "because he believes it to be in his best interest to change his plea today" (R. 1606). However, Fla. R. Crim. Pro. 3.172(e) requires a trial judge to inquire of the defendant (rather than simply making the pronouncement himself) if the change of plea is being taken because the defendant believes the plea is in his best interest, yet maintains his innocence, or if he is acknowledging his guilt of the facts alleged. Judge Downey's failure to follow this basic requirement clearly violated Rule 3.172(e) and Mr. Griffin's right to a constitutional plea colloquy. Trial counsel failed to protect their client's rights and did not object to this unsubstantiated judicial finding. See Johnson v. State, 834 So. 2d 384 (2nd DCA 2003); see also Part B(2), *infra*.

For the next six months, Mr. Griffin and his family continued to believe that he would receive a life sentence, with eligibility for parole in 25 years. According to trial counsel

Roger Mills, in pretrial conferences the judge's mood had gone from "very amiable" to a plea deal being reached to "very adamant about moving the case" (PCR. 4272-73). Trial counsel never told Mr. Griffin about the judge's shift in mood, even after it became clear that the case was going to a penalty phase Id. Even with a penalty phase looming and Mr. Lopez remaining incompetent, trial counsel either ignored or misunderstood the reality of Mr. Griffin's situation, according to Mr. Mills:

> A: [W]e never got the impression there had been a change of heart as to where we were headed or what we were trying to do...That's what ultimately led Mr. Wells and myself to discuss and ultimately recommend to Mike that he waive jury in the second phase. We felt like let's go through this with as least amount of disruption as possible and get through this because we felt like that's what – the way to go about doing it would be.
>
> Q: So, in essence, trying to make it easier for the judge?
>
> A: Move it as quickly as possible. Do what needs to be done, but move it as quickly and as – with as little disruption as possible with the Court's time and effort.

(PCR. 4273-74). Rather than adequately preparing for Mr. Griffin's impending penalty phase by collecting records, having him evaluated by a mental health expert, and working up a complete mitigation case, trial counsel instead chose to waive Mr. Griffin's right to a penalty phase jury, as well as his

opening statement and various pretrial motions challenging the death penalty (PCR. 4274-75).

It was not December 8, 1997, the first day of the penalty phase proceeding, that Mr. Griffin learned that both his attorneys' advice and the signed plea form were wrong, and that he was not eligible for parole in 25 years (PCR. 4219-20, 4268). Mr. Griffin and his family were stunned Id. Trial counsel asked for a "brief recess" to discuss the matter with Mr. Griffin (PCR. 4509-10). During this hurried consultation, neither Mr. Mills nor Mr. Wells ever advised Mr. Griffin that he had the right to withdraw his plea (PCR. 4281, 4510). Rather, they pressured him to keep his guilty plea, and after the conclusion of the "brief recess," counsel informed the Court that Mr. Griffin would keep his guilty plea.

Throughout the penalty phase, Mr. Griffin continued to be told by trial counsel that they expected him to receive a life sentence at the conclusion of those proceedings. According to Roger Mills, "we still at that point believed that the ultimate sentence was going to be a life sentence" and they frequently relayed as much to Mr. Griffin and his family (PCR. 4220, 4230, 4280). Therefore, in order to move things along quickly, counsel waived the Spencer hearing and PSI: "[W]e felt like we had done what we needed to do... Again, it was one of those

things to... move the case, get it over with and try to save the Court as much time as we could" Id.

Mr. Wells similarly testified that he "truly believed . . . that they would receive life sentences. And that, in fact, very much colored the way I approached the case in terms of hiring other kinds of experts, and the things that I did do and some of the things I did not do"[12] (PCR. 4522-23; 4506). Mr. Wells also admitted that in the 60 or more felony cases he had worked on prior to Mr. Griffin's case, he could not recall another client whom he had counseled to plead guilty without any guarantee as to sentence (PCR. 4584). Nor could he recall the trial judge, Judge Downey, ever handing down a life sentence in a death penalty case (PCR. 4584-85). Still, the expectation that Mr. Griffin was to receive a life sentence was evident in defense counsel's memorandum in support of life sentences:

> As the court is well aware it was at least hoped at the time that Mr. Griffin entered his pleas, that the co-defendant, Anthony Lopez would be in a position to enter pleas and pursuant to discussion with the State Attorney's office at that time there would be an attempt to get approval by the State Attorney that both of the defendants Mr. Griffin and Mr. Lopez receive life sentences in this case.

(R. 2016).

[12] Although counsel requested a neurological evaluation of Mr. Griffin after the penalty phase was over, they never actually had Mr. Griffin evaluated.

Likewise, testimony from various collateral witnesses at the evidentiary hearing revealed that they too believed that Mr. Griffin was going to receive a life sentence. William Schnitzler was a high school friend of Mr. Griffin's who was recruited by Matthew Griffin, Mr. Griffin's brother, to testify at the penalty phase. Mr. Schnitzler testified at the hearing that he was never personally contacted by either Mr. Wells or Mr. Mills (PCR. 4375-77). His understanding of the proceedings was that trial counsel "had already figured out that he pled guilty and there really wasn't going to be any – pretty much any use for us. It was, you know, whether we were going to be used as character witnesses if they called us up" Id. Ultimately, Matthew Griffin was the one who told him when to come and testify Id. When Mr. Schnitzler arrived at the courthouse for the penalty phase, he recalled, Mr. Wells and Mr. Mills seemed to regard the sentencing as "kind of like a formality. Michael had already pled guilty to the charges. They were acting as if we weren't really probably going to have to even get up on the stand because it was... already pled out, that he was going to get life in prison" Id.

Melissa Clark Williams, the State's key witness, also testified at the hearing that she believed Mr. Griffin was going to receive a life sentence (PCR. 5132). Ms. Williams stated

that on the day she appeared to testify against Mr. Griffin at his penalty phase, State Attorney Investigator Steve Porter was also present (PCR. 5125). Mr. Porter told Ms. Williams "that Mike had already pleaded guilty and that he was going to receive life in prison and that this [the penalty phase] was just a formality" (PCR. 5132). This statement – from an employee of the State Attorney's office who was part of the investigation into Mr. Griffin's case – obviously contradicts the testimony of Assistant State Attorney Glenn Martin, who insisted at the hearing that no plea deal existed (PCR. 4167-68). The testimony of Mr. Schnitzler and Ms. Williams further demonstrates the confusion surrounding Mr. Griffin's plea and possible sentencing – confusion which infected the entirety of Mr. Griffin's underlying proceedings.[13]

On July 10, 1998, the day of Mr. Griffin's sentencing, lead counsel Dwight Wells approached Mr. Griffin's mother, Sandra Griffin, and for the first time, informed her that Mr. Griffin might receive a death sentence from the judge:

Q: And what did [Mr. Wells] say to you?

[13] At the evidentiary hearing, the State vigorously objected to Ms. Williams' testimony about what Steve Porter relayed to her during Mr. Griffin's penalty phase, but the objection was overruled (PCR. 5125-31). As Judge Morris noted at the time, the State could have called Mr. Porter as a rebuttal witness if it wished to try and refute Ms. Williams' testimony (PCR. 5128). The State did not do so.

A: He said [Michael] may get the death penalty, and I went crazy.

Q: Was that the first... inclination that you had... that Michael could receive death?

A: Yes.

Q: What else did Mr. Wells tell you during that conversation?

A: He said, “You can fire me.”

(PCR. 4221-22). Nancy Price, Mr. Griffin’s aunt, was also there the day of the sentencing and recounted substantially the same event (PCR. 4248-49). It was the first time that counsel had related to the family that Mr. Griffin might **not** receive a life sentence Id. According to Mrs. Griffin, the trial attorneys had told her “before,” “during,” and “after” the penalty phase that Mr. Griffin was going to receive life (PCR. 4220-22).

When Judge Downey pronounced the death sentence for Mr. Griffin, Mr. Mills recalled, “you could have knocked me over with a feather because I was in shock” (PCR. 4280). **“And I can assure you that [Mr. Griffin] didn’t expect it because we had not – we had led him to believe that we felt very confident that it was going to be a life sentence”** Id. (emphasis added). Mr. Griffin’s family was “hysterical” (PCR. 4249). In fact, Mr. Griffin’s father, who had attended every court hearing for his son since his arrest three years previously, did not attend the

sentencing pronouncement because “we [Mr. Griffin and his family] didn’t think anything was going to be happening other than what we had expected... we assumed it was just going to be a life sentence” (PCR. 4248). Neither Mr. Wells nor Mr. Mills informed Mr. Griffin that he had the right to withdraw his plea at that juncture.

B. ARGUMENT

1. *The Circuit Court Erred in Denying Mr. Griffin’s Rule 3.170(l) Motion to Withdraw His Guilty Plea.*

In denying Mr. Griffin’s motion to withdraw his guilty plea, the circuit court ruled that it “[did] not have the authority to consider the Defendant’s involuntary plea claim under rule 3.170(l)” (PCR. 1398). Because Rule 3.170(l) “requires that a motion to withdraw plea be filed within 30 days after rendition of the sentence,” Mr. Griffin’s motion was denied as untimely (Id.). The court cited Gafford v. State, 783 So. 2d 1191 (Fla. 1st DCA 2001) in support of its position that the 30-day time limit was jurisdictional, thus divesting the court of its authority to consider the motion (Id.).

However, the circuit court erred in its ruling that it was without jurisdiction to consider the motion. As Mr. Griffin argued in his Motion to Withdraw Guilty Plea, other courts, including this Court, have accepted pleas filed outside the 30-day time limit set forth in Rule 3.170(l). In Kilgore v. State,

688 So. 2d 895, 897 (Fla. 2002), this Court permitted a capital defendant to withdraw his plea after sentencing, and even well into his appellate process. In Kilgore, the defendant was indicted for first-degree murder and possession of contraband by an inmate. Id. Originally, Kilgore pleaded *nolo contendere* to both charges. After he was sentenced to death and his case was on appeal, Kilgore moved to withdraw his plea on the grounds that his attorney had mistakenly advised him that the death sentence would not be imposed because of the plea. Id. In an affidavit with the motion, Kilgore's trial counsel stated that he advised his client to plead guilty based upon repeated representations by the trial court and the State which led trial counsel to believe that a life sentence would ultimately be imposed. However, as in Mr. Griffin's case, there was never a guarantee, written or otherwise, that a life sentence would be the end result. Despite the fact that Kilgore had filed his motion outside of the 30-day time limit, this Court relinquished jurisdiction to the circuit court so that it could address Kilgore's motion to withdraw the plea. The lower court ultimately granted the motion, and Kilgore was tried by a jury. Id.

Similarly, in Johnson v. State, 834 So. 2d 384 (2nd DCA 2003), the defendant sought to withdraw his pleas well after

sentencing, when the case was remanded by the district court of appeal on a completely unrelated matter. In Johnson, the defendant pled guilty to two counts of armed robbery without an agreement as to what sentence would be imposed. He knew that he faced potential life sentences; however, he entered his pleas believing that the court could impose a lesser sentence based on any mitigation Johnson could establish. Johnson, 834 So.2d at 385. When the trial court accepted Johnson's plea, the court stated he was facing sentences "up to life," but there had been no formal agreement as to what sentence would be imposed. Id. Johnson was ultimately sentenced to concurrent 30-year prison terms. Id.

After the case was remanded on appeal for other matters, a different judge – Judge Brandt Downey, who was also Mr. Griffin's trial judge – handled Johnson's resentencing. Prior to the resentencing, Johnson sought to withdraw his guilty pleas, asserting that when the pleas were made, sentences of less than life were anticipated and discussed, and that he entered the pleas believing in and relying on the possibility that lesser sentences could be imposed. Id. Johnson argued, he had entered his pleas because of his mistake or misapprehension about the sentencing possibilities. Id. His motion was denied by Judge Downey, but that ruling was reversed on appeal.

The Second District Court of Appeals held that a trial court should allow a defendant to withdraw a plea when the defendant establishes that the plea was entered "under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting the defendant's rights." Id. The appellate court also noted that the trial court, in accepting the pleas, had failed to conduct a proper colloquy when it neglected to inform Johnson that he was subject to minimum mandatory sentencing, in violation of Fla. R. Crim. Pro. 3.172(c)(i). Id. at 386.

This Court should follow Kilgore and Johnson and permit Mr. Griffin to withdraw his plea, even though it was filed outside the 30-day time limit in Rule 3.170(l). The facts of Kilgore v. State are virtually indistinguishable from Mr. Griffin's situation.

Here, trial counsel testified that they encouraged Mr. Griffin to plead guilty because they believed that Judge Downey was going to impose a life sentence, and that they never counseled Mr. Griffin or his family otherwise. Mr. Wells testified that Michael was an unsophisticated client, who had almost no contact with the criminal justice system (PC-R. 4254-55; 4497-98). Mr. Griffin had no criminal history and "extremely cooperative" in following his attorney's mistaken

advice. He entered a guilty plea, fully believing that he would be given a life sentence. When the judge pronounced the death sentence, Mr. Mills testified he was in shock and said "I can assure you that Michael didn't expect it because we had not—we had led him to believe that we felt very confident that it was going to be a life sentence." (PC-R. 4280).

This Court has recognized time and again that "a defendant invariably relies upon the expert advice of counsel concerning sentencing in agreeing to plead guilty." Ey v. State, 982 So. 2d 618, 622 (2008) (citing, with approval, Leroux v. State, 689 So. 2d 235, 237 (Fla. 1996)). "[P]roviding such advice is a legitimate and essential part of the lawyer's professional responsibility to his client in most plea negotiations, where often the bottom line for the defendant is the amount of time he will serve." Leroux, 689 So.2d at 237 (Fla. 1996). However, where counsel's advice is patently mistaken or misguided, a defendant should not be prejudiced for reasonably relying upon that advice. See Hunt v. State, 613 So. 2d 893 (Fla. 1992) (voiding a plea is warranted where a defendant has a reasonable basis for relying on his attorney's mistaken advice that the judge will be lenient). Moreover, a trial court should be liberal in exercising its discretion to permit the withdrawal, especially when it is shown that the plea was based on a failure

of communication or misunderstanding of the facts. See Tobey v. State, 458 So. 2d 90 (Fla. 2nd DCA 1984).

Although Mr. Griffin's motion was outside the time frame established in Rule 3.170, the circuit court should have exercised its discretion to rule on the motion, as other courts have done. Kilgore, 688 So. 2d at 897; Johnson, 834 So. 2d 384. Mr. Griffin was never informed by his trial or direct appeal counsel that he had the right to move to withdraw his plea. The circuit court should have followed the precedent set in Kilgore and Johnson and permitted Mr. Griffin to withdraw his plea based upon the manifest injustice he suffered from his attorneys' mistaken advice and ineffective assistance. Snodgrass v. State, 837 So. 2d at 508 (Fla. 4th DCA 2003). The facts establish that Mr. Griffin reasonably relied upon his counsel's mistaken advice, and his plea was therefore not knowingly, intelligently, and voluntarily made. This reliance, coupled with counsel's ineffective assistance and Mr. Griffin's incomplete understanding of his possible defenses and the State's case in aggravation, resulted in manifest prejudice.

Mr. Griffin was repeatedly misinformed by his trial counsel as to his sentencing possibilities. "A defendant's entry of plea based upon his attorney's mistaken advice about sentencing can be a basis for allowing a defendant to withdraw the plea."

Snodgrass, 837 So.2d at 508 (citing Leroux, 689 So.2d at 237); see also Simeton v. State, 734 So.2d 446, 447 (Fla. 4th DCA 1999). The attorneys testified that they led Mr. Griffin to believe that he would receive a life sentence from Judge Downey (PCR. 2180). They gave Mr. Griffin legal advice based upon an "intuitive kind of feeling" they had about Judge Downey, who in their experience had never handed down a life sentence (PCR. 4575-76). Both attorneys testified at the evidentiary hearing, they were clearly mistaken about their "intuitive" feeling. Even when Mr. Mills suspected that a life sentence was not a guarantee, neither he nor Mr. Wells advised Mr. Griffin or his family about their concerns. Rather, they continued to reassure Mr. Griffin and his family that he would receive life. Trial counsel also failed to inform Mr. Griffin or his family that Mr. Wells was living and working part time in Louisiana and that he had three bar complaints pending against him during the time of Mr. Griffin's trial. Mr. Wells was also going through a "pretty egregious" divorce and broke his hip during the time he represented Mr. Griffin (PC-R. 4283-90; 4295-96). After the trial, Mr. Wells was suspended by the Florida Bar for 90 days (PC-R. 4295-96).

In granting Mr. Griffin relief on his 3.851 claim of ineffective assistance of penalty phase counsel, the circuit

court specifically recognized that trial counsel labored under a mistaken belief that Judge Downey would impose a life sentence, and that this mistake affected all of trial counsel's decisions regarding the penalty phase:

> [T]he Court concludes that counsel turned a blind eye to the elephant in the room – the reality that the death penalty could be imposed. While counsel's strategy may have been reasonable in a case of lesser magnitude, because the State was seeking the death penalty in this case, counsel was required to take the extraordinary steps necessary to ensure that the Defendant receive the representation guaranteed to him by the Sixth Amendment. **Instead, counsel's penalty phase strategy, or lack thereof, was clearly based on an unsubstantiated hunch that if the Defendant entered a straight-up plea the trial judge would sentence him to life and not death. Ultimately, counsel was guided by a genuine, but monumentally, mistaken hunch** in choosing what evidence to present to the trial judge at the penalty-phase proceeding.
>
> [* * *]
>
> Thus, considering the totality of the evidence, the Court finds that trial counsel's acts or omissions during the penalty-phase were outside "the broad range of reasonably competent performance under prevailing professional standards." **Trial counsel's ineffective assistance prejudiced the Defendant because counsel based his decision making on an erroneous intuition which ultimately led to the Defendant being sentenced to death.**

(PCR. 1408 (emphasis added) (internal citations omitted)).

The circuit court clearly found that counsel's "monumentally mistaken hunch" and "erroneous intuition" unreasonably affected their decision making regarding penalty phase, and also precluded Judge Downey from having a complete

understanding of Mr. Griffin's case (both in aggravation and mitigation) before he sentenced Mr. Griffin to death Id.

Mr. Wells was an experienced capital defense attorney who had tried "many, many capital cases" (PCR. 4255). If counsel's mistaken intuition was of such magnitude that he was found to have rendered constitutionally ineffective assistance, how could Mr. Griffin, described by Mr. Wells as an unsophisticated client who was "probably very dependent upon my advice and counsel," (PCR. 4256), have realized that his attorneys were giving him "monumentally" misguided advice about entering his guilty plea? Both Mr. Wells and Mr. Mills admitted that they never led Mr. Griffin to believe anything other than that his ultimate sentencing outcome would be life.

Like the defendants in Hunt and Leroux, Mr. Griffin was entitled to rely upon his attorneys to properly advise him on this most crucial aspect of his capital murder case. He should not now be prejudiced for reasonably depending upon his attorneys' advice that he would receive a life sentence.

Like in Johnson v. State, the evidence conclusively established trial counsel's confusion about the way that plea deals are negotiated in Pinellas County. Trial counsel repeatedly assured Mr. Griffin that he was going to receive a life sentence and that the offer flowed from the prosecutor's

office to the defense, not the other way around. Mr. Wells testified that despite his awareness of the State's position seeking death, he continued to advise Mr. Griffin to plead guilty because of an "intuitive kind of feeling" he got from Judge Downey (PCR. 4575-76).

According to Assistant State Attorney Glenn Martin, Judge Downey did not play any role in the plea negotiations. The decision was solely within the provenance of State Attorney Bernie McCabe. Trial counsel either misunderstood or actively ignored the information they received from the State and the judge about the likelihood of Mr. Griffin getting a life sentence. They failed in their duty to investigate and prepare for trial before advising their client about the realities of a guilty plea. Mr. Griffin entered his plea based upon his attorneys' mistaken advice about sentencing, resulting in manifest prejudice. See Leroux, 689 So. 2d at 237.

This prejudice was compounded by counsel's failure to inform Mr. Griffin that he had the ability to withdraw his guilty plea, forcing the motion to be filed well after the timeline contemplated by Rule 3.170. The circuit court should have exercised its discretion and granted the motion on its merits. Relief is warranted.

2. *Trial Counsel Provided Ineffective Assistance During the Guilt Phase of Mr. Griffin's Trial, Rendering His Plea Constitutionally Invalid.*

Ineffective assistance of counsel may also provide a reason for a post-sentence withdrawal of a guilty plea. DeMartine v. State, 647 So.2d 900, 902 (Fla. 4th DCA 1994). Here, the ineffectiveness of Mr. Griffin's trial attorneys in counseling him to plead guilty without conducting any investigation or preparation for trial amounts to manifest injustice worthy of this Court's relief.

Trial counsel failed to make a plea offer to the State as is required by well-established procedures in Pinellas County. Instead, defense counsel went forward with their "strong feeling" that the judge would impose life (PCR. 4262-68). Trial counsel knew that the State was seeking the death penalty, and admitted that they were "aware" of the State's position that the only way Mr. Griffin would be guaranteed to receive a life sentence was if both he and his co-defendant pled guilty (PCR. 4267, 4506-08). Nevertheless, trial counsel proceeded to urge their client to plead guilty without giving him a complete understanding of his situation (PC-R. 4280). Mr. Mills testified that, **"I can assure you that Michael didn't expect it because we had not – we had led him to believe that we felt very confident that it was going to be a life sentence."**

Trial counsel never informed Mr. Griffin of the possibility of going to trial with a voluntary intoxication defense because they did not investigate Mr. Griffin's social or family history. They did not discuss the option of using the guilt phase to set up the penalty phase defense (PCR. 4258-60, 4513-14, 4576). They hired Paul Barko as their investigator but only had him work 3.5 hours on the case. Trial counsel could not adequately inform him of his other possible defenses because they had no knowledge of what they were.

Such inaction was in violation of clearly established rules of criminal procedure, which mandate that counsel inform his client of "all pertinent matters bearing on the choice of which plea to enter... as well as any possible alternatives that may be open to the defendant." Fla. R. Crim. Pro. 3.171.

A defendant should be allowed to withdraw a plea where the plea was based upon a misunderstanding or misapprehension of the facts considered by the defendant in making the plea. Forbert v. State, 437 So.2d 1079, 1018 (Fla. 1983); Wade v. State, 488 So.2d 127, 129 (Fla. 3rd DCA 1986). A trial court should be liberal in exercising its discretion to permit the withdrawal, especially when it is shown that the plea was based on a failure of communication or misunderstanding of the facts. Tobey v. State, 458 So. 2d 90 (Fla. 2nd DCA 1984).

Trial counsel also neglected to protect Mr. Griffin's rights during the plea colloquy, which was completely inadequate and failed to comport with the established mandates of Fla. R. Crim. Pro. 3.172 and the Sixth Circuit change of plea form. A trial court is required to "carefully inquire" into a defendant's understanding of the plea, in accordance with the rules governing plea colloquies, "so that the record contains an affirmative showing that the plea was intelligent and voluntary." Koenig v. State, 597 So.2d 256, 258 (Fla. 1992) (citing Boykin v. Alabama, 395 U.S. 238 (1969)).

In this case, there were numerous errors and omissions in the plea colloquy which trial counsel neither objected to nor attempted to correct. Judge Downey never inquired as to whether Mr. Griffin was under the influence of drugs, alcohol, or mental illness, which is mandated by the Sixth Circuit plea form.

Judge Downey also incorrectly told Mr. Griffin that by pleading guilty, he was waiving his right to challenge the job done by his attorneys, in clear violation of Fla. R. Crim. Pro. 3.172(c)(4). Trial counsel did not correct his errors.

The judge also made the finding that Mr. Griffin was taking the plea because it was in his "best interest," but without conducting an inquiry of Mr. Griffin on this point as is required by Rule 3.172. Fla. R. Crim. Pro. 3.172(e). At no time

did Mr. Griffin's counsel intervene or object to the sufficiency of the colloquy.

More egregious, neither the judge, the State, nor defense counsel noticed that Mr. Griffin was entering a plea with the belief that he would be eligible for parole in 25 years. The "brief recess" at the outset of Mr. Griffin's penalty phase six weeks after entering the plea was not sufficient to correct this striking error. The change in the substance of the plea from life with the eligibility of parole after 25 years and life without that possibility is a significant difference. It was a difference that required more scrutiny than a scrivener's error and more explanation to an "unsophisticated" client who had never been a criminal defendant before. As in the Johnson case (which also involved this same judge), Judge Downey's plea colloquy was inadequate and insufficient to protect Mr. Griffin's rights.

Trial counsel's ineffectiveness both prior to the change of plea and during the deficient plea colloquy are sufficient to meet both the "manifest injustice" standard for withdrawal of Mr. Griffin's plea, and the Strickland calculus for ineffective assistance of counsel. Williams v. State, 316 So.2d 267, 273-74 (Fla. 1975) (quoting with approval the *ABA Standards Relating to the Administration of Criminal Justice*, and holding that

"withdrawal is necessary to correct a manifest injustice when the defendant proves that... he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule"). To meet the two-part Strickland test to challenges to guilty pleas based upon ineffective assistance of counsel, a defendant must show both deficient performance, *and* that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Grosvenor, 874 So. 2d at 1179. When reviewing whether a reasonable probability exists that the defendant would have insisted on going to trial, this Court has held that a court should examine the totality of the circumstances surrounding the plea, "including such factors as whether a particular defense was likely to succeed at trial and the colloquy between the defendant and the trial court at the time of [the] plea." Id. at 1181-82. If confidence is undermined in the outcome of the case, the reasonable probability standard has been met. Id.

In Mr. Griffin's case, the post-conviction court has already found trial counsel's deficient performance in failing to investigate and prepare for penalty phase was prejudicial. The same analysis should hold true for the guilt phase.

Trial counsel's testimony clearly establishes that they were deficient in their guilt phase preparation. They admitted that they failed to investigate or explain Mr. Griffin's possible defenses before advising him to plead guilty (PCR. 4258-60, 4513-14, 4576). Counsel was unaware of the massive amounts of cocaine that Mr. Griffin was ingesting in the days leading up to the crime and the day of the crime. Witnesses were available, but counsel never asked the questions nor sought the records to explore possible defenses (PC-R. 4501; 4515). Mr. Wells acknowledged that the witnesses in this case were "local and willing to talk" (PC-R. 4502). He would have wanted to put on evidence that someone else masterminded the robbery, but he did not even speak to Kocolis (PC-R. 4516-17). He would have explored a family history of drug or alcohol abuse and presented it to the judge, but he never sought it (PC-R. 4521-22). He was unaware of the full extent of Mr. Griffin's brain damage, and never asked for neurological or psychological testing (see id.).

Counsel also never informed Mr. Griffin that he had the right to withdraw his plea after any of the numerous times during the underlying proceedings where it was evident that the plea was flawed based upon Mr. Griffin's lack of understanding about his potential sentencing outcomes (PCR. 4510-11 (failure to advise Mr. Griffin that he could withdraw his plea after he

learned that he was not eligible for parole); 4280 (failure to advise Mr. Griffin that he could move to withdraw his plea at sentencing); 4273-74 (counsel admitted they continued to advise Mr. Griffin he was going to receive life and did not inform him he could withdraw his plea even when the trial court announced the case would be going to penalty phase).

The prejudice to Mr. Griffin from counsel's deficient performance is that he did not get to choose whether to go forward with a certain defense at a guilt phase or choose to waive those defenses and plead guilty. He cannot choose if his attorneys gave him no choices. It is clear from the record that counesl's belief was that "there [was] really only one option on the table, and it's a death penalty" (PC-R. 4503-04). Yet it is in such cases that more investigation is warranted, not less. Had counsel engaged in even the most basic investigation and preparation, they would have learned that there were options other than just the death penalty for their client.

Both his trial counsel and his family members testified that Mr. Griffin believed he was going to receive a life sentence, and that he specifically pleaded guilty in order to avoid the death penalty (PCR. 4215, 4247, 4268, 4280, 4508, 4521-22). Witnesses at the penalty phase, as well as an employee of the State Attorney's office, believed that Mr.

Griffin's penalty phase was a "just a formality," and that he was going to receive a life sentence (PCR. 4375-77, 5132). Mr. Griffin's father was so confident that a life sentence would be given that he did not even attend the sentencing.

Trial counsel also failed to explain any other defense to Mr. Griffin other than a straight up guilty plea in exchange for nothing. Mr. Griffin was ignorant of any other possible defenses before he pled guilty (PCR. 4258-60, 4513-14, 4576). They never informed Mr. Griffin that he had the right to withdraw his plea when a significant error occurred in having him plead to the wrong sentence (PCR. 4510-11, 4280, 4273-74). Facts adduced at the evidentiary hearing demonstrate a reasonable probability that a voluntary intoxication defense would have been a successful opposition to the State's case in guilt and aggravation. Mr. Griffin would have been found not guilty or been found guilty of a lesser offense that could have resulted in a sentence less than death. Cf. Grosvenor, 874 So. 2d 1176 (Fla. 2004) (to prevail on ineffective assistance of counsel claim for failing to advise of voluntary intoxication defense defendants do not have to show the defense was viable).

Mr. Griffin showed at the evidentiary hearing that a plethora of evidence was available to prove a viable voluntary intoxication defense. Such a defense under these facts is

successful because co-defendant Lopez used a voluntary intoxication defense at his trial that resulted in two life sentences. Mr. Griffin's history of severe drug addiction, the findings of Drs. Hyde and Mash that the only reason he committed the crime was due to that drug addiction, and the fact that Mr. Griffin used copious amounts of cocaine immediately before the crime, establish that a voluntary intoxication defense was an avenue which trial counsel unreasonably failed to investigate or pursue. The only reason trial counsel did not pursue a voluntary intoxication defense was because of their own unreasonable failure to investigate.

Likewise, Mr. Wells testified that he would have used the evidence of Kocolis's masterminding the robbery and Mr. Griffin's drug use prior to the crime if he would have known about it. When counsel's error is failure to investigate or discover potentially exculpatory evidence, the determination whether the error prejudiced the defendant by causing him to plead guilty rather than going to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. The ABA guidelines for appointed death penalty defense counsel set out the obligations of counsel in this regard:

GUIDELINE 11.4.1: INVESTIGATION

> A. Counsel should conduct **independent** investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations **should begin immediately** upon counsel's entry into the case and **should be pursued expeditiously**. . . .
>
> Nor may counsel "sit idly by, thinking that investigation would be futile." The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel's evaluation and advice amount to little more than a guess.

American Bar Association "Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases" 1989, § 11.4.1.C and Commentary (emphasis added) (footnotes omitted).

Effective counsel would not have advised Mr. Griffin to plead guilty without first investigating the red flags of their client's cocaine addiction and traumatic brain injuries. Counsel's mistaken intuition and deficient performance regarding the plea were sufficient for the circuit court to grant Mr. Griffin's claim of ineffective assistance of counsel at the penalty phase. Yet but for counsel's errors and the confusion surrounding the circumstances of his plea, Mr. Griffin would not have pled guilty. Thus, these failures similarly amounted to ineffective assistance during the guilt phase, such that relief is warranted. Mr. Griffin should be allowed to withdraw his guilty plea due to the ineffective assistance of counsel.

ARGUMENT II

MR. GRIFFIN WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN ADEQUATE ADVERSARIAL TESTING WHEN THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL IMPEACHING AND EXCULPATORY IN NATURE AND/OR KNOWINGLY PRESENTED FALSE OR MISLEADING EVIDENCE AND/OR ARGUMENT AT HIS CAPITAL TRIAL.

A. THE LAW

In order to insure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 540 U.S. 668 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275; see also Johnson v. Butterworth, 713 So. 2d 985, 987 (Fla. 1998) (State has a duty to disclose exculpatory information in post-conviction proceedings).

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that unconstitutional prejudice accrues to a defendant when the State suppresses favorable evidence that is exculpatory or impeaching. See also Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice is established where confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to comply with his obligation to disclose

exculpatory evidence. Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992).

"In determining whether prejudice has ensued, this Court must analyze the impeachment value of the undisclosed evidence." Mordenti v. State, 894 So. 2d 161 (Fla. 2004). In the Brady context, the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995); Young v. State, 739 So.2d 553, 559.

B. The Facts

During the State's cross examination at the March 19, 2007 evidentiary hearing, drug dealer Nicholas Kocolis, who was the mastermind behind the planning and implementation of the Service America crimes, testified that he had received immunity in exchange for information against Mr. Griffin:

> KOCOLIS: No, sir. When I spoke to the State Attorney's Office, they assured me that if I gave them the information that they wanted, that they would not prosecute me in any charges concerning this case.
>
> [* * *]
>
> MR. MARTIN: You were given what's called use immunity, were you not?

> [KOCOLIS]. **I don't know if it was called that, but my understanding was that if I told him the truth about the information that I had, that they would not prosecute me in connection with this case, and that's what I did.**

(PCR. 4430-31) (emphasis added).

This was the first time post-conviction counsel learned Kocolis had been given immunity from prosecution for his role in the crimes in exchange for his cooperation with police. Trial counsel was also unaware that Kocolis had struck such a deal with the prosecution (PCR. 4516-17; 4559-61).

In rebuttal, the State presented Assistant State Attorney Bruce Bartlett, who testified that to his knowledge, Kocolis was not given immunity (PCR. 5465). However, he was not aware that Kocolis had spoken with law enforcement for "several hours" before being brought to his office to give a statement. He admitted that "Mr. Kocolis was not real anxious to cooperate" and that he was "slick" and "knew the system" (PCR. 5465, 5477). Mr. Bartlett could only say definitively that he never personally offered Kocolis any deals, although he could not say with certainty whether officers in the case had promised Kocolis anything in exchange for his cooperation (PCR. 5465-77). He maintained that Kocolis was not called at trial because they were dealing with "a bunch of cokeheads" and Kocolis was

therefore not credible (PCR. 5466; 5472). Regardless of Mr. Bartlett's recollection, however, the caselaw establishes that the prosecution is deemed to have knowledge of statements showing the police were giving assurances to Kocolis that he would not be prosecuted for his crimes. See, e.g., Kyles, 514 U.S. at 436.

At the time of the Service America crimes, Kocolis was on probation in Hillsborough County for burglary and drug possession (PCR. 2741; 2753-54). As a consequence, he was not supposed to be dealing drugs, be in possession of firearms, or leave the county. During Kocolis' first statement to police, he was informed that investigators had information that implicated him in a double homicide in Pinellas County (PCR. 2722). When Kocolis expressed concern about his probation, the police reassured him at every juncture that he would not be prosecuted for any new crimes (PCR. 2796; 2809; 2833; 2851). The police told Kocolis they had information that he could get guns "whenever you want to" and that he "routinely handle guns in trade for dope" and it was "no big secret" to police that he was a "dope dealer" (PCR. 2740; 2839). Detective Snipes said, "We can ask the cops that work around here – it's not a big secret. **We're not concerned about that; all right?**" (PCR. 2796; 2809).

Kocolis denied any involvement in the crimes. Yet police continued to question Kocolis because they believed he was "the common denominator" and that all of Kocolis's "associates" were linked to him because "you're their force" (PCR. 2772; 2775-76; 2782). They told him that they knew he was the "master link" who was "running things" (PCR. 2772; 2775-76; 2782). When Kocolis expressed reluctance to provide information, police warned him that "[t]he boat is sinking quickly. People are jumping off, grabbing life savers, doing the best they can to swim to safety. But you can wait too long, or you can be with the captain going down" (PCR. 2784).

After thinking about his dilemma for ten days, Kocolis gave a second statement on November 10, 1995. At that time, Pinellas County investigators met him in Hillsborough County, with Hillsborough County detectives present, to further reassure Kocolis that his Hillsborough County probation as well as other crimes he may have committed were not going to be prosecuted. Pinellas and Hillsborough County detectives assured Kocolis they were "not worried about" his drug dealing (PCR. 2796), and that he would not get into trouble for his statement (PCR. 2809).

Kocolis knew how to work the criminal justice system and he smartly got officers to repeatedly assure him on the recorded

statements that he was not going to be prosecuted if he told them what they wanted to hear:

> **Kocolis:** **– I'm doing this because, evidently, everybody wants me to say this.**
>
> Det. Pupke: Well—
>
> A. Everybody – when you want to hear this from me—
>
> Q. No. You're the – you're the piece of the pie [sic for puzzle]...
>
> [* * *]
>
> Det. Pupke: And I still think – **I don't know why you're holding back. I mean, you're here. This is how you can help you; okay?**
>
> A. I didn't do anything.
>
> **Q. Worry about your ass**.
>
> A. Why? I didn't do nothing.

(PCR. 2832) (emphasis added).

> Kocolis: "You're going to prison, buddy." I've been told that.
>
> Lt. Hart: **Are you in handcuffs?**
>
> A. No. No.
>
> Q. **Are we carrying you away?**
>
> A. I would have told you - -
>
> **Q. Are we telling you we're going to?**
>
> A. [Unintelligible].
>
> Pupke: All right.

Hart: Well, then **if we were going to put you in jail, we would have done that out there; okay.**

A. I know that. I know that.

Q. So forget about that–

A. Okay. But it –

(PCR. 2833-34) (emphasis added).

Law enforcement assured Mr. Kocolis that he would not be prosecuted for supplying the guns for the robbery even though it was a violation of his probation and a crime.

Kocolis: To be honest with you, I don't know if this is illegal or not. But I - - I did take a close look at it [9 mm gun], at one point, but I don't remember no.

Pupke: **We're not looking to hammer you on that?**

A. I – I'm on probation. I"m not allow to touch - -

Q. I understand that.

A. – a gun.

Q. **But we're not looking to hammer you on that.**

Lt. Hart: We're not - -

(PCR. 2847) (emphasis added).

Kocolis: Okay. **From what I understand, you have a picture of that gun {9 mm gun] sitting on the table, with me around that gun. That's not good.**

Det. Pupke: No, it isn't.

A. That's not good.

Q. But - -

A. But I think - -

Q. - - we're not looking to do that - -

[* * *]

Q. And if what you tell us is valuable to us, then we will work with you.

(PCR. 2851) (emphasis added).

Law enforcement was also not concerned when Kocolis confessed that he had gotten proceeds from the Service America robbery:

Pupke: Right. I didn't plan it. And I - - You left out that big part that I know who did, and I know something about it, and I might have even got some proceeds from it - -

A. No. I didn't get no proceeds.

Q. You know what I'm saying?

A. - - from that crime.

Q. $300 in quarters, proceeds from that crime.

A. Well, what does –

Q. Correct.

A. —that make me?

Q. That - - we're - - not even going to address that issue.

A. No?

Q. Because it doesn't concern us.

(PCR. 2908) (emphasis added).

The State's contention that Kocolis was never given immunity for his statements is belied by the record. His statements demonstrate that the police were more than willing to ignore the key role Kocolis played in the Service America crimes in exchange for his assistance with the case. ASA Bartlett described Kocolis as a slick operator who knew how to manipulate the criminal justice system. Kocolis was on probation for burglary and drug possession and had an extensive criminal history. The likelihood of Kocolis speaking without an immunity deal from police was nil. However, it was not until Kocolis testified during the evidentiary hearing that trial and collateral counsel were made aware of the immunity deal he had struck. Indeed, during cross-examination, ASA Martin asked Kocolis, "You were given what's called 'use immunity,' were you not?" (PCR. 4430-31).

Trial counsel was never informed by the State that Kocolis had been given immunity, and Kocolis did not testify at Mr. Griffin's trial. The State's failure to disclose this material information prejudiced Mr. Griffin's case. Trial counsel could not investigate the Kocolis deal, advise their client as to the import of that deal, or inform Judge Downey of this deal during the penalty phase. See Banks v. Dretke, 540 U.S. at 678.

Counsel testified at the evidentiary hearing that he had wanted to use Kocolis's involvement in the crime, his domination of Mr. Griffin, and the State's failure to prosecute Kocolis as mitigation (PCR. 4559-62). He would have wanted to show that an equally culpable co-defendant had walked away from prosecution, but he had no concrete evidence to back up that claim (PCR. 4500-4501; 4559-62). Had counsel known Mr. Kocolis had received immunity, he would have presented that evidence to Judge Downey (PCR. 4516-17; 4559-61). Moreover, this information could have been given to Dr. Maher and used to establish the statutory mitigator of "under duress or substantial domination of another" that Mr. Wells hinted at during penalty phase (see id.). Regardless of whether Kocolis testified or not, this information was important and could have been used by trial counsel in mitigation to show that equally or more culpable participants had received immunity for a double homicide. Because this exculpatory information was not revealed to trial counsel, Judge Downey erroneously believed that Mr. Griffin alone was responsible for the planning of this crime (PCR. 132-133). This was the prejudice Mr. Griffin suffered.

The materiality of Kocolis's immunity deal is further demonstrated by the State's willingness to strike immunity deals with other key witnesses. For example, Stephen Montalvo was

offered immunity for his cooperation and statements. Montalvo provided the State with key information about Kocolis's drug dealing and the planning and implementation of the Service America crimes. He was recruited by Kocolis early on to commit the Service America robbery, but he declined. At the time of trial, defense counsel knew that Montalvo had been given immunity in exchange for information. However, the State never revealed that the person it believed was the mastermind of the Service America robbery – Nicholas Kocolis – was given immunity.

In addition to the undisclosed immunity deal given to Kocolis, trial counsel and Judge Downey were not informed of other deals, promises, and/or threats made by the police and prosecution to several key State witnesses. For example, they did not know that Kimberly Ally had been given immunity in exchange for her cooperation, or that the State's own investigator, Steve Porter, testified on Ally's behalf to get a more favorable sentence on her pending charges (PCR. 5421-25). At the evidentiary hearing, Ally testified that she was driving home when police surrounded her car, took her to the police station, and threatened her with going back to jail. She was told that the police had tapped her phone, and that she would be deemed an accessory because she did not come to the police when she found out about the crime (see id.). Ally understood that

if she testified against Mr. Griffin, she would have immunity and "there would be no repercussions for me. . . that I would not go back to jail and I wouldn't be charged with anything" (Id.). None of this information was provided to Mr. Griffin.

Likewise, Heather Henline, an associate of Kocolis, testified that she was arrested in November 1995 on a drug case. Detective Snipes questioned her about evidence of burned coin bags found at her house. Police made it clear to her that they knew she was fighting the State for custody of her daughter and they could "stop it or I could continue doing what I was doing with my case plan":

> Backhus: What was the specific meaning to you as far as if you did not cooperate with them? What would happen with your custody case?
>
> Henline: It was not going to go in my favor.

(PCR. 5447-48). Ms. Henline admitted that no "promises" were made regarding her daughter's custody arrangements. However, the meaning she took from her interaction with the police was that "they could keep me from being with my daughter," which affected her decision to assist the police (PCR. 5455, 5458).

Had the prosecution disclosed these examples of the tactics police used to get incriminating evidence against Mr. Griffin, trial counsel would have presented this information to the judge (along with evidence regarding Kocolis) in favor of giving Mr.

Griffin a life sentence. The State relied upon witnesses who had been offered favors to establish the aggravating circumstances in support of sentencing Mr. Griffin to death. Trial counsel could have impeached these witnesses with the information regarding their interactions with police and the deals they received. Even though the State knew Mr. Griffin was not solely responsible for planning the Service America robbery, and even though the State knew that the witnesses it relied upon during its investigation and prosecution of Mr. Griffin received threats and/or consideration in exchange for their testimony, it never revealed this information to trial counsel. Rather, the State continued to argue that Mr. Griffin was the mastermind behind the crime. This inaccurate information was the basis for Judge Downey's sentencing order, and Mr. Griffin suffered prejudice as a result.

The post-conviction court wrongly believed that only information that completely exculpates the defendant can be a Brady violation: "[A]ny evidence that Kocolis was given immunity would not exculpate the defendant of guilt for the murders, nor would it otherwise reduce his culpability and thereby reduce his sentence" (PCR. 1409-10). The court supported its finding by claiming that because Mr. Griffin admitted his guilt to witnesses, the evidence of deals offered to key State witnesses

was not material. However, that does not mean there cannot be material Brady evidence that could have been used to mitigate his sentence.

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434; Strickler, 527 U.S. 263, 281-82. The materiality inquiry is not a "sufficiency of the evidence" test. Rather, the burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 529 U.S. 362 (2000); Kyles, 514 U.S. at 434. In evaluating whether habeas relief is warranted upon a claim that the State failed to disclose exculpatory evidence, the undisclosed or undiscovered information must be evaluated cumulatively to determine whether confidence is undermined in the outcome. Kyles, 514 U.S. at 436.

Here, the State misled Mr. Griffin's trial counsel and Judge Downey because they already disclosed the immunity deal with Mr. Montalvo. The State knew it was charged with turning over this information. This deception violated Mr. Griffin's right to due process. It is the State's burden to prove this due process violation harmless beyond a reasonable doubt.

The post-conviction court emphasized ASA Bartlett's testimony that no immunity deal was in place because only "[State Attorney] Bernie McCabe" can authorize immunity. However, that is not what detectives represented to Kocolis, and the evidence shows that immunity was given to Kocolis. Kocolis was never charged with his involvement in the case even though it was clear that police and the State knew he was heavily involved with the crime. For example, they knew that:

> -- Mr. Kocolis was on probation for burglary at the time of the crime and could not travel to Pinellas County (PCR. 2741, 2753-54);
>
> -- he sold drugs (PCR. 2817);
>
> -- he "routinely handled guns in trades for dope" (PCR. 2740, 2839);
>
> -- his nickname was Saint Nick because he "sent people on to the next level" (PCR. 2758);
>
> -- he was a "middle man, a trader between drugs and guns" (Id.)
>
> -- he was unemployed (PCR. 2744);
>
> -- he was the "yough guy in town" and used intimidation tactics like cutting or burning himself to scare people (PCR. 2748-49, 2785-86);
>
> -- "people [closest to him] might do some things that they don't want to do, mainly because [Kocolis] sa[id], Let's do it" (PCR. 2760-61);
>
> -- his reputation was that if someone does him wrong, he "get[s] the job done" (PCR. 2750);

-- he was the “master link” or the “common denominator” in the crimes and that the defendants were “his force” and totally dependent on him (PCR. 2772; 2775-76; 2782);

-- he had received proceeds from the crime (PCR. 2814);

-- there was a photograph of Kocolis in the room with one of the murder weapons on a table on the day of the crime (PCR. 2850);

-- the “party” purportedly arranged by Mr. Griffin after the murders was at a hotel called the Camberley, a hotel where Mr. Kocolis’ father worked (PCR. 2735).

None of this information, or the fact of Kocolis’ immunity deal[17], was ever conveyed to Judge Downey. This failure can not be considered harmless. Judge Downey believed that Mr. Griffin and Mr. Griffin alone was responsible for the planning the robbery. Judge Downey did not know officers had pegged Kocolis, not Mr. Griffin, as the “master link.” Under Banks, the burden is on the State to “set the record straight,” not upon the defense to intuit that the State is holding information back or misrepresenting facts. But instead of revealing the immunity deals with Kocolis and other witnesses, the State misrepresented that Mr. Griffin and Mr. Griffin alone was responsible for planning the robbery, when it knew Kocolis had been offered immunity. Whether the prosecutors authorized immunity through

[17] Detectives Pupke and Snipes told Kocolis that they were “not worried” about whatever crimes he had committed, and that he was not “getting in trouble” for the crimes (PCR. 2796; 2809). They told Kocolis that if they were going to put him in jail, they would have done it already (PCR. 2833; 2851).

"Bernie McCabe," or the detectives told Kocolis that "the deal" was that they were not going to arrest him for the crimes he was confessing to, the prosecution is has the duty to "set the record straight," and it did not do so. See Giglio v. United States, 405 U.S. 150 (1972).

The State's own sentencing memorandum misled the trial judge into believing that Mr. Griffin and Mr. Griffin alone was the mastermind of this crime, because only he procured the weapons and only he was concerned about being recognized and only he needed the proceeds from the crime (PCR. 125-126). Evidence of an immunity deal or a perceived immunity deal with Kocolis would have mitigated these aggravating facts. Under these circumstances, confidence in the outcome is undermined.

Moreover, the State's denial that Kocolis received immunity is illogical. ASA Bartlett testified that Kocolis was a slick operator and knew the system, yet he also acknowledged that Kocolis, who was not anxious to cooperate, ten days later magically became cooperative:

> [A]s we talked to a lot of the other witnesses and the investigation progressed, it became apparent that [Kocolis] potentially did have some involvement in initiating this thing or at least causing it -- facilitating it to happen. And when Mr. Griffin ultimately testified at the hearing that became very apparent that's what happened. So we actually at one point in time considered taking that case of Mr. Kocolis to the grand jury, but we didn't feel we had enough evidence to be able to make everything stick.

(PCR. 5466-67).

This Court must consider the cumulative effect of all the evidence not presented to the jury, whether due to trial counsel's ineffectiveness, the State's misconduct, or because the evidence is newly discovered. Kyles, 514 U.S. 419 (1995); State v. Gunsby, 670 So. 2d 920 (Fla. 1994). The cumulative analysis must include the evidence and claims presented at this evidentiary hearing. Here, the post-conviction court already found trial counsel ineffective for failing to investigate and prepare a defense at penalty phase. Strickland, 466 U.S. 668 (1984). It was important for the defense to attack the aggravating circumstances with any evidence that Mr. Griffin was not "solely" responsible for the planning of the robbery. Trial counsel had in their possession the police statements of Kocolis, Ally, Clark and Henline, and they were aware that the police had these and other persons as possible perpetrators of the crimes. Yet counsel did nothing to investigate the possibility that deals were made which tainted the State's evidence. Kocolis and others testified that Mr. Griffin's trial counsel did not speak with him (PCR. 4501). This omission is deficient performance that no reasonable attorney in possession of those police statements would have foregone. See Light v. State, 796 So. 2d 610 (Fla. 2nd DCA 2001) (judge is not examining

whether he believes the evidence presented as opposed to contradictory evidence, but whether nature of evidence is such that a reasonable jury may have believed it). Confidence in the outcome of Mr. Griffin's penalty phase is undermined and he should have been granted relief on that basis.

CONCLUSION

Based upon the foregoing, the Appellant, MICHAEL J. GRIFFIN, urges this Court to grant him relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Candance Sabella, Assistant Attorney General, Office of the Attorney General, 3507 E Frontage Road, Suite 200, Tampa, Florida 33607-7013 on October 5, 2009.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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