IN THE SUPREME COURT OF FLORIDA

MICHAEL ALLEN GRIFFIN,

Petitioner,

v. **CASE NO. SC08-2179**

BILL McCOLLUM,
Attorney General of the
State of Florida,

and,

WALTER A. McNEIL,
Secretary,
Department of Corrections,
State of Florida,

Respondents.
______________________________________/

REPLY TO RESPONSE TO PETITION SEEKING TO INVOKE THIS COURT'S ALL WRITS JURISDICTION AND/OR PETITION FOR WRIT OF HABEAS CORPUS

In the Response submitted by the State there are factual and legal errors. Herein, Petitioner seeks to point out several of the more egregious errors and explain why the writ should issue.[1]

A. Reply to Respondent's Assertions Regarding Belated Habeas Petition.

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[1]Respondent includes in the Response a Statement of the Case and Facts. Petitioner disputes the accuracy of this Statement generally, and notes that the Statement is in fact argumentative.

In the Statement of the Case and Facts, Respondent sets forth a discussion of the *pro se* appeal of the dismissal of the Rule 3.851 motion filed by Ken Malnick on June 23, 2003. Response at 8-9. The purpose of this discussion is apparently to set forth the context for the following assertion:

> This Court ordered Defendant's counsel to file a response to the State's motion and to indicate whether he was adopting the appeal. Counsel filed a pleading adopting the appeal, in which Counsel acknowledged that Mr. Giordano had been retained merely for the purpose of handling the post conviction appeal.

Response at 9.[2]

In making this assertion and in the subsequent use of this factual representation, Respondent's counsel is endeavoring to mislead this Court on the facts that serve as the basis for why this Court should entertain the habeas petition. In order to

[2]Counsel for Respondent also misrepresents the circumstances in 2005 that led to the circuit court vacating a previously entered order summarily denying the re-filed Rule 3.851 motion. Conspicuously absent from the discussion in the Response is any recognition that counsel appeared before the circuit court judge *ex parte* on two occasions and obtained an order denying 3.851 relief without Mr. Griffin or his counsel being present. Counsel for Respondent tries to hide this misconduct behind the statement "Defendant again failed to appear." Response at 11. However, as the circuit court subsequently found, neither Mr. Griffin nor his counsel received notice of the proceedings, and counsel for Respondent made no effort to notify them or otherwise delay the proceedings until either Mr. Griffin or his counsel were present.

In any event, those *ex parte* proceedings and the vacated order denying the re-filed Rule 3.851 motion are not relevant to Mr. Griffin's habeas petition. Respondent only included the inaccurate discussion of those events in an effort to confuse the matter and blow more smoke.

clarify the situation, it is necessary to step back and identify the various individuals who were "counsel" for Mr. Griffin in the relevant portions of the collateral process.

In the circuit court proceedings on Mr. Griffin's Rule 3.851 motion originally filed on March 19, 1997, Kenneth Malnick represented Mr. Griffin.[3] After the Rule 3.851 motion was denied, an appeal was filed. At that time, Kenneth Malnick withdrew as counsel before this Court and Michael Giordano entered his appearance.

Mr. Giordano had been retained by a benefactor to represent Mr. Griffin before this Court. After substitution was permitted on October 19, 2001, Mr. Giordano after receiving an extension of time to obtain and review the appellate record, filed the initial brief before this Court. Included in the brief that he filed were issues more properly in a habeas petition, specifically a claim of ineffective assistance of appellate counsel. Clearly, Mr. Giordano believed that he could raise a claim of ineffective assistance of appellate counsel in the appeal.[4]

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[3]Mr. Malnick was an Assistant CCRC-South who had been assigned to represent Mr. Griffin.

[4]Due to page limitations, only one page of the initial brief was devoted to addressing appellate counsel's ineffectiveness.

While the appeal of the denial of Rule 3.851 relief was pending before this Court, Mr. Malnick who had been Mr. Griffin's counsel filed another Rule 3.851 motion on June 23, 2003, in circuit court.[5] The circuit court summarily dismissed the motion, and Mr. Griffin filed a *pro se* appeal.

Meanwhile, this Court rendered its decision denying Mr. Griffin's previous appeal, the one that Mr. Giordano had briefed to this Court. Accordingly, he was advised by Roger Maas of the Capital Cases Commission that if he was not intending to continue as counsel for Mr. Griffin that he should advise the circuit court and so that a registry attorney could be appointed to undertake representation of Mr. Griffin. As a result, Daniel Daly was appointed as registry counsel for Mr. Griffin on February 18, 2004.

It is in this factual context, that the noted passage from the Response should be read:

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[5]It must be assumed that Mr. Malnick was unaware that the circuit court lacked jurisdiction to entertain a Rule 3.851 motion while an appeal of a previous motion was pending in this Court. Tompkins v. State, 894 So. 2d 857 (Fla. 2005).

> This Court ordered **Defendant's counsel** to file a response to the State's motion and to indicate whether he was adopting the appeal. **Counsel** filed a pleading adopting the appeal, in which **Counsel** acknowledged that Mr. Giordano had been retained merely for the purpose of handling the post conviction appeal.

Response at 9. The "counsel" referred to in this assertion was Daniel Daly, the registry attorney appointed on February 18, 2004. The "counsel" reference here is not either Mr. Malnick or Mr. Giordano, the attorneys involved in the transition on October 19, 2001, three years before.

Mr. Daly was not a party to the arrangement by which Mr. Giordano undertook representation of Mr. Griffin before this Court. He was not in a position to have any first hand information as to what the understanding with Mr. Griffin was or to dispute the accuracy of Mr. Griffin's representation that he understood that Mr. Giordano would challenge the effective of Mr. Kassier's representation of Mr. Griffin at trial and on direct appeal.

Moreover, it is clear from the fact that Mr. Giordano did in fact attempt to raise an ineffective assistance of appellate counsel claim, albeit in the wrong manner, that Mr. Griffin was correct in his understanding that the claim would be raised. There was clearly a failure to communicate as to the manner in which the claim would be raised. Surely, a brain-damaged Mr. Griffin was entitled to assume that Mr. Giordano would know the

correct way to raise the issue and would comply with the proper procedure.

To the extent that Respondent seems to rely on language used by Mr. Daly who was not a party to the discussions between Mr. Griffin and Mr. Giordano to argue that Mr. Giordano's representation was limited to the appeal pending at the time, there is problem. From October 19, 2001, until February 18, 2004, Mr. Giordano was the only attorney representing Mr. Griffin. After Mr. Malnick withdrew, there was no CCRC or registry attorney in place to handle any collateral matters outside any limitations on Mr. Giordano's representation that existed. If counsel for the Respondent were found to be correct, it would seem the situation for Mr. Griffin was even worse and more deserving of an opportunity to present his habeas petition belatedly. If counsel for the Respondent were found to be correct, Mr. Griffin was without an attorney to file a habeas petition or otherwise represent him as required by statute.

Either Mr. Griffin had counsel who failed to know the proper way to raise an ineffective assistance of appellate counsel claim and neglected to file a habeas petition on Mr. Griffin, or Mr. Griffin had no counsel provided to him to represent him by filing a timely habeas petition. Either way, the circumstances warrant permitting Mr. Griffin to file a habeas petition.

B. The Assertion on Oath or Verification Is Necessary.

Respondent after arguing that there is no recognized mechanism for Mr. Griffin to obtain a belated appeal, then does a turnabout, and argues that Mr. Griffin failed to follow the proper and include a verification or a statement under oath.[6] It would seem that if there is no mechanism, then there would be no requirements for seeking that which cannot be sought. Respondent's argument that an oath or verification are necessary would seem to suggest that Respondent really does believe that the mechanism for obtaining a belated an appeal also applies to a belated habeas petition.

In light of this Court's recent opinion amending Rule 3.851 and Rule 9.142 of the Florida Rules of Appellate Procedure to explicitly authorize belated appeals of the denial of Rule 3.851 motions because of counsel's neglect in failing to file a timely notice of appeal, and the oath requirement contained therein,

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[6]Respondent's insistence on an oath or verification really smacks of requiring a time consuming and empty gesture that actually serves no purpose. Undersigned counsel is unaware of any time that he has been representing capital defendants in collateral proceedings that a representative of the State has recognized that a sworn statement from an individual on death row is proof of anything or is credible in any way.

Given that Mr. Griffin has now signed a verification swearing under oath to the accuracy of the factual representations in the habeas petition, it will be interesting to see if Respondent accepts the verification as credible evidence.

Mr. Griffin submits the attached verification in case this Court determines that it is necessary.

C. Timely of Request for Belated Habeas Petition.

Respondent also argues that counsel for Mr. Griffin failed to file a timely request for a belated habeas petition. Of course, the problem with Respondent's argument is that to the extent that a time limit applies, the failure to comply with it was according to Respondent the neglect of counsel to learn that the habeas petition had not been filed. Accordingly, the time limit can only apply if counsel and the capital defendant are aware of the failure to file a habeas petition and make a conscious decision to forego a request for an opportunity to file a belated petition.

D. The Allegation that Undersigned Counsel in Drafting a Rule 3.851 Motion in 2005 Should Have Discovered that Habeas Petition Had Not Been Filed.

This assertion has two problems. First, accepting it as true, it is still counsel's neglect that has cost Mr. Griffin his right to file a habeas petition and challenge the ineffectiveness of his appellate representation. If counsel's neglect in filing a habeas petition justifies a belated petition, then counsel's neglect in failing to learn that the habeas petition had not been filed and thereupon seek a belated habeas petition still means that it is counsel's neglect that is

costing the capital defendant his right to file a habeas petition.

Second, as undersigned counsel asserted in the petition, he was hired on a narrow basis to re-file the Rule 3.851 motion that this Court had ruled could be re-filed and treated as file *nunc pro tunc*. Counsel for Respondent argues that Mr. Giordano's representation was limited to an appeal, so therefore, he was under no obligation to file a habeas petition. It is baffling why Respondent's counsel understands that Mr. Giordano's representation can be limited to certain specific acts or courts, but then argues that undersigned counsel's representation was not limited to re-filing the Rule 3.851 motion.

CONCLUSION

For the reasons set forth herein and in the Petition Seeking to Invoke this Court's All Writs Jurisdiction and/or Petition for Writ of Habeas Corpus, Mr. Griffin respectfully asks that this Court grant him the opportunity to file a belated petition for a writ of habeas corpus and challenge the effectiveness of the representation that he received in his direct appeal before this Court.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by U.S. Mail, postage prepaid, to Sandra Jaggard, Assistant Attorney General, Department of Legal

Affairs, 444 Brickell Ave., Suite 650, Miami, FL 33131-2407, on January 20, 2009.

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