Bar

No. 96-112

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT, SIXTH DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

EVAN GRIFFITH,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County, Illinois
Criminal Division.
The Honorable Francis Mahon, Judge Presiding

BRIEF AND ARGUMENT FOR APPELLEE

RITA A. FRY
Public Defender of Cook County

200 West Adams 4th Floor
Chicago, Illinois 60606
(312) 609-2040

Counsel for Appellee.

STEPHEN L. RICHARDS
Assistant Public Defender

Of Counsel.

ORAL ARGUMENT REQUESTED

No. 96-112

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT, SIXTH DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County Criminal Division.
Plaintiff-Appellant,	)	
v.	)	
EVAN GRIFFITH,	)	Honorable
Defendant-Appellee	)	Francis Mahon, Judge Presiding

BRIEF AND ARGUMENT FOR
DEFENDANT-APPELLEE

POINT AND AUTHORITIES

ISSUE PRESENTED FOR REVIEW

Whether Judge Francis Mahon's judgment that Evan Griffith's plea was involuntary should be reversed, where Judge Mahon had an opportunity to view the demeanor of the witnesses, and where he concluded that Evan Griffith was telling the truth when he testified that he was misled by his attorney and by the court's mistaken admonition into believing that he might receive the death penalty if he pled guilty?

STATEMENT OF FACTS

The following facts are drawn from the hearing on Evan Griffith's post-conviction petition and the record below.

In June, 1985, 16 year old (R. A10-11, S.R. III) Evan Griffith was indicted on three counts of murder, one count of armed violence, and one count of armed robbery. (R.C.L. 4). Although Evan Griffith was for several months represented by assistant public defender Paul Stralka (R. A26-27), the prosecution never called Stralka as a witness at the post-conviction hearing.

In late December of 1985, Evan Griffith's mother, Myrna Griffith, hired Lori Klingman to represent Evan Griffith. (R. A11, A33-34). She paid her a fee of $7500. (S.R. III).

At the time Ms. Klingman was retained, she had been a lawyer for only six months. (R. A33). She told Ms. Griffith that she had never done any criminal cases. (R. A47). At the hearing, she testified that she did not believe she had handled any felony cases before representing Evan Griffith, but she could not be "positive." (R. A49). Circuit court records show that she had never previously filed an appearance in a criminal case. (S.R. III).

Ms. Klingman first spoke to Evan Griffith in December of 1985, at the Juvenile Detention Center. Evan Griffith testified that this conversation lasted twenty minutes. (R. A29). Ms. Klingman claimed that it lasted "at least" an hour. (R. A34).

On February 6, 1985, Ms. Klingman filed her appearance in Evan Griffith's case. (R. A45-46, S.R. III). Although Evan Griffith was charged with three counts of murder (S.R. III), and though Illinois law does not include an offense named "felony murder," Ms. Klingman gave the name of the first charge as "Felony Murder." (R. A46-47, S.R. III). She later made the same error on the written waiver of presentence investigation. (R. A18, S.R. III) .

At the hearing, Ms. Klingman claimed that she had extensively investigated the case, examining the state's evidence and speaking with witnesses. (R. A35-36). She "contemplated" filing a motion to suppress Evan Griffith's confession and also moved to have him examined by a psychiatrist. (R. A30, 36). She was unable to document her claims of investigation, however, because she had destroyed her files. (R. A47).

In another conversation, which took place sometime in April of 1986, Ms. Klingman told Evan Griffith that she would not be able to win the case, and asked him how he would feel about pleading guilty to the charges. (R. A12). Evan Griffith told her that he did not like the idea, but gave his permission for a Rule 402 conference. (R. A13).

About a month later, in May of 1986, Ms. Klingman told Evan Griffith that the state had suggested a sentence of 35 years in return for a guilty plea. Evan Griffith testified that Ms. Klingman told him that if he went to trial he could

receive a sentence of death. Mr. Griffith told Ms. Klingman that he needed time to consider the state's offer. (R. A14).

The next month, in June of 1986, Ms. Klingman had another conversation with Evan Griffith in which she again urged him to plead guilty. According to Evan Griffith, Ms. Klingman again "stressed the point that if I didn't plead guilty, I would probably lose at trial, and the penalties would be natural life or [a] death sentence." (R. A15). Frightened by the prospect of the death penalty (R. A26), Evan Griffith agreed to plead guilty. (R. A15).

On the day of his plea, July 24, 1996, Evan Griffith had a final conversation with Ms. Klingman. After he signed the appropriate waivers, Ms. Klingman instructed him as to the responses he should give during the plea. She told him that if he seemed indecisive he would be "forced to go to trial and face either natural life or [a] death sentence." (R. A17).

Following this conversation, Evan Griffith pled guilty to murder and armed robbery and received concurrent sentences of 35 years for murder and 30 years for armed robbery. (S.R. I, 39). The judge admonished him that for murder he could receive "natural life and even under certain circumstances *** the death penalty." (S.R. I, 36).

During the plea, Ms. Klingman at no time corrected the judge's misstatement of the possible penalty. (R. A42-43). Evan Griffith heard and understood the judge's admonition.

(A. A19, 20). Because Ms. Klingman had told Evan Griffith on "many occasions" that he could receive the death penalty, he was not surprised what the judge said. (R. A20). He pled guilty because he thought he had no chance to win and was afraid that he would get the death penalty. (R. A25-26).

At the hearing, Ms. Klingman claimed that she knew from the outset that Evan Griffith was not facing the death penalty. She denied that she ever advised him that he could be sentenced to death. When asked whether she had ever specifically advised him that he was not death eligible, she replied: "We didn't even discuss it." (R. A37).

Assistant Public Defender Owen Greenberg testified at the hearing that he had served in Judge Francis Mahon's courtroom for seven or eight years. (R. A52-53). He testified that he often corrected misstatements during pleas, and that Judge Mahon was grateful for all corrections. (R. A53-54).

Believing that he had avoided the death penalty, Evan Griffith did not file a motion to vacate his plea. (R. A20-21). Three years later, however, he learned for the first time that he had been misled. Joe Woods, a fellow prisoner and jailhouse "lawyer" informed Evan that he had not been eligible for death because he was not 18 years or over at the time of the occurrence. (R. A22-24). With Woods' help, Evan Griffith then filed a post-conviction petition. At the time the post-conviction petition was filed, Evan Griffith had no other adult criminal convictions and there were no other

charges pending against him. (R. A24).

In his pro se post-conviction petition, Evan Griffith alleged that his guilty plea was based upon his attorney's mistaken advice that Evan met the "criteria to receive" the death penalty. (R.C.L. 33). He also alleged that because of the trial court's mistaken admonition that he was eligible for death, he was "under the impression" that if he did not plead guilty he could receive the death penalty. (R.C.L. 34).

The public defender appointed to represent Evan Griffith on the post-conviction petition filed a supplemental petition alleging a number of additional errors in the trial court's admonishments. (R.C.L. 20-31). The state filed a motion to dismiss which responded only to the additional claims in the post-conviction petition, and did not address the issue of whether the defendant was misled as to the applicability of the death penalty. (S.R. I, 53-56). In fact, the state's motion to dismiss included the statement: "The facts in petitioner's case indicates [sic] that he was charged with a potential capital case. That fact alone does not constitute coercion." (S.R. I, 55). After hearing arguments, the trial court granted the state's motion to dismiss the petition. (S.R. II, 12).

On appeal, Evan Griffith alleged that the trial court had erred by dismissing his pro se petition without an evidentiary hearing. (R.C.L. 13, 16). In response, the state claimed that any issues in the petition had been waived by

Evan Griffith's failure to file a motion to withdraw his guilty plea and to file a direct appeal. (R.C.L. 16). The state did not dispute the legal merit of Evan Griffith's claim that his plea was rendered involuntary by the court's mistaken admonition and by his attorney's advice that he was eligible for the death penalty.

This court rejected the state's claims of waiver and held that "defendant has presented an issue which may have significantly impacted the voluntariness of his plea." This court therefore held that the voluntariness of Evan Griffith's plea should be determined at an evidentiary hearing. (R.C.L. 18).

At the evidentiary hearing, the state characterized the issue as a "question of credibility at this point," and argued that attorney Klingman was more credible than Evan Griffith. (R. A63-64). The state also argued that Evan Griffith's plea was voluntary because he received what he bargained for. (R. A63).

The trial court granted Evan Griffith's petition and ordered a new trial. (R. C3). This appeal followed.

THE TRIAL JUDGE'S ASSESSMENT OF CREDIBILITY IN THIS CASE WAS NOT MANIFESTLY ERRONEOUS, AND HIS JUDGMENT THAT EVAN GRIFFITH'S PLEA WAS INVOLUNTARY IS THEREFORE FULLY SUPPORTED BY THE RECORD.

Evan Griffith is a 16 year old who was misled by his attorney and by the trial court into believing that he was eligible for the death penalty. After hearing evidence, the trial court properly determined that his plea was involuntary. The trial court was correct. This court should affirm.

As a preliminary matter, it should be noted that the state's argument for reversal is deliberately designed to distract this court from the main issue. The state has buried the essence of Evan Griffith's claim in Point IV of its brief, and has deliberately confused the issue of the voluntariness of the plea with the separate, although related issue of his counsel's ineffectiveness. These ploys should confuse no one.

On Evan Griffith's initial appeal, this court determined that a "guilty plea following an erroneous admonishment from the court and alleged advice from counsel that the defendant could be subject to a sentence of death" presented an issue of constitutional dimensions. (R.C.L. 17). This court therefore remanded the case for an evidentiary hearing on the voluntariness of Evan Griffith's plea. (R.C.L. 18).

The main issue is the voluntariness of Evan Griffith's plea following incorrect admonishments by the court and counsel as to the applicability of the death penalty. It is not the relatively minor errors in the admonishments listed in the supplemental petition and addressed in Points I, II, and III of the state's brief.

Nor is it counsel's ineffectiveness, which although related to the main issue, is separate and distinct. In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court has held that where a plea is otherwise voluntary, a claim that the plea was induced by counsel's misadvice must satisfy the two-part test for ineffectiveness established by Strickland v. Washington, 466 U.S. 668 (1984). This standard has no application, however, where, as here, counsel's misadvice mirrors an incorrect admonition by the trial court, and where the misadvice is so fundamental as to render the plea involuntary. Thus Strickland is inapplicable.

The real question presented to the trial court upon remand was whether Evan Griffith made a voluntary, knowing, and intelligent plea of guilt under Boykin v. Alabama, 395 U.S. 238 (1969), as codified by Illinois Supreme Court Rule 402. The trial court, after an evidentiary hearing, properly concluded that he did not.

The state in its brief acknowledges that the "threshold" issue in this case is whether attorney Lori Klingman actually told Evan Griffith that he was eligible for the death

penalty. (St. Br. at 28). On this point, there was a clear credibility contest. Evan Griffith testified that attorney Klingman told him he was eligible for the death penalty. Attorney Klingman denied it. One of the two was either lying or mistaken.

The state further concedes that the trial judge assessed the credibility of the witnesses and determined this issue in Evan Griffith's favor. (St. Br. at 28). The state argues, however, that this court should disregard the trial court's ruling, determine de novo that Lori Klingman was credible, and reverse. The state is wrong.

As the state concedes, "the credibility of the testimony in a post-conviction case, as in other cases, tried by the court without a jury, is a matter for the trial judge to determine, and unless something appears to show that the determination by the trial judge was manifestly erroneous, the trial judge, who had an opportunity to see and hear each witness should be upheld." People v. Bracey, 51 Ill. 2d 498, 283 N.E.2d 685, 688 (1972). Moreover, "credibility is not, of itself, a question for a court of review." People v. Griffin, 109 Ill. 2d 293, 487 N.E.2d 599, 605 (1985).

The trial judge in this case, Francis Mahon heard Evan Griffith testify. He saw him testify. He heard Lori Klingman testify. He saw her testify. He could tell whether they answered questions clearly and forthrightly or slowly and hesitantly. He could heard the tones of their voices. He

could see the expressions on their faces.

Important demeanor evidence, available to him, but not to this court on appeal, could easily have played a critical role in his decision. Judge Francis Mahon called this credibility contest in Evan Griffith's favor. This court can, and should, respect that call.

The state argues, however, that various factors render the trial court's decision as to credibility manifestly erroneous. The state is wrong.

The state argues, for example, that Ms. Klingman "must have" known that Evan Griffith was not eligible for death because she spoke "extensively" with "attorneys" who were "very experienced" in criminal practice. (St. Br. at 29). This is sheer speculation, as well as a distortion of the record.

Ms. Klingman testified that she spoke with two other attorneys. She did not say that she spoke with them "extensively," but that their felony trial experience was extensive. (R. A49). She never testified that either of these two attorneys told her that Evan Griffith was ineligible for the death penalty.

One of these two persons was a unnamed criminal defense lawyer in Philadephia. (R. A49). There is no showing that this person knew anything about Illinois death penalty law. Indeed, the subject of her conversations with this attorney was apparently Ms. Klingman's efforts to get affidavits from

Evan Griffith's parents, who were living in Philadelphia, not capital punishment. (R. A49).

The second, a "Jim Meltreger" was, according to Ms. Klingman a "private practitioner," who she "believe[d]" had just left the State's Attorney's office. (R. A49). Ms. Klingman never testified that she discussed Evan Griffith's eligibility for the death penalty with Mr. Meltreger. Indeed she never testified that she discussed the specifics of Evan Griffith's case with Mr. Meltreger, only that she had "talked" with him. The record does not show, and Ms. Klingman was not asked, what, if anything, Mr. Meltreger told her. Mr. Meltreger was not called as a witness at the hearing.

Moreover, any experienced criminal attorney whom Ms. Klingman consulted would only have known that Evan Griffith was ineligible for death if: (1) the attorney had been familiar with death penalty law, a subject on which many experienced practitioners might well be ignorant, and (2) Ms. Klingman happened to tell them that Evan Griffith was 16 years old. There is no showing that Ms. Klingman ever discussed Evan Griffith's age with any other attorney.

In fact, Ms. Klingman's own inexperience in criminal matters fully supports Judge Mahon's determination that her testimony was not credible. It is easy to understand how a novice attorney might assume Evan Griffith was eligible for death. After all, death penalty law is rarely taught in law school, and does not appear on the bar exam. Ms. Klingman's

testimony that she "knew from the outset" (R. A37) that this was not a capital case might have been more credible if she had ever stated where and when she had learned this information. Since she did not, Judge Mahon was fully justified in finding that she was not telling the truth.

The state also argues that Ms. Klingman should be believed over Evan Griffith because Mr. Griffith's mother, Myrna Griffith, did not corroborate his testimony that he believed he was eligible for death. However, the state, which had an opportunity to cross-examine Evan Griffith at the hearing, never asked Evan Griffith whether he told his mother that he was eligible for death. Indeed, Ms. Griffith was in Philadelphia during the pendency of the case. There is no showing as to the nature or frequency of her conversations with Evan Griffith or Ms. Klingman. She herself swore in her affidavit that Ms. Klingman failed to keep her apprised of the progress of Evan's case. (S.R. III). Nor did Ms. Klingman ever testify that she had discussed potential sentences with Ms. Griffith.

Lastly, the state argues that Evan Griffith should not be believed because he was previously represented by a public defender who was part of the Public Defender's office's Murder Task Force. (St. Br. at 29). However, the state, which had an opportunity to cross-examine Evan Griffith at the hearing, never asked Evan Griffith whether he had discussed potential sentences with his public defender. Nor did the

state call that public defender as a witness at the hearing. There is no showing that Evan Griffith was correctly informed as to his ineligibility for death, or, if so informed, whether he believed whatever his public defender told him. Many defendants hire private attorneys instead of using a public defender because, rightly or wrongly, they do not trust the advice which public defenders give.

Even assuming arguendo that Evan Griffith received correct advice from his public defender, the trial court's determination that he acted upon incorrect advice from Ms. Klingman is still supported by the record. Evan Griffith was entitled to rely upon the advice of the attorney who represented him at the plea, particularly when it was corroborated by the trial court's mistaken admonition.

Indeed, the trial court's determination, far from being manifestly erroneous, is fully supported by the record below. Ms. Klingman's abysmal lack of criminal experience lends credence to the trial court's determination that she was not aware of the applicable penalties. Her inexperience was demonstrated by her repeated characterization of the charged offense as "Felony Murder" (R. A46-47, S.R. III), a title which was not used on the indictment and is not the correct name of the charged offense under Illinois law. This mistake strongly suggests that she did not examine Illinois statutes before advising Evan Griffith. Her testimony that she did not even "discuss" with Evan Griffith whether he was eligible for

the death penalty, (R. A37) even to tell him that he was ineligible because of his age, strains credulity. Finally, her silence during the plea proceedings, when she failed to correct the trial judge's false admonition that this was a potential capital case (S.R. I, 36), strongly suggests that she believed Evan Griffith could get death.

Moreover, the trial judge was entitled to rely on Evan Griffith's own testimony, which in contrast to Ms. Klingman's, was detailed, specific, and very credible. This court should therefore affirm the trial court's credibility determination and order a new trial.

The state also argues that "even if Ms. Klingman did tell defendant that he was eligible for the death penalty, he still cannot show voluntariness." (St. Br. at 30). This argument is wrong, and for two reasons: it has been waived by the failure to raise it below and it is legally incorrect.

The principle of waiver applies equally to the state and the defense in a criminal case. Advocacy of a specific ground or objection at the trial court level will waive all grounds not specified. People v. Andrews, 132 Ill. 2d 451 (1989) (state waived objection to timeliness of Batson motion where it responded to the merits and failed to raise that objection at trial); People v. O'Neal, 104 Ill. 2d 399 (1984) (state waived ground to support trial court's refusal to give defense instruction where State relied on different ground at trial).

The state is now arguing for the first time that the allegations contained in Evan Griffith's pro se petition, even if true, do not state a legal claim for relief. This argument has never been made before.

In its motion to dismiss Evan Griffith's post-conviction petition, the state responded only to the additional claims in the supplemental post-conviction petition and did not address the issue of whether the defendant was misled as to the applicability of the death penalty. (S.R. I, 53-56). Indeed, the state's motion to dismiss included the statement: "The facts in petitioner's case indicates [sic] that he was charged with a potential capital case. That fact alone does not constitute coercion." (S.R. I, 55). The state, like Evan Griffith, had been misled as to his eligibility for the death penalty by the trial court's faulty admonishments.

Subsequently, in response to Evan Griffith's appeal to this court, the state claimed only that any issues in the pro se petition had been waived by Evan Griffith's failure to file a motion to withdraw his guilty plea and to file a direct appeal. (R.C.L. 16). The state did not dispute the legal merit of Evan Griffith's claim that his plea was rendered involuntary by the court's mistaken admonition and by his attorney's advice that he was eligible for the death penalty. Finally, at the evidentiary hearing, the state characterized the issue as a "question of credibility at this point," and argued that attorney Klingman was more credible

than Evan Griffith. (R. C63-64). The state did not argue that Evan Griffith's plea was voluntary even if he was misled as to the applicability of the death penalty.

In short, the state is now presenting arguments and authorities which were never presented to the trial court and upon which the trial court was never given an opportunity to rule. These arguments have therefore been waived.

Even if not waived, these arguments are clearly incorrect. The general rule is that to pass constitutional muster a plea must be knowing, voluntary, and intelligent. The case of Boykin v. Alabama, 395 U.S. 238 (1969), as codified by Illinois Supreme Court Rule 402 (a), requires that the defendant be fully informed of the true penal consequences of his plea, including the maximum and minimum sentences for each offense charged. Clearly, Evan Griffith was misinformed as to the maximum sentence he could receive for murder. Judge Mahon believed his testimony that he pled guilty to avoid a death sentence he could never possibly have received. Commonsense tells us that a plea taken to avoid a consequence which could never have happened is not knowing, voluntary, and intelligent, and that Judge Mahon's decision was therefore correct.

And while no Illinois case other than the uncitable Rule 23 decision in People v. Pamela Knuckles addresses the issue of the voluntariness of a plea given by a juvenile who mistakenly believed himself eligible for death, this issue

has been addressed by the New Jersey Supreme Court in State v. Kiett, 121 N.J. 483, 582 N.E.2d 630 (1990). In that case, the New Jersey Supreme Court firmly held that a "defendant's belief, incorrect as a matter of law, that he was subject to the death penalty is sufficient basis for the withdrawal of a guilty plea if the avoidance of the death penalty was a substantial factor in the decision to plead guilty." 582 N.E.2d at 635. The court therefore vacated the plea of a juvenile who could not legally have received death under a subsequent decision finding the penalty inapplicable to juveniles, but who had pled as part of a bargain which specified that he would not receive capital punishment. 582 N.E.2d at 638.

Moreover, the two cases cited by the state for the proposition that Evan Griffith's plea was voluntary are clearly inapplicable.

For example, in People v. Goodwin, 50 Ill. 2d 99, 277 N.E.2d 131, 132 (1971), defense counsel and the court falsely informed the defendant that the maximum sentence he could receive upon a plea was life in prison. He was correctly told, however, that he could be sentenced to death after trial. He pled and received 25 years to life. The court affirmed the denial of defendant's post-conviction petition. 277 N.E.2d at 133.

This situation is clearly distinguishable from that of Evan Griffith. The defendant in Goodwin was told, correctly,

that if he did not plead he might receive death. Although he was falsely told that a plea would guarantee that he did not get death, he pled and did not in fact receive death. The fact that he could have theoretically received death on a plea hardly vitiates the voluntariness of his plea to a nondeath sentence. The value of what he received was exactly the same as what he bargained for: a nondeath sentence, as opposed to the capital punishment he might have received had he gone to trial.

Here, in contrast, Evan Griffith was falsely told he could get death if he went to trial. He was therefore woefully misled as to the value of an offer of 35 years on a plea. He thought the value of his plea was the difference between a sentence of 35 years and a possible sentence of death. In fact, the value of the plea was only the difference between a sentence of 35 years and a sentence of natural life in prison. Since death is a "unique" penalty, different in kind and character from any other type of sentence, Evan Griffith's misunderstanding of the value of his plea was extremely critical.

The second case cited by the prosecution, People v. Nichols, 96 Ill. App. 3d 354, 420 N.E.2d 1166 (1981) is also inapplicable. In Nichols, the defendant was admonished by the trial court, but not by his attorney, that death was a possible penalty. On appeal he argued he could not receive death because the only possible aggravating factor was that

the murder was committed in the course of rape or deviate sexual assault, of which there was no evidence in the record. 420 N.E.2d at 1168. He did not allege in his motion to withdraw his plea that he feared the death penalty and was induced by that fear to plead guilty. 420 N.E.2d at 1169.

Three factors distinguish Nichols from this case.

First, the Nichols defendant never alleged, at least on his appeal, that his attorney falsely told him he was eligible for death; indeed his counsel was found to be competent in a "post-trial" hearing and this finding was not challenged on appeal. 420 N.E.2d at 1169. Here, in contrast, Judge Mahon has specifically found credible Evan Griffith's testimony that he was told by attorney Klingman -- and believed -- that he could receive death.

Second, the Nichols defendant never alleged that he feared the death penalty and was induced by that fear to plead guilty. Here, in contrast, Judge Mahon has specifically found credible Evan Griffith's testimony that he pled guilty because he thought he had no chance to win and was afraid that he would get the death penalty. (R. 25-26).

Third, the situation in Nichols is distinguishable because the defendant's eligibility for death depended upon the presence or absence of a specific factual aggravator, not upon defendant's age. Whether a murder is committed during the course of a listed felony under section 9-1(b) of the Criminal Code is a factual question, which may be difficult

to answer definitively with the limited information available at a plea.

In Nichols, for example, the victim was found with her breasts exposed and her pants pulled down near her ankles. A pubic hair found on her body was similar to the defendant's. The defendant admitted in his statement that he beat the defendant to death after foreplay. 420 N.E.2d at 1170.

Under these circumstances, a fact-finder might well have concluded that the murder occurred during the course of rape or deviate sexual assault, and defendant could have been found eligible for death. See People v. Cloutier, 156 Ill. 2d 483, 622 N.E.2d 774 (1993). The trial court was therefore fully justified in admonishing the defendant that death was a "possible sentence," even if it was not absolutely clear that defendant would be proved eligible for death beyond a reasonable doubt. Here, in contrast, there is no way in the world the state could ever have proved defendant was 18 years old at the time of the offense; and for a good reason: He was sixteen. The defendant's eligibility did not depend upon facts which could not be determined with certainty at the time of the plea. He was clearly and absolutely not subject to the death penalty. Failing to inform him of that fact severely weakened, if, indeed, it did not utterly destroy, the voluntary character of his plea.

Even assuming that Judge Mahon was incorrect in finding that the guilty plea was involuntary, his decision may still

be affirmed upon the ground that the record was sufficient to show that attorney Klingman was ineffective. Attorney Klingman's advice to Evan Griffith that he was eligible for death clearly fell outside the range of advice that a reasonable attorney would give. See People v. Blommaert, 604 N.E.2d 1054 (Ill. App. 3d Dist. 1992) (attorney was ineffective who misinformed defendant as to possible sentences).

Moreover, in the guilty plea context, Strickland does not require a defendant to demonstrate that his plea was involuntary or that he was forced to plead guilty by his attorney. All that is required is that the defendant show a reasonable probability that, but for counsel's misadvice, defendant would not have pled guilty and would instead have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Evan Griffith clearly testified that he was reluctant to plead and that his plea of guilt was based upon his false fear of the death penalty. Moreover, although the probability that he could have succeeded at trial may also be taken into account, this probability would depend upon the nature of the state's evidence. Judge Mahon, who heard the factual basis for the plea in conference, was in the best position to determine whether there was a reasonable probability of success at trial.

His decision should therefore be affirmed.

CONCLUSION

For the foregoing reasons, the trial court's decision should be affirmed, and the case should be remanded for a new trial.

RESPECTFULLY SUBMITTED,

RITA A. FRY
Public Defender of Cook County
200 West Adams St., 4th floor
Chicago, Illinois 60606
(312) 609-2040

Counsel for Appellant.

Stephen L. Richards,
Assistant Public Defender

Of Counsel.