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

REPLY/CROSS-ANSWER BRIEF OF APPELLANT

TERRI BACKHUS
Florida Bar No. 946427
Special Assistant CCRC-S

CELESTE BACCHI
Florida Bar No. 0688983
Assistant CCRC-S

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

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I. Argument I in Reply – Ineffective Assistance in Guilt Phase

A. The trial court had jurisdiction to grant the motion to withdraw the guilty plea in post-conviction.

Jurisdiction over the 3.170(l) motion was properly before the post-conviction trial court. While Fla. R. Crim. Pro. 3.170(l) requires a defendant to file a motion to withdraw his plea within 30 days after rendition of his sentence, Mr. Griffin did not make such a motion at that time because neither defense counsel informed him of this option (PCR. 4509-10; 4281). Thus, Mr. Griffin raised the involuntariness of his plea in post-conviction through both a 3.170(l) motion, and in a 3.851 claim of ineffective assistance of counsel. Cf. Griffin v. State, 820 So. 2d 906 (Fla. 2002).

The circuit court could point to only one district court of appeal case which specifically holds that a reviewing court is absolutely forbidden to review 3.170(l) motions filed outside of the 30-day period prescribed by the rule. See Gafford v. State, 783 So. 2d 1191 (Fla. 1st DCA 2001). However, in his initial brief, Mr. Griffin cited two cases in which the procedural issues surrounding a Rule 3.170 motion were atypical, and the defendants' motions to withdraw were ultimately granted. See Kilgore v. State, 688 So. 2d 895 (Fla. 2002); Johnson v. State, 834 So. 2d 384 (2nd DCA 2003). It is not clear from those cases whether the defendants had been advised by their attorneys that

they had the option of withdrawing their guilty pleas. Nor is it evident in the Kilgore opinion when he filed his **first** motion to withdraw, and it is unknown what extra-record material the State relied on to recite the dates. The State argues that Kilgore does not support Mr. Griffin's argument because Kilgore's **supplemental** motion to withdraw his plea was filed only "*16 days after he changed his plea*, not after Kilgore filed his appeal as asserted by defendant" (ACB 54) (emphasis in original). However, the State ignores the portion of the Kilgore opinion it cited in its own brief: "When a sentence of death was announced, however, 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. **Although a notice of appeal had been filed,** this Court relinquished jurisdiction in order that it might address the motion." Kilgore, 688 So. 2d at 897 (emphasis added). This language indicates that Kilgore's initial 3.170(l) motion was filed beyond the 30 days permitted by the rule.

However, while counsel could have misunderstood the dates of the Kilgore motion to withdraw, the bases for relief for Mr. Griffin remain the same, and the circuit court should have followed the precedent set in Kilgore and Johnson and exercised its discretion to rule on the motion. Mr. Griffin was never informed by trial or direct appeal counsel that he had the right

to move to withdraw his plea. 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. Snodgrass v. State, 837 So. 2d 507, 508 (Fla. 4th DCA 2003); see also Defendant's Initial Brief, Argument I.

B. Trial counsel did not investigate viable defenses before advising his client to take a guilty plea, therefore making the plea unknowing and involuntary.

The prevailing case law and Florida Rules of Professional Conduct, which mirrored the American Bar Association Guidelines in place in 1995-97, demanded that trial counsel investigate and inform their client of possible defense options before advising him to plead guilty. Fla. R. Prof. Cond. 4-1-1; 4-1-4; Rompilla v. Beard, 545 U.S. 374 (2005). The fact that a defendant gives detailed testimony, or that the facts surrounding a murder are not favorable, does not relieve counsel of his duty to investigate. Porter v. McCollum, 130 S. Ct. 447 (2009). The State ignores these clearly established requirements, which imbue trial counsel with the duty to investigate and prepare **before** advising their client what course of action is best. The fact remains that trial counsel could not and did not properly counsel Mr. Griffin

regarding possible defenses, because they did not perform a reasonable investigation which would have revealed a wealth of information supporting a voluntary intoxication defense.

The State argues that Mr. Griffin's statements negated that he had any legal defense of voluntary intoxication (AB at 65). However, the cases the State relies on in support do not obviate clearly established caselaw which mandates that defense counsel investigate before advising their client of his possible defenses (see id.). None of those cases involved a situation where the defendant has pled guilty before being informed of his possible defenses. Moreover, a defendant's statement is just one of the many factors that should have gone into counsel's consideration before advising Mr. Griffin on his defense. See Williams v. Taylor, 529 U.S. 362, 396 (2000) (counsel has an obligation to conduct a thorough investigation of defendant's background).

The problem here is that neither Wells nor Mills considered any factors other than a plea bargain. Generally, the worse the facts are, the more critical it is to investigate the case because the stakes are so much higher for the defendant. Cf. Rompilla v. Beard, 545 U.S. 374 (2005); Fla. R. Prof. Cond. 4-1-1 (Comment: "…the required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence").

Despite its best efforts, the State cannot spin the facts to justify counsel's omissions. While counsel retained investigator Paul Barko, Wells said he "spent minimal time on the case" (PCR. 4501). He only worked 3.5 hours on Mr. Griffin's capital murder case with his attention directed to "get as much information together" about Kocolis and his associates (even though he never actually spoke with them). He was unreasonably not instructed to follow clear evidence regarding Mr. Griffin's crippling addiction, or whether Mr. Griffin was intoxicated at the time of the crime.

According to Wells, there were 283 possible witnesses (PCR. 4503-04). While counsel attended 13 of the 22 depositions taken in the case, lead counsel was absent at nine of them. Co-counsel Mills, an attorney who had never done a death penalty case to completion, attended four depositions. That left five depositions where Mr. Griffin was not represented by anyone. Mr. Lopez's interests were directly adverse to Mr. Griffin. The fact that counsel may have received copies of the depositions conducted by co-defendant Lopez does not relieve counsel of the responsibility to ask questions specific to Mr. Griffin. Moreover, it was not Lopez's responsibility to ask questions that might benefit Mr. Griffin. In fact, he would likely be inclined to do the opposite, since they were each blaming the other for the fatal gunshots to the victims and their defenses antagonistic to each other.

Mr. Griffin was hardly the evil genius behind the botched robbery, but counsel never investigated beyond 3.5 hours to prove Kocolis was the mastermind (PCR. 4500-01). Counsel felt "that Kocolis was very much involved in what had happened and certainly leading up to what had happened" (PCR. 4500-01). He said he "would have wanted to put on information that someone else masterminded the crime" and acknowledged he could have put that information in through direct testimony or through a mental health expert (PCR. 4516-17). Wells also admitted that he would have presented evidence regarding the extent of Mr. Griffin's addiction (including amounts of drugs used and his family history of addiction) and the severity of his brain damage, but he failed to obtain that information (PCR. 4521, 4541).

No reasonably competent defense attorney would fail to investigate the crime, no less their client's mental state during a severe cocaine addiction. Wells attempted to justify his failure to present a voluntary intoxication defense by claiming that he did not have any facts that led him to believe Mr. Griffin's cocaine use "in any way minimized his conduct" (PCR. 4541) – yet such information was at his fingertips, had he only reasonably pursued it.[1]

[1] In contrast, counsel for Lopez **did** pursue and present readily available evidence regarding his voluntary intoxication; he ultimately received a life sentence.

For example, had anyone representing Mr. Griffin attended Chad Neeld's deposition, they would have learned that Neeld saw Mr. Griffin on the day of the crime smoking cocaine, and that Neeld had been recruited by Kocolis to commit the robbery before he asked Mr. Griffin and Mr. Lopez to commit the robbery (PCR. 4620; 4622; Def. Ex. 10). Similarly, trial counsel deposed state witness Melvin Greene on September 11, 1996. Although Greene saw Mr. Griffin an hour before the crime, Wells never asked him about his client's demeanor, behavior or drug use. Had he done so, he would have learned that Greene observed Mr. Griffin acting sketchy and paranoid, "like he was on drugs;" his hands were twitching and his eyes appeared "bug-eyed" one hour before the crime (PCR. 4395). The red flags of intoxication were missed or ignored.

A plethora of other State witnesses reported that Mr. Griffin was consuming massive quantities of cocaine in the weeks, days and hours leading up to the crime. Moreover, even if Kocolis would have exercised his right under the Fifth Amendment not to speak about the crime (as he did at the evidentiary hearing), nothing prevented counsel from having Kocolis speak with Dr. Maher or some other mental health expert about Mr. Griffin's cocaine use on the day of the crime. Instead, the trial judge never knew that Mr. Griffin picked up "9-10 grams of coke right

before the crime" and did cocaine with Kocolis just prior to leaving for the Service America (PCR. 4413-15).

No "fraud" can be perpetrated on the court when the State's own witnesses confirm that Mr. Griffin was intoxicated at the time of the crime (AB 67). The State cannot at this late juncture suggest that its own witnesses are not credible. Kocolis, who received immunity from the State, said he "did drugs with Mike right before the crime" (PCR. 4415). State witnesses Melvin Green, Steven Montalvo, Chad Neeld, Melissa Clark, Mary Hall, Kimberly Ally and Heather Henline all observed Mr. Griffin's addiction (PCR. 4453-54; 5114; 5122-23; 4395-97; 4615-16; 4620-21), and Kocolis, Green and Neeld observed Mr. Griffin using large quantities of cocaine an hour before the crime. Judge Downey did not know this when he held that there was no evidence that Mr. Griffin was under the influence of drugs at the time of the crime (R. 2062-75).

Contrary to the State's argument, trial counsel donned blinders early on and kept them there until sentencing. Mr. Wells believed "this was a case where there's really only one option on the table, and it's a death penalty" so that affected his preparation (PCR. 4503-04). According to co-counsel Mills, there was an "overwhelming amount of evidence. . .that Mike, even though he had a great deal of knowledge of this business, was probably not the person who had directed this. . .he was pretty

much under the hand of another gentleman [Kocolis],” but they “opted to pursue moving towards trying to resolve the case without a trial and so a lot of those things got put on the back bench in an effort to try to resolve the case” (PCR. 4260-61).[2]

The State suggests that Mr. Griffin cannot “seriously allege” an intoxication defense in light of the facts of the case (AB 66). The issue, however, is not whether the State believes the defense would have prevailed. It is that Mr. Griffin never had a choice to decide whether he wanted to pursue it. Trial counsel did not investigate the possibility that Mr. Griffin, a drug addict, was high on cocaine at the time. Trial counsel did not consider telling Mr. Griffin of the option of using these facts as a defense. Cf. Whatley v. State, 7 So. 3d 1126 (Fla.

[2] Presumably, of course, if a plea was counsel’s sole defense in guilt phase, then the first thing that trial counsel should have done was to actually convey a firm plea offer to the prosecution. However, they failed to give any plea offer to the prosecution. Prosecutor Glen Martin testified that the only way a plea offer would have been entertained by his office was for trial counsel to offer it. Mr. Martin testified that “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…Since we never had a firm offer from the two counsels, that was a far as it went.” (PCR. 4167).

Clearly, there was no plea bargain on the table even though defense counsel told Mr. Griffin and his family that there was. The trial court rightly faulted trial counsel for this omission in granting penalty phase relief. Yet, the court did not recognize that the same mistakes were fatal to the voluntariness of the guilty plea. The State can point to no case where any court has found it reasonable attorney conduct for trial counsel who have chosen a plea as their guilt phase defense to fail to offer one to the prosecution.

2ndDCA 2009) (counsel's failure to investigate factual defense resulting in ill-advised guilty plea is facially sufficient attack on conviction). Counsel made this decision despite the fact that Wells had been successful with the defense in the past (PCR. 4513).[3]

Thus, it was not "sheer sophistry" to suggest that Mr. Griffin could have chosen a voluntary intoxication defense, but sheer ignorance of the defense at all that merits relief. The test is not whether Mr. Griffin would have prevailed on the defense had he chosen. The test is whether any reasonably competent trial counsel with two years to prepare for trial would have failed to investigate Mr. Griffin's addiction, family history of addiction or social history. Cf. Strickland v. Washington, 466 U.S. 668 (1984), or whether any reasonably competent trial attorney would fail to "explain matters. . .to permit the client to make informed decisions regarding his representation." Fla. R. Prof. Conduct 4-14 (b).

Here, counsel obtained no medical records on their client, despite a cooperative family and client. They presented no social

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[3] Though Wells testified that he did not believe juries liked such a defense, he was not litigating to a jury. He was presenting his evidence to Judge Downey, a judge he considered favorable and one who purportedly knew the technical aspects of the defense. Wells cited to no reason why he could not investigate such a defense. Instead, Judge Downey was left with the impression that Mr. Griffin was sober at the time of the crime and the mastermind, when the opposite was true.

history. They did not discover organic brain damage. They never asked their client about the amount of drugs he was taking. Despite two documented suicide attempts, a pellet gun injury to the head among other head injuries that caused unconsciousness, none of these events were presented to the trial judge in the context of the massive cocaine addiction Mr. Griffin suffered at the time of the crime. Had Mr. Griffin known of these defenses he would not have pled guilty and would have gone forward with trial. See Grosvenor v. State, 874 So. 2d 1176, 1181 (Fla. 2004). Family members' testimony at the evidentiary hearing corroborated those facts when they said they would not have recommended to Mr. Griffin that he plead guilty had they known other defenses were available to him. Under the proper test, Mr. Griffin's plea should have been considered unknowing and involuntary.

II. Argument II in Reply – No adversarial testing could occur when the State withheld exculpatory and impeaching evidence that was critical to the trial judge's decision.

In order to establish a violation of Brady v. Maryland, 373 U.S. 83 (1963), a defendant must demonstrate (1) that favorable evidence, either exculpatory or impeaching, was (2) willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). The circuit court's denial

of relief on this claim (PCR. 1409-12) was not supported by the facts or the law, and is therefore in error.

Regarding suppression, the circuit court found Kocolis's testimony that he was granted use immunity to be not credible, and therefore this factor was not met (PCR. 1411). The court pointed to the testimony of ASA Bruce Bartlett, who maintained that only Bernie McCabe, the elected State Attorney, had the authority to grant immunity, and that he never contacted McCabe to obtain such authorization (PCR. 5466). However, both the circuit court's order and the State's answer brief completely fail to address the fact that ASA Glenn Martin **acknowledged the existence of a use immunity deal** during his cross-examination of Kocolis at the evidentiary hearing:

> 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 in this case, 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).

It not until ASA Martin acknowledged the existence of the use immunity deal during his cross, and Kocolis affirmed his understanding of the arrangement, that Mr. Griffin and post-conviction counsel were aware such a deal existed. Only after the State revealed it did counsel ask to amend his 3.851 motion with a Brady claim. It is not "piecemeal" litigation when the State is the party who reveals the information. [4]

The trial court and the State make much of quoting ASA Bartlett, one of two prosecutors involved in the Griffin case, who claimed **he** did not offer immunity to Kocolis (PCR. 5466). But clearly someone at the State Attorney's Office or in law enforcement led both Kocolis **and** ASA Martin to believe there was a use immunity deal in place. If there were no such deal in existence, why would ASA Martin have asked Kocolis, "you were given what's called use immunity, were you not?" (PCR. 4431).

Nowhere in its brief does the State acknowledge that it is imputed with the knowledge of all of the State actors, including

[4] New disclosures which lead to evidence presented that does not directly correspond to the Rule 3.851 motion is not an unusual development in post-conviction proceedings. For example, in Jones v. State, 709 So.2d 512, 518 (Fla. 1998), evidence of a Brady violation was discovered on the eve of an evidentiary hearing. There, the defendant was permitted to present the evidence and allowed to subsequently orally amend his successor Rule 3.850 motion to include a previously unpled Brady violation. Cf. Way v. State, 760 So.2d 903, 916 (Fla. 2000) (no error where testimony was excluded by the judge at the evidentiary hearing as outside the scope of the 3.850 motion because "Way never attempted to amend his post-conviction motion," not even during the appeal). The trial judge properly allowed the 3.851

all of the prosecutors, State Attorney investigators (such as Mr. Porter) and law enforcement. Kyles v. Whitley, 514 U.S. 419, 436 (1995) (knowledge of police is imputed to the State whether or not the prosecution is aware of the information). The State did not present the testimony of both prosecutors who were involved in the Griffin case, nor of State Attorney McCabe, to establish that none of them gave Kocolis an immunity deal. Nor did it present the testimony of Pinellas County detectives Pupke or Snipes to deny that they had offered Kocolis immunity – even though their questioning clearly indicated that they "aren't worried about" his involvement in the case and would "work with [him]" if he provided valuable information (PCR. 2832-34, 2847, 2851, 2908).

Moreover, Bartlett acknowledged that Kocolis was "slick," "knew the system," and "was not real anxious to cooperate" in the beginning (PCR. 5465, 5477). Yet he could not explain why Kocolis (who was on active probation at the time he was questioned by police) suddenly decided, after several weeks and two interrogations, to provide information implicating himself and Mr. Griffin without an immunity deal. Indeed, Detective Pupke's own statements during Kocolis' interrogations lend credence to Kocolis' belief that he had immunity. He told Kocolis police were "not concerned" about his drug dealing even though he was on

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amendment, and it was within his discretion to do so.

probation (PCR. 2796; 2809), that they were not going to put him in handcuffs (PCR 2833); or "weren't looking to" prosecute him for procuring the 9 mm gun Lopez used in the crime (PCR. 2851). Perhaps most importantly he was told "if what you give us is valuable, **we will work with you**" (PCR. 2851) (emphasis added).[5] Finally, the fact remains that Kocolis was never prosecuted for his role in these crimes, despite the wealth of evidence the State had against him.

The State cannot now pretend that immunity was not provided to Kocolis by hiding behind ASA Bartlett's ignorance about his case.[6] Bartlett's testimony was the only testimony that there was not a deal. In contrast, Kocolis, Martin, Ally and Henline all testified that they had gotten deals in exchange for giving information against Mr. Griffin. Unless the police statements and the state's own witnesses are all now testifying falsely, the weight of the evidence produced at the evidentiary hearing showed that immunity deals existed which were not disclosed to the defense. The State cannot have it both ways. Either their

[5] While it is true that trial counsel had access to the transcripts of those recorded conversations at the time of trial, it was not until the evidentiary hearing that Mr. Griffin learned that Kocolis had use immunity, as revealed by Mr. Martin and corroborated by Kocolis. Trial counsel also testified that they had no idea that Kocolis was granted immunity (PCR. 4559-60).

[6] It was unclear why Bartlett did not know that Steve Porter, his own state attorney investigator, testified favorably for state witness Kimberly Ally to get a more favorable sentence on pending charges (PCR. 5421-25). Clearly, Mr. Bartlett was not

witnesses are credible or they are not. Contrary to the State's argument and the trial court's belief, Bartlett was not the last word on whether deals existed. Even if he were, he was imputed to have known what law enforcement, the other prosecutors, and his own investigator were telling the witnesses. See Kyles, 514 U.S. at 436. Therefore, the trial court's order finding that no plea deal existed was incorrect and simply not based on competent and substantial evidence.

Regarding the materiality prong of Brady, Mr. Griffin asserted that had trial counsel been aware of information regarding plea deals, he would have shown that Kocolis, not he, was mastermind of the crime, and would have provided support for his argument that he committed the crime under Kocolis' domination. The circuit court found that Mr. Griffin did not prove that the Kocolis deal was material, because Mr. Griffin admitted that he was involved with the murders, and that "there was substantial evidence that the Defendant was not Kocolis' 'can-do' person and that the Defendant acted independent of Kocolis" (PCR. 1411). The circuit court's finding is not supported by competent and substantial evidence.

It did not matter whether the State called these witnesses to testify or not. What matters is whether the information they possessed could have been used by defense counsel. See Banks v.

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privy to all that was happening on his case.

Dretke, 540 U.S. 668 (2004). Here, trial counsel testified that the suppressed evidence was material and impeaching to the State's case in aggravation. Specifically, Wells testified that he did not have information that Kocolis had been granted use immunity by the State Attorney's Office, but if he had, such information would have been valuable to his defense (PCR. 4559-60). Wells directed his investigator to "get up as much information [on Kocolis' involvement] as he could" because he wanted to present information that someone else masterminded the crime (PCR. 4500-01). Wells considered an immunity deal for Kocolis as material because Judge Downey "certainly would have known what immunity was…and in a case of this magnitude, it's a pretty good free ride" (PCR. 4561). Kocolis would not have been able to exercise his Fifth Amendment rights not to incriminate himself if Wells had subpoenaed him to testify solely regarding an immunity deal (PCR. 4559-61).

The State also argues that the information of the immunity deals was not material in that it did not "exculpate" Mr. Griffin. This is the same erroneous reasoning adopted by the trial court. A Brady violation applies equally to impeachment evidence. See Strickler, 527 U.S. at 281-82 (1999) (prejudice accrues where suppressed favorable evidence is impeaching to the State's case). Here, the State argued that Mr. Griffin should receive the death penalty because he was solely responsible for

the robbery and murders and that he was the mastermind behind the planning of the crime. Thus, the immunity deals given to the State's witnesses – particularly Kocolis – were important to show the judge that others, who were not addicted to cocaine and high, were involved in the planning and received proceeds and benefits from the crime. The significance of the withheld evidence was not to exonerate Mr. Griffin, but to impeach and rebut the aggravating factors and the state's law enforcement witnesses. Cf. Mordenti v State, 894 So. 2d 161 (Fla. 2004) (in determining prejudice court must analyze impeachment value of undisclosed evidence).

The State also argues that there was no prejudice because the "jury and judge" heard Mr. Griffin's own statements about his participation in the crime (ACB at 80). However, there was no jury – the judge was the sole sentencer in deciding the severity of punishment. Information that several other state witnesses had been given immunity, particularly Kocolis – the sober mastermind who orchestrated the crime – would have rebutted the judge's erroneous belief that Mr. Griffin acted alone in planning the crime. Moreover, this information could have colored advice to Mr. Griffin on his testimony.

Finally, the prejudice here must be considered cumulatively with trial counsel's ineffectiveness in failing to investigate the facts of the case, not "item by item" as the State urges. See

Kyles, 514 U.S. at 436. Yet neither the circuit court nor the State properly addressed the prejudice which accrued from the trial court's failure to hear the Brady evidence (e.g., Kocolis received immunity despite the fact that he planned and directed the crime) in conjunction with evidence trial counsel unreasonably failed to present (e.g., the severity of Mr. Griffin's cocaine addiction, his intoxication at the time of the crime, the extent and effects of his brain damage, and his history of addiction). In the sentencing order, the trial court specifically found that Mr. Griffin alone was the mastermind of the crime and that he was not under the influence of drugs at the time of the crime (R. 2063, 2065-66, 2070-71). Yet both of these factors would have been rebutted had trial counsel rendered effective assistance and had the Brady information been disclosed.

Despite prevailing law to the contrary, the State still clings to its argument that it was Mr. Griffin's responsibility to ferret out this information when Kocolis had previously denied the information, and prosecutors themselves are giving contradictory information about whether immunity deals exist (ACB 77). However, it is not Mr. Griffin's duty to discover, it is the States duty to disclose any impeachment evidence that may be favorable to the defense. "Use" or any other kind of immunity deal with three state witnesses is favorable impeachment evidence

to refute the state's aggravation. The State cannot refute that this was impeaching evidence for Mr. Griffin, particularly when defense counsel testified that this information was material and necessary. Relief is warranted.

III. Argument on Cross-Appeal – The Trial Judge Correctly Granted Mr. Griffin a New Penalty Phase Proceeding (Restated)

In granting Mr. Griffin relief on his claim of ineffective assistance of penalty phase counsel, the circuit court made the following findings:

> Specifically, the Defendant alleges that trial counsel's ineffectiveness prevented the trial judge from considering, as substantial mitigating evidence, "particularized characteristics" about him, which, if presented, would have supported sentencing him to life in prison. . . . The particular mitigating evidence that the Defendant argues counsel should have presented concerned the severity of his cocaine addiction and the impact it had on his participation in the crimes; his history of depression; the impact of his prior rain injury; and, his family history of mental illness and substance abuse addiction. In support of this claim, the Defendant presented testimony and evidence at the evidentiary hearing from family members; friends who were close to him long before the murders, as well as friends who were close to him immediately prior to and after the murders; and, two doctors. Rather than presenting to the trial judge this or similar evidence, the Defendant asserts that trial counsel waived an advisory jury and a Spencer hearing and instead proceeded on a "good-guy defense" because he had an "intuition" that the trial judge would impose life sentences and not the death penalty. This argument is persuasive; therefore, the Court finds that the Defendant was deprived of a reliable penalty phase hearing. In coming to this conclusion, the Court looks to the evidence that was not investigated and/or presented; but more importantly, it considers trial counsel's reason for failing to present adequate penalty-phase evidence.

[* * *]

. . .[T]rial counsel, Dwight Wells, admitted that, even though the co-defendant wasn't entering a plea because he was incompetent, the State's amenability to a plea agreement that would have involved the co-defendant prompted him to advise the Defendant to enter a straight-up guilty plea, and, **"quite frankly, colored everything" he did after that. He further admitted that he "truly believed that there would be a recommendation to Mr. McCabe, based upon the family's wishes, that they would receive life sentences. . . [a]nd that, in fact, very much colored the way [he] approached the case in terms of hiring other kinds of experts, and the things I did do and some of the things I did not do."**

As this Court is required to do, it views counsel's actions from counsel's perspective at the time of the alleged ineffective assistance. In doing so, the 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.** As a result, the trial judge made the best decision he could under the circumstances when he imposed the death penalty.

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. 1407-09).

In its Cross-Appeal brief, the State argues that the circuit court erred in granting a new penalty phase, as neither deficient performance nor prejudice was established by Mr. Griffin, or properly evaluated by the court. However, a review of the record and the order granting relief reveal that there was a wealth of competent, substantial evidence to support the circuit court's finding that Mr. Griffin was denied his right to effective assistance of penalty phase counsel.

A. *The Legal Framework*

In order to prevail on his claim of ineffective assistance of counsel during the penalty phase, Mr. Griffin must show that trial counsel's ineffectiveness deprived him of a reliable penalty phase proceeding. See Grim v. State, 971 So. 2d 85, 99-100 (Fla. 2007); Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998). "An attorney's obligation to investigate and prepare for penalty portion of a capital case cannot be overstated because this is an integral part of a capital case." State v. Hurst, 18 So. 3d 975 (2009). When determining whether counsel's performance was deficient, a reviewing court "must consider not only the quantum of evidence known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate

further." Wiggins v. Smith, 539 U.S. 510, 527 (2003). While strategic decisions of counsel are entitled to deference, a decision may be considered "strategic," and therefore reasonable, only when it is "based upon informed judgment." Henry v. State, 862 So.2d 679, 685 (2003); accord, Strickland, 466 U.S. at 690.

"It is well established that Mr. Griffin "had a right – indeed, a constitutionally protect right – to provide the [trier of fact] with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams, 529 U.S. at 396; accord, Strickland, 466 U.S. 668 (1984). When assessing the prejudice of the unpresented evidence, a reviewing court must reweigh the evidence in aggravation against the totality of available mitigating evidence. Wiggins, 539 US at 534. Where, as here, relief is granted after an evidentiary hearing and the trial court makes factual findings, this Court defers "to the factual findings that are supported by competent, substantial evidence but reviews the legal conclusions *de novo*." Ferrell v. State, 2010 WL 114481 15 (Fla. 2010).

B. *Deficiency and Prejudice*

The State maintains that deficient performance was not established because "most of [the] evidence [about Mr. Griffin's cocaine addiction, mental health history, brain injury, and family history of addiction and mental illness] was presented to the sentencing court," and the "good guy defense" utilized by

trial counsel was “a reasonable strategy” (AB 82-83). The record does not support these claims.

At the evidentiary hearing, Mr. Griffin presented evidence regarding his extraordinary family history of addiction (PCR. 4182-92, 4233-38) and mental illness (PCR. 4190, 4195-96, 4199-4200, 4344, 4235-36) – information which was unknown to trial counsel and never presented to trial court (PCR. 4520-22). When questioned about this available evidence at the hearing, 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). 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, trial counsel never asked them about the family’s history of addiction or mental illness (PCR. 4216, 4246). Perhaps most egregiously, trial counsel unreasonably failed to present the court with information establishing that Mr. Griffin was intoxicated at the time he committed the crime (PCR. 4413-15, 4395). Wells admitted at the evidentiary hearing that he would have presented information on the extent of Mr. Griffin’s drug use, as well as his family

history of drug addiction, alcoholism, and mental illness to Judge Downey had he obtained such evidence, as such information could have established either statutory and/or non-statutory mitigation (PCR. 4519-20).

Trial counsel also failed to present the actual extent of Mr. Griffin's severe cocaine addiction – addiction which rose to the level of "extremely severe" cocaine dependency disorder (PCR. 4823-24). Wells maintained that he wanted to show that Mr. Griffin was a "good guy" until he started using cocaine – yet he admitted that he never even asked his client about the amount of cocaine he using, and this information was not presented to Dr. Maher or the trial court (PCR. 4541). In contrast, at the evidentiary hearing, numerous witnesses testified regarding the extraordinary amount of cocaine Mr. Griffin was using in the months, weeks, and days prior to the crime (PCR. 4113-16, 4242, 4347, 4408, 4453-54, 5144). According to post-conviction expert Dr. Mash, the amount of cocaine Mr. Griffin consumed, coupled with the speed with which his usage escalated, demonstrated "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" (PCR. 4823-24). Mr. Griffin's illness was compounded by his familial and personal history of mental illness, as well as his family history of addiction (PCR. 4825). As a result, Dr. Mash found that his ability to conform his

conduct to the requirements of 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 (PCR. 4900).

Similarly, the trial court was never presented with accurate information regarding the extent of Mr. Griffin's brain damage. While Dr. Maher discussed Mr. Griffin's pellet gun injury, he was never given readily available medical records which substantiated both the severity of the initial injury, and the fact that Mr. Griffin continued to complain of lasting effects from the injury (including headaches and olfactory hallucinations) throughout his life. Dr. Maher never conducted any neurological or neuropsychological testing in order to determine whether, in fact, Mr. Griffin was brain damaged, but instead relied only on a clinical interview which he admitted was focused on determining competency (R. 274, 282, 295).

In contrast, post-conviction expert Dr. Thomas Hyde reviewed extensive medical records, conducted a standard battery of neuropsychological tests, evaluated the test results of State expert Dr. Sidney Merin, and reviewed Mr. Griffin's social history (PCR. 4932-36). This wealth of information – which was either never obtained by trial counsel, and/or was not presented to Dr. Maher – led Dr. Hyde to conclude that Mr. Griffin suffered from a "fairly significant brain injury" which resulted

in lasting damage to his right hemisphere, including his right frontal lobe (PCR. 4954-56).

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.).

This was not, as the State maintains, simply a situation where collateral counsel managed to find experts to testify more favorably than the trial expert. The evidence presented in post-conviction differed both in weight and in kind from that presented at the penalty phase, and as a result, prejudice is evident.

In its sentencing order, the trial court specifically found that "there was no testimony that the Defendant committed the crime while under the influence of any narcotic drug. Nor was there any testimony that at the time of the crimes the

Defendant's ability to comprehend what was going on was in any way impaired" (R. 2073). As a result, the court gave the mitigator of Mr. Griffin's "drug problem" "very little weight" (Id.). Regarding his "minor mental problems," the trial court found that the "limited testimony" presented did not rise to the level of mitigation, and therefore he gave that factor "no weight" (R. 2072).

Had trial counsel not relied upon his "monumentally mistaken hunch" that the trial court was going to impose a life sentence, he would have recognized the need to investigate and present readily available evidence which would have established that Mr. Griffin was indeed under the influence of narcotics at the time of the crime, and that his addiction prevented him from conforming his conduct to the requirements of the law; that he suffered from lasting brain damage which impacted his addiction and behavior at the time of the crime; and that his family history of mental illness and addiction both supported the finding of statutory mitigation. As the circuit court correctly found, trial counsel's failure to present this evidence fell outside "the broad range of reasonably competent performance under prevailing professional standards," therefore depriving Mr. Griffin of a reliable penalty phase proceeding (PCR. 1407-08). But for counsel's failures, Mr. Griffin would not have been sentenced to death. The circuit court ruling should be affirmed.

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

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/s/ Terri L. Backhus__
TERRI BACKHUS
Florida Bar No. 946427
Special Assistant CCRC-S

CELESTE BACCHI
Florida Bar No. 0688983
Assistant CCRC-S

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT