

IN THE SUPREME COURT OF FLORIDA  
CASE NO. \_\_\_\_\_

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MICHAEL JOSEPH GRIFFIN,

Petitioner,

vs.

WALTER A. McNEIL, Secretary,  
Florida Department of Corrections, and  
BILL McCOLLUM, Attorney General,

Respondents.

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ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY FLORIDA

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PETITION FOR WRIT OF HABEAS CORPUS

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## **INTRODUCTION**

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Sixth, Eighth and Fourteenth to the United States Constitution, claims demonstrating that Mr. Griffin is entitled to a *de novo* proportionality review by this Court and that he was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the record on the direct appeal shall be as (R. \_\_\_) and (RSupp\_\_\_). Citations to the postconviction record shall be as (PC-R. \_\_\_).

## **JURISDICTION**

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that “[t]he writ of habeas corpus shall be grantable of right, freely and without cost.” Art. I, Sec. 13, Fla. Const.

## **REQUEST FOR ORAL ARGUMENT**

Mr. Griffin requests oral argument on this petition.

## **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

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). The State informed defense counsel for Mr. Griffin that the victims' families were amenable to a life sentence if both he and Mr. Lopez plead 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). The law at the time mandated that the only possible sentences 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 eligible for parole (Supp. R. 22-25). Following a brief recess, Mr. Griffin said he would keep his plea. His original plea and plea form were modified to reflect that a life sentence without parole was the only 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<sup>1</sup> 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). 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

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<sup>1</sup> Spencer v. State, 615 So. 2d 688 (Fla. 1993).

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. Griffin v. State, 820 So. 2d 906 (Fla. 2002). Direct appeal counsel did not file 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). Because the trial of co-defendant Juan Anthony Lopez had not yet been completed, there were voluminous records to which Mr. Griffin was entitled that were filed under seal. On August 27, 2003, without the benefit of all the public records he was entitled to, Mr. Griffin filed his initial Rule 3.851 motion (PCR. 1-215).

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<sup>2</sup>, reserved Mr.

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<sup>2</sup> 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).

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 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<sup>3</sup> 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 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).

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<sup>3</sup> Brady v. Maryland, 373 U.S. 83 (1963).

## **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).

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.

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).<sup>4</sup>

At this time, Mr. Griffin had a new girlfriend, Tracey Tellis, who attempted to

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<sup>4</sup> 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).



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 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 (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.

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5M ontalvo 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.

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 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.<sup>6</sup> Montalvo, Williams, and Hall testified for

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<sup>6</sup> 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.

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 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).<sup>7</sup>

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.

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).<sup>8</sup>

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

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<sup>7</sup> 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).

<sup>8</sup> "...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.

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.<sup>9</sup> At the evidentiary hearing, Mr. Neeld testified that he 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

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<sup>9</sup> 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 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.

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 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 27<sup>th</sup> 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 is essential to consider Mr. Griffin’s response to stressful situations, his history of depression, and his cocaine addiction in evaluating brain damage:

When people receive brain injuries in childhood, their brain is what we call plastic. It has the ability to recover. Rarely is the recovery as good as the intact brain, and there are certain circumstances where the patched-up brain tissue doesn’t perform as well as it might. The analogy I like to use is it’s like patching the sidewall of a tire. When you’re on a straight, flat highway, the tire goes pretty well, but you go on a bumpy road and you can blow out the tire again at the site of the patching. It’s the same as somebody who has had a brain injury. . . . Oftentimes these people, particularly in childhood, make a very nice recovery and they look for all intents and purposes like they are functioning fairly well. But under certain circumstances you can see that there is a highlighting of the underlying deficit state.

(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<sup>10</sup> (PCR. 4957-58). In Dr. Hyde’s opinion, the depression and cocaine abuse

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<sup>10</sup> 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

Mr. Griffin experienced in 1995 amounted to the tragic “bumpy road” which led to his dysfunction and the commission of this crime.

In addition to the powerful mitigating evidence described above, Mr. Griffin also established that, in contrast to the findings of the trial court, he was not in fact the “mastermind” of the crimes. 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

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findings are supported by, and provide support for, the existence of such brain damage.

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).

## CLAIM I

**MR. GRIFFIN IS ENTITLED TO A LIFE SENTENCE IN THAT HIS SENTENCE IS DISPROPORTIONATE, DISPARATE AND INVALID BASED ON NEWLY DISCOVERED EVIDENCE THAT HIS EQUALLY CULPABLE CO-DEFENDANT WAS SENTENCED TO LIFE CONTRARY TO ART I, SEC. 9 OF THE FLORIDA CONSTITUTION AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

*Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990)(citations omitted).

Proportionality review arises, in part, by necessary implication from the mandatory and exclusive jurisdiction of this Court over death penalty appeals. Art.

V, Sec. 3(b)(1) *Fla. Const.* The obvious purpose of this jurisdiction of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise from the lower courts. Proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death penalty law. *Id.*

Likewise, this Court prides itself in a “system of justice that requires equality before the law” and reviews cases to ensure that defendants are not treated differently upon the same or similar facts. See *United States v. Jackson*, 390 U.S. 570 (1968). “When the facts are the same, the law should be the same.” *Slater v. State*, 316 So. 2d 539, 542 (Fla. 1975). This is not what occurred in Mr. Griffin’s case.

Mr. Griffin received a death sentence for shooting the two victims, Mr. Lopez, who also shot the two victims received a life sentence and Mr. Kocolis, the mastermind of the crime, was not charged. Because Mr. Griffin’s direct appeal went through the appellate process before his co-defendant, Mr. Lopez became competent to be tried, this Court has not conducted either a disparate treatment analysis or an accurate proportionality review of Mr. Griffin’s case as is constitutionally required. See, Art. I, Sec. 9, Fla. Const.

#### ***A. Disparate Treatment***

### *1. Due Diligence*

On June 13, 1997, Mr. Griffin entered an open guilty plea to two counts of first-degree murder with the expectation that he and Mr. Lopez would both plead guilty in exchange for a sentence of life without parole. However, Mr. Lopez became incompetent shortly after his arrest. The prosecutors on the case would not agree to allow Mr. Griffin to enter the plea alone. After a time, Judge Downey became frustrated waiting on the joint guilty plea. Lopez had not become competent and the judge wanted to move Mr. Griffin's case along. He gave Mr. Griffin's counsel a trial date and Griffin's counsel advised him to plea guilty straight up to Judge Downey without any guarantee that he would not sentence him to death. Initially, trial counsel wrongly advised Mr. Griffin that he would be eligible for parole after 25 years. Then, they were forced to vacate the plea and re-advise Mr. Griffin that the sentencing alternatives were only death or life without parole. Trial counsel also advised Mr. Griffin to continue to plead guilty and to waive a jury a penalty phase. After trial counsel waived opening penalty phase statements and presented a few mitigation witnesses, they were surprised when Judge Downey sentenced Mr. Griffin to death on both counts. This Court affirmed the conviction and sentences on May 30, 2002.

Mr. Griffin filed his original post-conviction motion on August 27, 2003 and

then amended that motion on September 19, 2003. In January, 2004, Lopez became competent. Lopez had been charged with the same two counts of first-degree murder for killing the same victims as Mr. Griffin. It was not until after Mr. Griffin's direct appeal had been affirmed and after Mr. Griffin filed his original and amended post-conviction motions that co-defendant Lopez went to trial.

Because Mr. Griffin had already been sentenced to death, Lopez's attorneys were able to argue to Lopez's jury that Mr. Griffin was more culpable and that he had already been sentenced to death for the two homicides. Cf. Lopez v. State, 2004 Fla. App. LEXIS 17453 (Fla. 2nd DCA 2004). Lopez's attorneys used a voluntary intoxication defense which was viable and successful. The jury believed Lopez's attorneys. Mr. Lopez received two life sentences from a jury and Judge Federico on January 30, 2004. Thus, Mr. Griffin could not have presented his claim of disparate treatment to this Court until now.

The post-conviction court recognized Mr. Griffin's dilemma and addressed the issue *sua sponte* in its November 26, 2008 order. Even though the circuit court had already granted penalty phase relief based on ineffective assistance of counsel, the court correctly recognized that *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992) (which authorizes the court to address on collateral review the proportionality of two equally culpable defendants when one defendant is sentenced to death and the other

co-defendant is sentenced to life imprisonment), could be an additional legal basis for a new penalty phase. The judge wrote:

...[C]onsidering that relief is being granted to the Defendant [Griffin] because of trial counsel's ineffective assistance during the penalty phase, the Court notes that the granting of such relief may or may not have been further justified by the precedent set in *Scott*. See, *People v. Palmer*, 162 Ill. 2d 465 (Ill. 1994) ("It cannot be conclusively determined that the co-defendant receiving life sentences would not have produced a life sentence, when in conjunction with additional mitigating evidence.").

(PC-R. 1413).

The post-conviction court deferred the disparate treatment/proportionality review to this court stating it had insufficient record evidence to weigh the relative culpability of the co-defendants in light of its grant of relief on other grounds. *Id.* The record, at the original trial and in post-conviction, showed the relative involvement of the co-defendants as the court took judicial notice of the underlying records in both cases.

For example, the State's Sentencing Memorandum from the original trial argued that both defendants were equally responsible for killing the victims.

...the **defendants** primary purpose in committing the murders arose as a result of the robbery, **they** also committed the crime of kidnapping... (RT. 2052);

...**he and codefendant Lopez** shot and killed the McCallops...*Id.*;

...the **defendants** returned to the Brandon area and decided that the



crime must be done the next day. (RT. 2054);

...**they** return to the freezer and **they** execute the two victims...(RT. 2057);

...the **defendants** killed them...Id;

...the **defendants** already had money...**they** returned to the freezer...(RT. 2058);

...the **defendants** killed the victims as part of the planned robbery...(RT. 2060).

The defense also argued in its sentencing memorandum that:

7. It has not been proven beyond a reasonable doubt that in fact Mr. Griffin was the actual shooter in the deaths of the victims. It does appear from various statements taken from Mr. Griffin and Mr. Lopez as well as the evidence itself that while Mr. Griffin may have shot one of the victims, that gun shot wound may or may not have been fatal. The fatal wounds resulted from being shot with a pistol which by all the evidence presented by the State, was in the possession of the co-defendant Lopez...(RT. 2017).

In his sentencing order, trial judge Brandt Downey justified the death sentence finding that Mr. Griffin had planned the crime, knew he was going to have to kill the victims prior to the robbery and procured the weapons for the crime. (R. 2074). In the same order, Judge Downey refused to find the cold, calculated and premeditated aggravator stating that “there does not seem to be present the ‘heightened premeditation’ the cases refer to in order to make this factor applicable.” (R. 2068) presumably meaning that Mr. Griffin did not plan to murder the victims prior to their deaths.

However, these conflicting findings are rebutted by the post-conviction testimony presented at the evidentiary hearing. Testimony from the state's own witnesses showed that it was Mr. Griffin was hopelessly addicted to drugs and would have done anything to get more drugs from his dealer, Nicolas Kocolis. Evidence revealed that both Griffin and Lopez were "do-boys" for Kocolis and that Kocolis' violent reputation was well known by police and his associates who were the witnesses called in this case. Testimony at the evidentiary hearing indicated that Kocolis had planned the robbery, received the proceeds from the crime and had pressured Mr. Griffin to pay him back for drugs Mr. Griffin had used instead of sold.

Public records disclosures from the Pinellas County Sheriff's Office showed that police knew of Kocolis' involvement in the crime through his statements to police in October and November, 1995. Detectives knew that:

- Mr. Kocolis was on probation for burglary at the time of the crime and could not travel to Pinellas County (PC-R. Vol. 16, p. 2741); 2753-54);
- that he sold drugs (PC-R. Vol. 17, p. 2817);
- that he "routinely handled guns in trades for dope;" (PC-R. Vol. 16, p. 2740; Vol. 17, p. 2839);
- that his nickname was Saint Nick because he "sent people on to the next level" (PC-R. Vol. 16, p. 2758);
- that he was a "middle man, a trader between drugs and guns;" *id*;
- that he was unemployed (PC-R. Vol. 16, p. 2744);

-that he was the “tough guy in town” and used intimidation tactics like cutting or burning himself to scare people (PC-R. Vol. 16, p. 2748-49;2785-86);

-that police believed “ people (closest to him) might do some things that they don’t want to do, mainly because [Kocolis] sa[id], Let’s do it.” (Vol. 16, p. 2760-61);

-that his reputation was that if someone does him wrong, he “get[s] the job done.” (PC-R. Vol. 16, p. 2750);

-that he was the “master link” or the “common denominator” in the crimes and that defendants were “his force” and linked to him (PC-R. Vol. 16, p. 2772; 2775-76; 2782);

--that he had received proceeds from the crime (PC-R. Vol. 17, p. 2814);

-that police had a picture of Kocolis in the room with one of the murder weapons on a table on the day of the crime (PC-R. Vol. 17, p. 2850).

--that the hotel “party” purportedly arranged by Mr. Griffin after the murders was at a Sable Park Hotel called the Camberley, a hotel where Mr. Kocolis’ father worked (PC-R. Vol. 16, p. 2735).

This information was never conveyed to Judge Downey. Kocolis himself testified at the evidentiary hearing that he believed he had a deal with the prosecution that he gave him immunity.<sup>11</sup> Clearly, there was debatable evidence

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<sup>11</sup>The prosecution denied that Kocolis had been given immunity, even though he believed he had been given immunity (PC-R. 4430-4431). Detectives Pupke and Snipes told Kocolis during his 11/10/95 statements that they were “not worried” about whatever crimes he had committed, and that he was not “getting in trouble” for the crimes (PC-R. 2796;2809). They told Kocolis that if they were going to put him

of whether Mr. Griffin was the person who planned the robbery. Judge Downey's reasons for distinguishing the two defendants and sentencing Mr. Griffin to death were seriously flawed.

***B. Evidence of Lopez's life sentence would have mitigated Griffin's sentence to life.***

As in *Scott*, Lopez's life sentence was not imposed until after his jury trial. Mr. Griffin's direct appeal had concluded and his original and amended post-conviction motions had been filed. The record shows that Mr. Griffin had no prior criminal record. The trial court failed to find as mitigation Mr. Griffin's massive drug use because trial counsel failed to investigate and discover that Mr. Griffin had been under the influence of massive cocaine abuse at the time of the crime. Trial counsel also failed to investigate or present evidence that Mr. Griffin and Mr. Lopez were dominated by drug dealer Kocolis. Both men depended on Kocolis for drugs and a house to live it.

Because trial counsel failed to investigate and present evidence, the trial judge did not know that it was Kocolis who had recruited people to commit the robbery, not Mr. Griffin, as Kocolis had told police in the arrest affidavit (PC-R. 3276).

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in jail, they would have done it already (PC-R. 2833; 2851).

Stephen Montalvo testified that Lopez was a drug runner for Kocolis to prevent Kocolis from “being busted.” (PC-R. 4449). Initially, Lopez was Kocolis’ only seller until Mr. Griffin’s drug habit was greater than what he was selling. (PC-R. 4450). Lopez was a “do boy” for Kocolis, and he made Mr. Griffin one, too (PC-R. 4464). He said that Mr. Griffin was “really ate up on cocaine...it took total control of him.” (PC-R. 4454).

At first, Mike was a real nice guy and then he was always coked up, mentally unstable and desperate (PC-R. 4450-54). In the two months leading up to the crime, Mike was coming to Nick’s house to buy coke “everyday” and he would buy 2 to 4 eight balls a day (7-14 grams). *Id.* Mike owed Nick so much money he had to start “working it off and whatever Nick wanted Mike to do, Mike did.” (PC-R. 4464). That was the way Kocolis ran his business.

Mr. Montalvo testified that Kocolis approached him before the robbery about a “lick” he wanted to do and Montalvo turned him down. Kocolis acknowledged afterward that he had been referring to the ServiceAmerica robbery. (PC-R. 4455). Mr. Montalvo was “positive” Kocolis planned the robbery. He said Nick would burn or cut himself to intimidate people to show how tough he was (PC-R. 4457-59). Mr. Montalvo once saw Nick drink transmission fluid just to show he was a tough guy. *Id.* In his opinion, Kocolis was in charge of planning the crime (PC-R. 4466).

He said “nobody did nothing without Nick’s approval.” (PC-R. 4459).

Mr. Montalvo’s testimony was corroborated by Chad Neeld, who initially sold drugs for Kocolis, then started his own separate drug operation. He observed firsthand how Kocolis conducted business (PC-R. 4611). Kocolis did not do the selling himself, he had other people do it for him by getting them hooked on drugs then making them work off their debt (PC-R. 4612). At the time of the crime, Montalvo, Lopez and Griffin worked for Kocolis. Mr. Griffin was using “massive” amounts of cocaine (PC-R. 4615). He saw Mike snorting and smoking cocaine. Mr. Griffin’s drug use progressively got worse. He turned from a clean cut kid who did not fit into the partying lifestyle to being paranoid and jittery with poor personal hygiene (PC-R. 4614-16).

Mr. Griffin would do whatever Nick wanted done, like collecting money(PC-R. 4617). He described an instance in August, 1995, when two kids had ripped off Nick for some money. He and Mike were sent to retrieve it (PC-R. 4617-18). Mike’s behavior was “a little wild” and he was ready to get the job done. Mike was substantially different than when he had first met him. (PC-R. 4618).

In September, 1995, Kocolis attempted to recruit Neeld to do some work for him, and he talked about a new way to get money instead of selling drugs (PC-R. 4619). He had inside information from the police department that they were

targeting him, and they were coming to raid his house *Id.* Neeld said he was willing to do the job but nothing happened beyond conversations. He then learned what happened at ServiceAmerica on October 7, 1995 (PC-R. 4620). The last time he saw Mr. Griffin was on the day of the crime at Nick's house, partying and smoking cocaine.

Beside his deposition, Mr. Neeld was not contacted by Mr. Griffin's attorneys, but he testified at Mr. Lopez's trial about Lopez's drug use. (PC-R. 4623). He would have been willing to testify for Mr. Griffin as well but he was never asked.

In Judge Downey's sentencing order, the distinguishing facts that justified the imposition of a death sentence was that Mr. Griffin had planned the robbery because he had previously serviced the refrigeration system with his father at ServiceAmerica, and Griffin had procured the guns for the crime. However, information that it was Kocolis who procured the weapons and planned the robbery was not presented to the judge either by the ineffectiveness of counsel or by the State's withholding of a deal with Mr. Kocolis. Nor was the judge aware the Mr. Griffin had ingested massive amounts of cocaine just prior to the commission of the crime.

Had the judge known that Mr. Lopez had received a life sentence and that Mr. Griffin was so addled by drugs that he could not plan, no less, carry out the crime,

the result probably would have been a life sentence. Had trial counsel presented evidence from the Sheriff's office statements in their possession that police knew that drug dealer Kocolis, who was on probation for burglary, was the "master link" in the crime and had what he believed was immunity for his participation, the trial judge probably would have given Mr. Griffin a life sentence.

This information was mitigating and was not presented to the trial court through no fault of Mr. Griffin. This disparate treatment is what was anticipated in *Scott*. See *Slater v. State*, 316 So. 2d 539 (Fla. 1975) [defendants should not be treated differently upon the same or similar facts]; Cf. *Hannon v. State*, 941 So. 2d 1109, 1144 (Fla. 2006)[no disparate treatment where Hannon more culpable defendant]; *Ventura v. State*, 794 So. 2d 553, 571 (Fla. 2001)[not equally culpable when Ventura was triggerman and received insurance proceeds]. Here, both defendants were the triggermen.

Neither the trial court nor the prosecution could say who fired the fatal shots that killed the victims. Testimony showed that Mr. Griffin carried a shot gun at the time of the crime and Mr. Lopez carried a 9mm pistol . The medical examiner testified that Mr. McCallops suffered five gunshot wounds, four from a hand gun and one from a shot gun (R. 164, 196). The medical examiner testified that the victim was able to move between the shot gun wound and the rest of the shots



indicating the he was still alive (R. 200). Mrs. McCallops suffered two gunshot wounds, both from a hand gun (R. 181, 192). Six nine millimeter shell casings were found at the crime scene inside the freezer (R. 230-32). Shotgun wadding and #4 pellets were also found in the freezer, but technicians could not determine where the person with the shot gun was standing when the shot was fired (R. 235-36). It was not clear who fired the fatal shots, but it was clear that more shell casings were found from the 9mm and more wounds were caused from that gun.<sup>12</sup>

The medical examiner testified that Mr. McCallops died from the shotgun wound, and Mrs. McCallops died from a 9 mm bullet wound, thus both defendants were equally culpable. Det. Snipes testified there was no evidence to suggest that Mr. Griffin possessed the handgun on the day of the crime (RSupp2. 333).

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<sup>12</sup>At trial, Det. Snipes testified that Lopez told Kimberly Ally that Mr. Griffin shot Mr. McCallops and he then shot both victims in the head (RSupp2. 332-33). Cynthia Lambert, Lopez's girlfriend, told Det. Snipes in an interview that Lopez watched the victims while Griffin got the money from the money lockers. He then returned and shot the victims and told Lopez to make sure "it was done." (RSupp1. 88). Lopez admitted he fired the 9mm during the robbery. *Id.*

The prosecution's theory that Mr. Griffin was the mastermind of the crime was discredited by the detectives' own words during their questioning of Griffin and Kocolis and by witnesses at the evidentiary hearing. Detective Snipes testified that he knew Mr. Griffin sold drugs for Kocolis and had a dependent relationship with him (RSupp1. 79). He knew that Kocolis "assisted" in planning and receiving proceeds from the robbery (RSupp1. 81, 90). He knew Kocolis paid for and provided the shotgun and the handgun that were used in the robbery (RSupp1 81, 99-100). Yet, Kocolis was never indicted for any crime relating to this case.<sup>13</sup> Mr. Griffin said he was afraid of implicating Kocolis during Det. Snipes questioning but agreed to assist police (RSupp1. 85-86). Kocolis had a lengthy criminal history for drug dealing and burglaries. Mr. Griffin had no criminal history.

Numerous witnesses testified at the evidentiary hearing that Mr. Griffin was ingesting massive amounts of cocaine at the time of the crime. Even though Judge Downey found no indication that Mr. Griffin had ingested drugs prior to the crime, Kocolis testified that on the day of the crime they had been doing cocaine all day, "the night before and...the day before that, too, continually."

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<sup>13</sup>At the time of his post-conviction testimony, Kocolis was serving time for armed trafficking, delivery of cocaine, felony possession of a firearm, felony possession of marijuana and another trafficking charge stemming from a 1996 crime (PC-R. 4404-05).

Thus, Mr. Griffin meets the *Scott* criteria. Even if he did not, this Court could still conduct a *de novo* proportionality review based on the corrected facts from the post-conviction proceeding.

### ***B. Proportionality Review***

Proportionality review in death cases rests on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, Sec. 9, *Fla. Const*; *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). This Court conducted a proportionality review at the time of Mr. Griffin's direct appeal, before Mr. Lopez had been sentenced to life by a jury on the same facts as those against Mr. Griffin.

After Mr. Griffin's trial and direct appeal were concluded, the State offered Mr. Lopez a life plea when he became competent (PC-R. 4569). Mr. Griffin pled guilty and waived penalty phase jury but was never given the benefit of the deal because his attorneys' understanding was it was a "package deal." (PC-R. 4505, 4511). Mr. Wells was "incredulous" when he found out that Lopez had been offered a life deal by the State (PC-R. 4569). Wells admitted that much of their lack of investigation was "colored" by what they thought the resolution of the case would be—a life plea (PC-R. 4522-23; 4549). Wells' investigator spent "minimal time on the case," 3.5 hours (PC-R. 4501). The attorneys never spoke with Kocolis or had

their investigator do it. Wells was not aware that Kocolis believed he had immunity and would have wanted to present that to the judge (PC-R. 4518).

Wells admitted he was living and working in Louisiana at the time of Mr. Griffin's trial. He was going through a "fairly egregious" divorce and broke his hip taking him "out of commission" for a couple of months with hip surgery (PC-R. 4283). He also had three bar complaints pending from other clients with the Florida Bar during the time he was to be working on Mr. Griffin's case (PC-R. 4282-4289; Def. Ex. 2-4). After Mr. Griffin's trial, Mr. Wells was suspended for ninety (90) days from one of the pending bar complaints (PC-R. 4289, 4294; Def. Ex. 2-4).

Mr. Wells testified that his theory of defense was that "but for 7 months of his life, [Mr. Griffin was] a decent guy." (PC-R. 4514). Mike was unique in that he had a job, close family, and was a model prisoner (PC-R. 4515). The problem is that the trial judge was focused on the 7 months that Mr. Griffin was doing massive amounts of cocaine that trial attorneys did not investigate or present to the judge.

Mr. Wells testified that he would have wanted to put on evidence that someone else masterminded the crime (PC-R. 4516-17). He didn't recall working up a social history or getting medical records of Mr. Griffin's traumatic head injury (PC-R. 4520). He was aware of Mr. Griffin's suicide attempts, but he was not

aware of his family's history of drug and alcohol abuse and would have presented that information to Judge Downey as well (PC-R. 4521).

Mr. Lopez's attorneys, however, presented a voluntary intoxication defense at guilt phase to set up a full mitigation case featuring testimony of his drug use, dependence on Kocolis. Lopez's attorneys argued that Mr. Griffin had already pled guilty and been sentenced to death (PC-R. 4623). Even though there was no question that Mr. Lopez was in possession of the 9 mm pistol at the time of the crime and that a 9mm bullet was responsible for the death of at least one of the two victims, he received a life sentence.

Had Mr. Griffin's attorneys presented the mitigation evidence that was readily available in conjunction with knowledge that Mr. Lopez had gotten a life sentence, Mr. Griffin also would have received a life sentence. Mr. Griffin had no previous criminal record. The aggravating circumstances against Mr. Griffin were the same four aggravators that were found against Mr. Lopez. The only difference being that Mr. Lopez's attorneys were effective. Mr. Griffin's attorneys were ineffective and failed to investigate and prepare a defense for penalty phase (PC-R. 1408). The attorneys advised Mr. Griffin to plead guilty without a guarantee of a sentence, waive a jury for penalty phase, waive a *Spencer* hearing, waive a PSI, waive opening statements. Mr. Griffin's attorneys had him waive everything. But

it was not until the post-conviction proceedings that the complete facts were presented.

This Court's prior proportionality review on direct appeal was premature and incomplete based on the "very little mitigation" presented by ineffective counsel to the trial court. Prior to Mr. Lopez's trial and sentencing, this Court conducted a proportionality review on Mr. Griffin's case based on the fact findings of Judge Downey. *Griffin v. State*, 820 So. 2d 906, (Fla. 2002).

This Court acknowledged that in conducting its review, it makes a "comprehensive analysis in which it determines whether the crime falls within the category of both the most aggravated and the least mitigated of murders," *Id.*, at 916, citing *Cooper v. State*, 739 So. 2d 82, 85 (Fla. 1999). On direct appeal, this Court found Mr. Griffin's sentence proportional based on four aggravators: prior capital felony (for the contemporaneous murder); during the commission of a kidnapping (for moving the victims from one part of the building to another); avoiding arrest (witness elimination) and pecuniary gain (the robbery). *Griffin*, 820 So. 2d at 916-17.

This Court reviewed the mitigation presented to Judge Downey. No prior criminal history was given little weight. This Court found that the accomplice in a capital felony mitigator to have been "partly established," but rejected it because

“Griffin planned the events leading to the murders, procured the weapons and carried out the plans.”*Id.* This was given little weight. Judge Downey gave great weight to Griffin’s family and employment backgrounds and assigned little weight to remainder of the statutory mitigators. This Court adopted his findings.

Regarding nonstatutory mitigation, the trial court gave moderate weight to Mr. Griffin’s good jail conduct and courtroom demeanor and moderate weight to his remorse for the two deaths. This Court agreed and found the mitigating evidence “minor” and “insubstantial” and ultimately decided that there were four strong aggravators and “very little mitigation.” *Griffin*, 820 So. 2d at 917.

Justice Anstead dissented stating that the pecuniary gain and kidnapping aggravators were both based on the same “aspect of the criminal episode and should have been considered a single aggravating circumstance.” *Griffin*, 820 So. 2d at 918; citing *Cherry v. State*, 544 So. 2d 184, 187 (Fla. 1989). Justice Pariente concurred.

Based on this Court’s mandate to ensure uniformity in death penalty law, it is this Court’s responsibility alone to perform this unique function of reviewing Mr. Griffin’s case with accurate and complete facts in light of the substantial mitigation that was available to trial counsel. The post-conviction court has already found that significant and compelling mitigation was not presented to Judge Downey and that counsel were ineffective for failing to adequately investigate and prepare their

case. Mr. Lopez received a life sentence based on these same facts and aggravators as Mr. Griffin's case.

Had trial counsel presented the available evidence, the distinguishing factors Judge Downey found as a basis for a death sentence are no longer valid. This Court should conduct a new proportionality review, affirm the grant of relief and reduce Mr. Griffin's sentence to life in prison without the possibility of parole.

***C. Conclusion***

Mr. Griffin entreats this Court to find that his sentence to death was either disproportionate or disparate and grant his request to impose a sentence of life without the possibility of parole.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by electronic filing and United States Mail postage prepaid to Clerk of Court, Florida Supreme Court, 500 Duval Street, Tallahassee, FL ; Ms. Candance Sabella, Asst. Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607 on this 5th day of October, 2009.

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Petition for Writ of Habeas Corpus is formatted in Microsoft Word, with 14 point New Times Roman font in compliance with Fla. R. App. P. 9.100(1) and 9.210(a)(2).

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