IN THE SUPREME COURT OF FLORIDA

MICHAEL GRIFFIN,

Appellant,

vs. **CASE NO. 93,906**

STATE OF FLORIDA,

Appellee.

__________________________/

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statement of case and facts with the following additions and corrections:

On June 13, 1997 appellant entered a guilty plea to two counts of first degree murder. The state attorney set forth bases for the charge on the record as follows:

On or about October 7, 1995, Michael Griffin and Anthony Lopez entered the business of Service America by trickery and deceit. Michael Griffin had previously worked for Morris Freezer and had serviced the freezers at Service America. During the evening hours of October 7, 1995 appellant and Lopez went to Service America and under the guise of fixing a freezer, they robbed and killed Thomas McCallops and his wife, Patricia McCallops. Thomas McCallops knew Michael Griffin. Both Mr. McCallops and Mrs. McCallops were walked in one of the coolers at gun point by Lopez and Griffin and locked inside the cooler.

Afterwards Michael Griffin and Anthony Lopez proceeded to forcefully open several of the metal money lockers built into the Service America. These metal money lockers were used by the drivers on the roof, when they took out their money they placed it in the lockers. They were forcefully opened and an excess of $8,000 was removed.

After removing the money, both Lopez and Griffin returned to

the cooler of Service America, which was approximately a fourteen by fourteen foot room with only one door. Griffin and Lopez stood at the door and fired their weapons into the room, inflicting fatal wounds upon Patricia and Thomas McCallops. (R9: 1599-1600)

The blood of Michael Griffin was found on one of the metal lockers that was forcibly opened and also on the floor. Griffin and Lopez have both admitted their involvement to several of their friends prior to them being arrested by the police. There were some admissions to law enforcement but no confessions. Defense counsel Dwight Wells agreed that these are the facts as he understands them. (R9: 1601)

The court then inquired of Griffin concerning his guilty plea as follows:

> THE COURT: Okay. You are Michael Joseph Griffin; is that correct?
> MR. GRIFFIN: Yes, sir.
> THE COURT: And Mr. Griffin, you have had an opportunity to discuss changing your plea with your attorneys?
> MR. GRIFFIN: Yes, I have.
> THE COURT: And do you understand what's in the change of plea form that you have signed?
> MR. GRIFFIN: Yes, sir.
> THE COURT: Do you understand that by entering a change of plea that you are giving up your right to have a jury trial as it relates to your guilt on these two charges? Do you understand that?
> MR. GRIFFIN: Yes, sir.
> THE COURT: Do you understand that by changing your plea you are giving up your right at the penalty phase, should there be one, to contest any of the facts that relate

to your guilt or innocence on this charge?

MR. GRIFFIN: Yes, sir.

THE COURT: And do you understand that if there is a penalty phase there is still a possibility that a jury upon hearing aggravating circumstances could recommend to me that I impose a death sentence against you and that I could impose a death sentence against you after a penalty phase? Do you understand that?

MR. GRIFFIN: Yes, sir.

THE COURT: And you understand that by entering a plea of guilty to the two charges of murder you're giving up your right to contest any of the facts?

MR. GRIFFIN: Yes, sir.

THE COURT: And any pre-trial motions that your attorneys might see fit, any motions in limine, you're giving up your right to have your lawyers confront all of the State's witnesses at a trial and none of those matters will be open to you for purposes of appeal?

And you're giving up you're [sic] right to contest the fact that your lawyers might not necessarily have done the best job for you as it relates to your guilt phase of the trial?

Do you understand you're giving up all of those rights by entering a change of plea today?

MR. GRIFFIN: Yes, sir.

THE COURT: Had your lawyers or anybody else made you any promises or representations other than what we talked about here today as to what's going to happen to you and what the sentence is going to be?

MR. GRIFFIN: No, sir.

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

MR. GRIFFIN: Yes, sir.

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

MR. GRIFFIN: Yes, sir.

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

MR. GRIFFIN: Yes, sir.

THE COURT: Okay. And knowing all of this it is still your desire to enter a change of plea at this point?

MR. GRIFFIN: Yes, sir.

THE COURT: And you got your lawyers standing beside you. Are you satisfied with the advise [sic] that they have provided to you thus far?

MR. GRIFFIN: Yes, sir.

THE COURT: You heard the factual basis that Mr. Martin has presented to the -- on the record that's your understanding that that's the factual basis the State Attorney's Office would have been presenting during the penalty phase and during the guilt -- excuse me -- during the guilty phase of your trial, and during the penalty phase almost all of those facts are going to come to the attention of the jury? Do you understand that?

MR. GRIFFIN: Yes, sir.

THE COURT: Mr. Martin, are you aware of any other acknowledgment that we need to get out of Mr. Griffin before I accept the plea?

MR. MARTIN: No, your Honor. Just so I can put of record, the State did file a notice of seeking the death penalty and they are still seeking the death penalty.

THE COURT: I understand that. No waiver, or anything?

MR. MARTIN: Just so Mr. Griffin understands.

THE COURT: Okay. Mr. Griffin, do you understand that the State Attorney's Office still has on the record that they are seeking the death penalty against you on both of these murders? Do you understand that?

MR. GRIFFIN: I understand.

THE COURT: I find Michael Joseph Griffin to be alert and intelligent and understands what's going on.

He has freely and voluntarily agreed to a change of plea on both of these charges and

nobody’s forcing you to do this.

He understands it is the potential sentences that he would receive at a sentencing and that he understands all of the rights that he’s giving up by entering a change of plea on these very very serious charges.

And he is doing so with his -- certainly with his eyes wide open and understands all of the consequences of his actions here.

He is doing so because he believes it to be in his best interest to change his plea today.

I will at this point accept his change of plea. I will at this time adjudicate that he is guilty of both counts. I will set a sentencing on this case for Tuesday, September the 9th.

We’ll set a couple of status checks in between then and now or now and then, I guess I should say, to determine whether or not on September the 9th we’re actually going to have a penalty phase trial or whether or not we’re going to have a sentencing of some other kind pursuant to understanding an agreement of counsel.

And this plea is accepted by the court without any -- the plea is accepted without any regard as to what might ultimately happen to Mr. Lopez in this case.

At this point, Mr. Griffin having entered a plea and been adjudicated guilty, if there is any type of penalty phase hearing it would have to be separate and distinct from Mr. Lopez, unless, of course, he enters a change of plea between now and then, and at that point we could possibly have penalty phases together. But if he does not then -- and we have a trial on Mr. Lopez sometime down the road both of guilt and a penalty phase that that would have to be separate and distinct.

And so for the most part I believe this makes the Defense motion to sever moot and so --

MR. MARTIN: I would agree with that, you Honor. It is moot at this point until we get into another posture then we have other issues.

> THE COURT: That's fine.
> So at this point I would end this motion. And I believe at this point that's the only motion that is a written motion any way; is that wrong?

(R9: 1602-1607)

The plea was accepted by the court without any regard as to what might ultimately happen with co-defendant Juan Antonio Lopez in his case. The court notes that if they ultimately have a trial and guilt phase for Lopez that it would be separate and distinct. (R9: 1607)

Subsequently, appellant also decided to waive the presence of a jury during his penalty phase. The following colloquy is reflected in the record:

> THE COURT: That's fine.
> Mr. Griffin, in your absence a moment ago your attorney indicated that there is a possibility that for purposes of this penalty phase that you would -- might be willing to waive your right to have a jury determination and recommendation with regard to sentencing.
> THE DEFENDANT: Yes.
> THE COURT: Have you had an opportunity to discuss this with your lawyers?
> THE DEFENDANT: Yes, sir.
> THE COURT: And have you made any decision with regard to whether or not this is what you want to do?
> THE DEFENDANT: Yes, sir, I have.
> THE COURT: And what do you want to do?
> THE DEFENDANT: I'd like to waive the jury, sir.
> THE COURT: You understand, sir, that a presentation of evidence and testimony to the jury would be for the purposes of the State Attorney to prove the aggravating circumstances that they feel are present in this case, for the jury to hear that testimony

and then to make a recommendation to me as to what they feel the proper sentence would be. Do you understand that that's the purpose of the penalty phase?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And you understand that their recommendations of either imposing the death sentence or imposing a life sentence need not be unanimous, that it just takes a majority vote of seven to five for the jury to recommend the imposition of the death sentence? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And do you understand by giving up your right to having this evidence presented to the jury that in essence this evidence would be presented to me and that I would make a final recommendation and decision as to what the sentence would be in this case? Do you understand that:

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And is anybody forcing you to make this decision, Mr. Griffin?

THE DEFENDANT: No, sir.

THE COURT: This is how you want to proceed in this case?

THE DEFENDANT: Yes, sir.

THE COURT: All right. What says the State in this matter?

MR. MARTIN: Judge, I believe you have complied with Hernandez at 645 So.2d 432 and with Lamadline, L-a-m-a-d-l-i-n-e, versus State at 303 So.2d 17, which indicates a waiver, if it's knowingly and voluntarily given, at the Court's discretion may be accepted. Okay. Just a second.

THE COURT: That's all right.

MR. MARTIN: I believe that you have complied with those requirements. The only additional thing the State would ask that you advise the Defendant and make sure that he understands is that in this particular case the State is seeking the death penalty and the Court may impose either a death sentence or a life sentence, and that is based on the guidelines set forth in Hernandez which says that he specifically acknowledges that the trial court has discretion to impose a

sentence of life or death. So I ask you just make that one last inquiry.

THE COURT: That's fine.

Mr. Griffin, you understand in this case that the State is seeking the death penalty against you?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand further that it would be then my decision totally as to what the sentence would be?

THE DEFENDANT: Yes, sir.

THE COURT: And that a death sentence could be imposed against you --

THE DEFENDANT: Yes, sir.

THE COURT: -- even without a jury recommendation. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Fine. I think we've complied with all the statutory requirements.

MR. MARTIN: I believe so, Your Honor.

THE COURT: That's fine. Does the State have any opposition at this point to waiving a jury for purposes of a penalty phase?

MR. WELLS: Your Honor --

MR. BARTLETT: Judge, we don't have any specific opposition, but I don't really think this matters according to the Hernandez case.

THE COURT: I thought the State could object and request --

MR. BARTLETT: Not in a specific situation where you have a plea such as Mr. Griffin has entered. Then it is up to the Court to accept or reject, and the State's position really doesn't matter.

THE COURT: I understand.

MR. WELLS: If I might, just for the record.

THE COURT: Yes.

MR. WELLS: Under 921.141(1) -- and I won't read the entirety of this paragraph. It is quite lengthy. But it does read in part "if the trial jury has been waived, or if the defendant has pleaded guilty, a sentencing proceeding shall be conducted in front of a jury impaneled for that purpose, unless waived by the defendant." I think it is Mr. Griffin's right at the stage we are at to indicate to the Court what he has indicated

this morning.

THE COURT: That's -- I understand.

Okay. At this point then I will find that Mr. Griffin has knowingly and freely and voluntarily waived his right to have a jury impaneled and to proceed on with this penalty phase only to me, and we will then proceed forward without impaneling a jury for purposes of making a recommendation at this time. All right.

MR. WELLS: Your Honor --

THE COURT: Yes.

MR. WELLS: -- just briefly for the record.

THE COURT: Go ahead.

MR. WELLS: I want the Court to know this decision has been made with consultation with Mr. Griffin's parents. We spent a lot of time yesterday discussing the facts of the case, the reasons we would do this. Also present in the courtroom is Ms. Wells, (phonetic) who was going to help us pick a jury. She looked at the case yesterday and talked to Mr. Griffin this morning here in court. So I believe this certainly is done with a knowing and intelligent waiver of his right to having a jury make this decision.

THE COURT: I'm sure in any case, and most particularly in a case where the most, you know, severe sanction is being sought, that Counsel has spent ample time discussing these matters, not only with Mr. Griffin but his family, and I'm certainly -- as with the first decision that Mr. Griffin made with regard to entering a plea in this case, that sufficient and probably in some cases more than sufficient time was spent prior to the formal announcement in court, and it would appear that Mr. Griffin, with the aid of extremely competent Counsel, have reached these decisions as a result of their counsel and the result of discussions with other members of his family. He fully knows what he's doing and is proceeding in what he feels at this time to be in his best interest to -- as to how to proceed with this case, and certainly I

> would accept his waiver at this point, and we'll proceed onward.
>
> (SR1: 7-15)

The case then proceeded to the penalty phase on December 8, 1997. (SR1: 01) At the onset, defense counsel asked for time to consult with his client concerning the fact that the 25 year minimum mandatory for a life sentence had been eliminated at the time of Griffin's offense. The Court notes that he doesn't believe he would have told Griffin he was eligible for parole in 25 years. (SR1: 22-24)

After a recess the Court addressed the defendant and stated that it was brought to his attention that there was an entry on the plea form that he signed at the time of his change of plea back in June that made reference to the fact that the possible sentence you could receive was either the death sentence or life imprisonment with the understanding that you would be eligible for release after serving 25 years. The court noted that was not the law at the time of the crime and that it was not mentioned in reference to his change of plea. (SR1: 25) The judge inquired whether he has had the opportunity to discuss this matter with his attorneys. Griffin agreed at the time he entered his plea, it was with the understanding that he would receive either a sentence of life in prison or the death sentence and that the life sentence would be without the possibility of parole. Accordingly, the plea form was modified. (SR1: 26-27)

James Clesas testified for the state that he was employed as the District General Manager of Service America Corporation. (SR1: 29) Service America is a vending and food service company with the largest portion of their revenue derived from vending. The drivers involved in the sales would bring in the money in cloth bags and put the money in a set of lockers by the door. (SR1: 32)

One of the victims, Tom McCallops worked for Clesas. McCallops was a utility person, ran routes, ran the warehouse, worked on a fill-in basis and did several jobs. Pat McCallops was Tom's wife. She came to the Christmas parties, and she also used to come up to Service America once in a while to see Tom after he got off, but she did not work for Service America. (SR1: 29) Appellant worked for Moore's Refrigeration, and over the course of his employment Clesas saw him several times coming in and out of the building to fix the refrigeration on both the trucks and the coolers. (SR1: 30)

The McCallops knew Michael Griffin. When Griffin fixed the refrigeration, Tom would have to stay with him. Griffin was in the building when McCallops' truck had a refrigeration problem. Griffin was also present at times when money would be brought to the lockers at Service America. (SR1: 31)

Clesas got a call on Sunday morning from Terry Goldych saying that something was wrong, that the building was open, that all the doors were open and Tom's truck was open; his car was still there.

(SR1: 36) When he went to the building and there was no response they called the police. They estimate that $11,300 was missing, plus the day's receipts would have been about $700 in cash. The bodies were found in the cooler, refrigerator-freezer. (SR1: 38-39)

Detective Robert Snipes, Jr, with the Pinellas County Sheriff's Office, testified about the investigation. (SR1: 49) Detective Snipes introduced a time line that he compiled from statements obtained in his investigation. (SR1: 51, Exhibit 10) Detective Snipes discovered that on the Friday before the homicides, October 6th at 7:30 p.m., Griffin and Lopez went to Shorty's Bar across the street from Service America. (SR1: 52) The investigation indicated that they had made several trips to Shorty's Bar for the purpose of surveilling Service America. (SR1: 53-54)

Blood that was found on the lockers came back as consistent with Griffin's. (SR1: 62) Tire tracks found on the northeast side of the building in the soft sand matched the tires they had taken from Griffin's van. (SR1: 63)

The detectives met with Griffin on October 29th, and read him his rights. (SR1: 63) Defense stipulates that there was no violation of Griffin's rights by Detective Snipes. (SR1: 64) They asked Griffin about his knowledge of employees. Griffin admitted he knew Tom McCallops and that he was a nice guy. (SR1: 65)

Griffin told them that the first part of October 1995, he was unemployed and having financial difficulties. He was behind on his child support, he was behind on his payments on his truck and his girlfriend's electricity had been turned off. (SR1: 68-69)

Melissa Clark told them that prior to the homicide Griffin and Lopez talked about needing money and that on the Friday night, which would have been October 6th, Griffin and Lopez had gone to Shorty's Bar to do the robbery that night, but something went wrong, either there were too many people there or something went wrong and they did not do the robbery that night. They went to Shorty's Bar the next night to watch Service America. (SR1: 71) The defendant admitted his involvement in the crime to her. (SR1: 72)

Mary Hall told them that she was dating Michael and that she was with him that night at the Kimberly. He had scratches all over his arms. (SR1: 73) These were on his elbow and wrist - forearm and elbow area. This is consistent with the information with regard to the lockers; there was blood found on the inside of the lockers. The DNA from the blood was consistent with Griffin's. Suzette Copley said that there was blood on Griffin at the Tropicana Motel upon their return and also Melvin Green saw blood on him. (SR1: 74)

The detectives found coins which are consistent with the money taken from Service America had been rolled and dispensed by Griffin

and Lopez. They also had evidence that a number of bags Griffin burned in Valrico were related to this particular case. (SR1: 75)

Cynthia Lambert told them Griffin said he went in without a mask on and that Lopez was responsible for watching both of the victims in the freezer while Griffin was breaking into the lockers and taking the money out. After emptying the lockers, Griffin returned and shot the victims. Griffin asked Lopez to make sure that it was finished. Griffin told Cynthia Lambert that in his opinion he had to go there with a plan to kill these people because he was not wearing a disguise. (SR1: 92)

Nineteen year-old Melissa Clark testified for the state that she heard Griffin and Lopez planning a robbery in Oldsmar. The robbery was Griffin's idea. (SR1: 116) Griffin traded Kocolis a gold chain for a nickel plated nine millimeter gun. (SR1: 118-19) Griffin also had a shotgun in his van. (SR1: 118) After the robbery, she met with them at the Kimberly hotel in the presidential suite. (SR1: 122) Griffin ordered a bottle of Dom Perignon and strawberries. (SR1: 123) Griffin had scratches on his arms which he did not have earlier. (SR1: 125) They had bags filled with change. (SR1: 126) They rolled the coins and took them to Seminole Bingo to exchange for cash. (SR1: 130)

Later when she asked Griffin what had happened, he told her the people had let him in because they knew him and that they locked the couple in the freezer. After he got the money, he went

back to the freezer, stood them together and shot them. He told her that he had a shotgun. (SR1: 131) Griffin said that after he shot them he told Lopez to clean up and make sure the job was finished. (SR1: 134) He was very calm about the whole episode. (SR1: 135)

Griffin told her if anybody told, he would kill them. She saw him point to his head like a gun and threaten Mary Hall because he heard that she had talked to the police. (SR1: 132) She saw him burn the coin bags on the grill. (SR1: 133)

Associate Medical Examiner Marie Hansen, M.D., testified concerning her examination of Mr. and Mrs. McCallops. (SR1: 159-163) She described seeing them lying on the floor of the cooler at Service America. (SR1: 161-62) The autopsies revealed that Mr. McCallops had five gunshot wounds. Four of the wounds were from a handgun and one was from a shotgun. (SR1: 164) The shotgun wound was a life threatening wound severing an aorta to the heart and appeared to be one of the first shots McCallops received. (SR1: 165-67) Mrs. McCallops had two gunshot wounds to her body. One was from a distance of several feet and was to her chest. The second wound was to her head from close range. (SR1: 175-81) Both wounds were from a handgun. (SR2: 192)

In addition to a number of other witnesses, as well as Drs. Maher and Merin, appellant took the stand on his own behalf at the penalty phase. Griffin testified that he was twenty-seven years

old and that he entered a guilty plea because he felt responsible for what happened at Service America because he was the one who took Lopez there. (SR4: 442) Griffin claimed that he began using cocaine in early 1995. He met Lopez and Kocolis at that time. At one point he stayed with Kocolis because his girlfriend Tracy had kicked him out for using drugs. (SR4: 443) Griffin testified that he came up with the plan to rob Service America because it was a way to get more drugs and not because he was having financial problems. (SR4: 444) He explained how they went to Shorty's Bar to see if there was anybody at Service America. There was not, so they came back the next night. (SR4: 445) Service America had a security system, so in order to obtain entry, there would have to be somebody there to let him in. (SR4: 446) Griffin testified that his plan was to use a disguise and put whoever was there in the cooler and leave them there. (SR4: 447)

When they got there on Saturday night, the gate was open and the garage door was open. Griffin claimed he put on his ski mask and Lopez put on his hood and a cap. He also claimed that Lopez had the nine millimeter on his hip in a holster and that Lopez grabbed the shotgun because it was more intimidating. (SR4: 448) Griffin claimed he was not armed. When they got inside Lopez took the McCallops to the cooler and Griffin opened the money lockers with a crowbar. (SR4: 449) While he was opening the lockers, he heard Lopez screaming at the people to shut up, do you want to die.

Griffin claimed that as he opened the last locker he heard a shotgun go off. (SR4: 449) After he heard the shot, he ran back and saw Lopez shoot at Mr. McCallops as he was trying to struggle up off the floor. Griffin claimed that he grabbed Lopez and the shotgun. He denied telling Mary Hall or Tracy Murphy that he put the people in the cooler and came back and shot them. (SR4: 450)

Griffin then apologized to the family for the murders. He also noted that despite the misunderstanding concerning the possibility of parole that he chose to enter a plea of guilty after being informed that there was no possibility of parole. (SR4: 453, 457) He then read a letter he wrote to his infant daughter. (SR4: 4553-55)

On cross-examination Griffin concedes that the robbery was his idea and no one else had a connection to Service America. (SR4: 457) He was the only one that had the knowledge of where the coolers were, where the money was and the times when people were alone in the building loading their trucks. (SR4: 458-59) Griffin also concedes that despite what he said on direct that he could support his drug habit by selling drugs. He took the money because he was having financial troubles and wanted extra money. (SR4: 460-61) He was behind on child support, truck and beeper payments. (SR4: 461) Then he stated that he had money, that he made $11,000 in one drug deal. He just wasn’t making his payments. (SR4: 463) Despite having all this money he and Kocolis planned the Service

America robbery for two weeks. (SR4: 463) The plan included having firearms there to be used. Griffin got the nine millimeter. (SR4: 464) He also had several shotguns. (SR4: 465) Part of the plan was that some one had to be at Service America because he did not know the code for the security system. (SR4: 466, 472) He confirmed the existence of conversations testified to by the state witnesses. (SR4: 471)

When they entered Service America, they terrorized the victims from the start in order to gain control; the victims were absolutely under their control, they were terrified. At one point after they put them in the freezer, Mr. McCallops kicked the door open and starting screaming in fear. Griffin testified that he knew Tom McCallops, that he had talked to him a bunch, he was a very nice fellow. (SR4: 474-75) After hearing McCallops screaming in fear, Griffin continued about the business of stealing the approximately $12,000 in change. (SR4: 476) The money was very heavy, it weighed about 900 lbs. and was very difficult to load into the van. (SR4: 477) It was shortly after the scream that he heard Lopez shoot McCallops with the shotgun. (SR4: 478) The shotgun had a number four shot in it which would have a powerful impact. (SR4: 479) He saw Lopez shoot McCallops but not at close range. (SR4: 481) Tom McCallops would not have known Lopez but would have been able to recognize Griffin. (SR4: 481)

After they left he felt horrible about the murders. He then went to the Kimberly Plaza Hotel and called all his friends to come up and join him for a party. (SR4: 483) He was in a good mood and had a good time. (SR4: 484) They had drugs and champagne. (SR4: 487) On the way to the hotel, they stopped and threw the guns off a bridge on Hillsborough Avenue. (SR4: 500)

After obtaining sentencing memoranda from both the state and defense, the court below entered a sentence of death on July 10, 1998. This appeal ensued.

SUMMARY OF THE ARGUMENT

Griffin first contends that the record does not demonstrate that his waiver of a penalty phase jury was knowingly and intelligently entered. It is the state's position that the waiver was voluntary and intelligent and in accordance with the guidelines set forth by this Court.

Griffin next urges that the trial court erred in failing to consider his potential for rehabilitation and productivity as a non-statutory mitigating factor. He further contends that the state cannot show beyond a reasonable doubt that the failure to consider this factor is harmless. It is the state's contention that this claim is procedurally barred, that the trial court's order sufficiently addressed all of the mitigating evidence argued to the court and that error, if any, is harmless.

Appellant next contends that the trial court's consideration of both during the course of a kidnapping and pecuniary gain was improper as both factors refer to the same aspect of the crime. It is the state's position that this claim is without merit and that the sentence was properly imposed.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING THAT APPELLANT VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO A PENALTY PHASE?

After pleading guilty to two counts of first degree murder, Griffin waived his right to have the jury for the penalty phase. Now on appeal, Griffin contends that the record does not demonstrate that the waiver was knowingly and intelligently entered. It is the state's position that the waiver was voluntary and intelligent and in accordance with the guidelines set forth by this Court in Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974).

To support his claim of error appellant quotes a minor portion of the record where the court addressed Griffin about the ramifications of his waiver. (Initial brief of Appellant, pgs. 32-33) He then asserts that although the court applied the correct standard in finding a waiver of the advisory sentence, the record does not establish that this waiver was done knowingly and intelligently. A review of the entire colloquy refutes such a contention:

> THE COURT: That's fine.
> Mr. Griffin, in your absence a moment ago your attorney indicated that there is a possibility that for purposes of this penalty phase that you would -- might be willing to waive your right to have a jury determination and recommendation with regard to sentencing.
> THE DEFENDANT: Yes.
> THE COURT: Have you had an opportunity to

discuss this with your lawyers?

THE DEFENDANT: Yes, sir.

THE COURT: And have you made any decision with regard to whether or not this is what you want to do?

THE DEFENDANT: Yes, sir, I have.

THE COURT: And what do you want to do?

THE DEFENDANT: I'd like to waive the jury, sir.

THE COURT: You understand, sir, that a presentation of evidence and testimony to the jury would be for the purposes of the State Attorney to prove the aggravating circumstances that they feel are present in this case, for the jury to hear that testimony and then to make a recommendation to me as to what they feel the proper sentence would be. Do you understand that that's the purpose of the penalty phase?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And you understand that their recommendations of either imposing the death sentence or imposing a life sentence need not be unanimous, that it just takes a majority vote of seven to five for the jury to recommend the imposition of the death sentence? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And do you understand by giving up your right to having this evidence presented to the jury that in essence this evidence would be presented to me and that I would make a final recommendation and decision as to what the sentence would be in this case? Do you understand that:

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And is anybody forcing you to make this decision, Mr. Griffin?

THE DEFENDANT: No, sir.

THE COURT: This is how you want to proceed in this case?

THE DEFENDANT: Yes, sir.

THE COURT: All right. What says the State in this matter?

MR. MARTIN: Judge, I believe you have complied with Hernandez at 645 So.2d 432 and with Lamadline, L-a-m-a-d-l-i-n-e, versus State at 303 So.2d 17, which indicates a

waiver, if it's knowingly and voluntarily given, at the Court's discretion may be accepted. Okay. Just a second.

THE COURT: That's all right.

MR. MARTIN: I believe that you have complied with those requirements. The only additional thing the State would ask that you advise the Defendant and make sure that he understands is that in this particular case the State is seeking the death penalty and the Court may impose either a death sentence or a life sentence, and that is based on the guidelines set forth in Hernandez which says that he specifically acknowledges that the trial court has discretion to impose a sentence of life or death. So I ask you just make that one last inquiry.

THE COURT: That's fine.

Mr. Griffin, you understand in this case that the State is seeking the death penalty against you?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand further that it would be then my decision totally as to what the sentence would be?

THE DEFENDANT: Yes, sir.

THE COURT: And that a death sentence could be imposed against you --

THE DEFENDANT: Yes, sir.

THE COURT: -- even without a jury recommendation. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Fine. I think we've complied with all the statutory requirements.

MR. MARTIN: I believe so, Your Honor.

THE COURT: That's fine. Does the State have any opposition at this point to waiving a jury for purposes of a penalty phase?

MR. WELLS: Your Honor --

MR. BARTLETT: Judge, we don't have any specific opposition, but I don't really think this matters according to the Hernandez case.

THE COURT: I thought the State could object and request --

MR. BARTLETT: Not in a specific situation where you have a plea such as Mr. Griffin has entered. Then it is up to the Court to accept or reject, and the State's position really

doesn't matter.

THE COURT: I understand.

MR. WELLS: If I might, just for the record.

THE COURT: Yes.

MR. WELLS: Under 921.141(1) -- and I won't read the entirety of this paragraph. It is quite lengthy. But it does read in part "if the trial jury has been waived, or if the defendant has pleaded guilty, a sentencing proceeding shall be conducted in front of a jury impaneled for that purpose, unless waived by the defendant." I think it is Mr. Griffin's right at the stage we are at to indicate to the Court what he has indicated this morning.

THE COURT: That's -- I understand.

Okay. At this point then I will find that Mr. Griffin has knowingly and freely and voluntarily waived his right to have a jury impaneled and to proceed on with this penalty phase only to me, and we will then proceed forward without impaneling a jury for purposes of making a recommendation at this time. All right.

MR. WELLS: Your Honor --

THE COURT: Yes.

MR. WELLS: -- just briefly for the record.

THE COURT: Go ahead.

MR. WELLS: I want the Court to know this decision has been made with consultation with Mr. Griffin's parents. We spent a lot of time yesterday discussing the facts of the case, the reasons we would do this. Also present in the courtroom is Ms. Wells, (phonetic) who was going to help us pick a jury. She looked at the case yesterday and talked to Mr. Griffin this morning here in court. So I believe this certainly is done with a knowing and intelligent waiver of his right to having a jury make this decision.

THE COURT: I'm sure in any case, and most particularly in a case where the most, you know, severe sanction is being sought, that Counsel has spent ample time discussing these matters, not only with Mr. Griffin but his family, and I'm certainly -- as with the first

> decision that Mr. Griffin made with regard to entering a plea in this case, that sufficient and probably in some cases more than sufficient time was spent prior to the formal announcement in court, and it would appear that Mr. Griffin, with the aid of extremely competent Counsel, have reached these decisions as a result of their counsel and the result of discussions with other members of his family. He fully knows what he's doing and is proceeding in what he feels at this time to be in his best interest to -- as to how to proceed with this case, and certainly I would accept his waiver at this point, and we'll proceed onward.

(SR1: 7-15)

Despite this thorough questioning and explanation, appellant contends that his affirmative responses to the court's inquiry does not demonstrate that his waiver was knowing and intelligent. He contends that this is so because the court's explanation was limited and misleading. This claim is not supported by the facts or the law.

In Hunt v. State, 613 So.2d 893 (Fla. 1992), this Court rejected a similar claim by Hunt that she did not voluntarily waive a penalty-phase jury, stating in pertinent part:

> The facts pertinent to Hunt's first and second claims concerning her guilty plea are as follows. On May 7, 1990, the State announced it was ready for trial and that Hunt wished to withdraw her previously entered plea of not guilty and enter a guilty plea. Hunt's attorney agreed that Hunt wanted to enter a guilty plea and stated that she wanted to testify at the Fotopoulos trial. Both parties waived a penalty-phase jury and agreed to leave sentencing entirely within the trial court's discretion. It was also agreed that

Hunt's sentencing would be deferred until after the Fotopoulos trial so that any information coming to light during the Fotopoulos trial could be considered in Hunt's sentencing. Hunt stipulated as to the factual allegations setting up a prima facie case for the entry of the plea. Hunt's attorney stated that it had been explained to Hunt that, notwithstanding her plea and future cooperation, it was still a possibility that the death penalty would be imposed. The prosecutor reiterated that the State was in no way waiving its intent to seek the death penalty, that there had been no backroom negotiations and no understanding that the State would not seek the death penalty. Hunt's attorney explained that he had discussed the plea at length with Hunt and that they both agreed that "this plea and her offer to testify and cooperate in view of the facts and circumstances is really the only sensible and logical choice under this scenario." The prosecutor further stated that the State had not agreed that it, in fact, would call Hunt as a witness at the Fotopoulos trial.

In formally accepting her guilty plea, the trial judge outlined the plea agreement to Hunt as follows:

> **You would plead guilty as charged to all of the counts in the Information and the Indictment.**
>
> **The sentencing phase in your case would be postponed until the Fotopoulos matter was tried and disposed of, and, ma'am, I am not sure if that is going to be one trial, two trials.... Those are things that have yet to be decided.**
>
> **We would postpone the sentencing phase of your case until after the Fotopoulos trial.**
>
> **There would be a sentencing phase or sentencing trial in your case. The State is going to seek the death penalty whether or not you cooperate in the trials of Mr. Fotopoulos.**

My understanding is both the State of Florida and you are going to waive an advisory opinion as to life or death. You are going to try that second phase without the Jury, with Judge alone, with myself alone and it will be up to me to decide an appropriate opinion, which essentially will be either life in prison or the death penalty.

That is my understanding of what is happening.

Is that your basic understanding?

To this Hunt responded, "Yes, it is." Later in explaining the significance of the plea to Hunt the court stated:

I think one of the other important things is that whatever evidence is presented in the Fotopoulos trials and my understanding from what the attorneys are saying here, you are going to testify at the Fotopoulos trials. I am going to consider your testimony and anything else that I hear in the Fotopoulos cases as part of the evidence in your sentencing hearing. I am going to take those into consideration and we definitely will have a sentencing hearing in your case.
You need to know that the State is still going to seek the death penalty and when you enter the plea, you need to be aware that certainly at this point and I think you should consider from now on, they are going to seek the death penalty no matter what you do.

Ultimately the sentencing decision will be up to me.

After thoroughly explaining to Hunt all the implications of entering the plea, ensuring that her plea was knowingly, intelligently and voluntarily made, and finding that there was a factual basis to sustain the plea, the court accepted Hunt's plea of guilty.

* * *

> Finally, we find no merit to Hunt's claim that she did not voluntarily waive a penalty-phase jury. Her position appears to be that although her waiver of an advisory jury clearly was voluntarily made at the time she entered her plea, the waiver was not effective because the plea agreement was rendered void when she was sentenced prior to Fotopoulos' trial. During the plea colloquy, it was thoroughly explained to Hunt that she was giving up her right to an advisory jury as part of the agreement. The trial court's finding at the time of accepting the plea that Hunt's decision to waive an advisory jury was made knowingly and voluntarily is supported by the record. We have previously rejected Hunt's underlying premise that the entire agreement was rendered void.

Hunt v. State, at 893-95, 899 (emphasis added)

A comparison of Hunt's colloquy to the inquiry of Griffin demonstrates that the inquiry conducted in the instant case was sufficient. The court clearly outlined to Griffin what rights he would be waiving and the purpose of the penalty phase jury recommendation.

Moreover, counsel for Griffin stated for the record that he had thoroughly discussed Griffin's options with him and his parents. Counsel stated:

> MR. WELLS: I want the Court to know this decision has been made with consultation with Mr. Griffin's parents. We spent a lot of time yesterday discussing the facts of the case, the reasons we would do this. Also present in the courtroom is Ms. Wells, (phonetic) who was going to help us pick a jury. She looked at the case yesterday and talked to Mr. Griffin this morning here in court. So I believe this certainly is done with a knowing and

> intelligent waiver of his right to having a jury make this decision.

(SR1: 15)

Additionally, in the defendant's sentencing memorandum, Griffin's counsel notes that "[a]fter lengthy discussions with Mr. Griffin, he decided to waive presenting his mitigation evidence to a jury and instead chose to proceed to the penalty phase before the court.

In Wuornos v. State, 676 So.2d 966, 968-70 (Fla. 1995), this Court rejected Wuornos' contention that her plea was invalid where the record showed that she was represented by counsel who assured the court that her plea was knowing and voluntary. This Court stated:

> The obvious evil addressed by the United States Supreme Court in Boykin [v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)] was of **poorly advised defendants unwittingly subjecting themselves to death penalties by a guilty plea, or of facts that simply do not merit a death penalty.** We believe that this is the type of "prejudice" contemplated by rule 3.172(I). Here, however, the record substantially and competently supports the trial court's finding of a basis to accept the plea. Wuornos herself indicated she was aware of the penalties she faced, knew the rights she was abandoning, and voluntarily had agreed to plead guilty. Although the procedures used below were not the most desirable, they nevertheless did not prejudice Wuornos within the meaning of rule 3.172(I). **The record refutes any contention she was poorly advised or unwittingly subjected herself to the death penalty, and the facts here are of a kind that would warrant the death penalty in a full**

> **trial**. (FN9) Accordingly, the deviations from the rule did not rise to the level of error.

Wuornos v. State, at 968-70 (emphasis added)

Griffin, like Wuornos, has failed to establish actual prejudice from any alleged failure of the judge to inform him of the various nuances of a penalty phase. This claim should be denied.

ISSUE II

WHETHER THE TRIAL COURT ERRONEOUSLY FAILED TO CONSIDER A MITIGATING CIRCUMSTANCE PRESENTED BY THE DEFENSE?

Griffin next urges that the trial court erred in failing to consider his potential for rehabilitation and productivity as a non-statutory mitigating factor. He further contends that the state cannot show beyond a reasonable doubt that the failure to consider this factor is harmless. It is the state's contention that this claim is procedurally barred, that the trial court's order sufficiently addresses all of the mitigating evidence argued to the court and that error, if any, is harmless.

Procedural Bar

The written sentencing order which appellant is now challenging was orally pronounced at the sentencing hearing held on July 10, 1998. No challenges to the sentencing order were raised at that time. Prior to §924.051 becoming effective on July 1, 1996,[1] errors regarding sentencing orders could be raised for the first time on appeal because "when sentencing errors are apparent on the face of the record, the purpose of the contemporaneous

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[1] Section 924.051, Florida Statutes (1996) applies. Section 924.051 became effective on July 1, 1996. Appellant entered a guilty plea on June 13, 1997 and was sentenced on July 10, 1998. The statute provides that the *party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court and precludes review unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.* Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996).

objection rule is not present because the error can be corrected by a simple remand to the sentencing judge." Davis v. State, 661 So.2d 1193, 1197 (Fla. 1995).

Now, however, review of appellant's challenge to the written order is precluded because the issue was not preserved for appeal as required by Florida Rule of Criminal Procedure 3.800(b) and §924.051 Florida Statutes (1996). Cf. Neal v. State, 688 So.2d 392 (Fla. 1st DCA 1997). §924.051(3), Florida Statutes, and Rule 3.800(b) require defendants to preserve sentencing errors by making a contemporaneous objection or filing a written motion to correct sentence within 30 days after entry of the sentence. Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773, 775 (Fla.1996); Amendments to the Florida Rules of Criminal Procedure, 685 So.2d 1253, 1271 (Fla.1996); Collins v. State, 732 So.2d 1149, 1151 (Fla. 1st DCA 1999); Mason v. State, 698 So.2d 914 (Fla. 4th DCA 1997). Griffin neither raised a contemporaneous objection nor filed a written motion to correct sentence pursuant to Rule 3.800(b). Therefore, as Griffin's claim that the trial court failed to address the potential for rehabilitation does not constitute fundamental error, this claim should be denied as procedurally barred. Cf. Davis v. State, 661 So.2d 1193, 1197 (Fla. 1995) (The failure to file written reasons is not fundamental error that may be raised at any time if the sentence is within the maximum period allowed by law.)

Assuming, *arguendo*, that this claim has been properly preserved, Griffin still bears the burden of establishing prejudicial error.[2] Griffin has established neither error nor prejudice. The thirteen page written order sentencing Griffin to death contains a thorough and detailed analysis of the facts of this double homicide, as well as the aggravating and mitigating evidence presented. Contrary to Griffin's assertion, the sentencing order in this case not only complies with the approved procedure, but shows that the trial court bent over backwards to give full consideration to the proffered mitigation. Although the order does not specifically mention the word rehabilitation, it does show a thoughtful and deliberate weighing of aggravating and mitigating circumstances, and consideration of the evidence argued in support of the claim of potential for rehabilitation. The court gave good faith consideration to the mitigation presented by Griffin. Mungin v. State, 689 So.2d 1026, 1031 (Fla. 1995) (rejecting Mungin's claim of error based on court's failure to

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[2] In Nelson v. State, 24 Fla. L. Weekly S250 (Fla., May 27, 1999), this Court, while declining to determine if §924.051 was applicable to Nelson's conviction, nevertheless, noted: . . . "Section 924.051 shifts the burden of establishing error to the moving party: '[T]he party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court.' §924.051(7), Fla. Stat. (Supp.1996). Prejudicial error is defined as 'an error in the trial court that harmfully affected the judgment or sentence.' §924.051(1)(a), Fla. Stat. (Supp.1996). Prior to this change, the burden was on the benefitting party to prove beyond a reasonable doubt that the error did not affect the verdict and was therefore harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986)."

specifically evaluate the substance of the evidence of appellant's childhood, his good prison record or evidence of alcohol and drug use); Bogle v. State, 655 So.2d 1103, 1109 (Fla. 1995)(fact that the trial judge did not specifically list Bogle's artistic talent and capacity for employment in mitigation is insufficient to overrule the trial judge's imposition of the death penalty given the minor weight that would be afforded to those factors.)

In the instant case, the lower court found four aggravating circumstances, including: 1) prior violent felony, 2) during the commission of a kidnapping, 3) avoid arrest and, 4) pecuniary gain. (R11; 2064-68) In mitigation the court found no significant criminal history, Griffin's drug usage, Griffin's family and employment background, Griffin's good jail conduct and courtroom behavior and Griffin's remorse. (R11: 2069-73) The sentencing order thoroughly sets forth the basis of each of these factors given the fact that the sentence was based on a double homicide resulting from a well thought out plan to rob Service America. Griffin's plan included making sure an innocent employee was at the facility in order to allow Griffin to bypass the security system. The plan also included bringing a nine millimeter gun, as well as a shotgun to use during the robbery. This calculated plan was balanced against relatively insignificant mitigating evidence. Accordingly, error if any, was harmless.

The harmlessness of this alleged error is further evidenced by the lack of emphasis placed on this factor in the defendant's sentencing memorandum. (R11: 2045-50) The reference to the potential for rehabilitation was limited to one line in the sentencing memorandum which was incorporated within the context of Griffin's employment history and his status as a good provider. (R11: 2048) Griffin's employment history and his status as a good provider were clearly considered by the trial court in the sentencing order. The court's failure to mention this one word does not establish prejudicial error.[3] Hauser v. State, 701 So.2d 329, 331 (Fla. 1997)(finding failure to specifically mention PSI in sentencing order harmless); Thomas v. State, 693 So.2d 951, 953 (Fla. 1997)(finding failure to mention mitigating evidence in sentencing order harmless where evidence in aggravation massive).

Based on the foregoing, the state urges this Court to deny the claim and affirm the sentence. However, should this Court determine that resentencing is necessary, the state disagrees with appellant's assertion that this Court should follow Valle v. State, 502 So.2d 1225 (Fla. 1987) and order a new jury recommendation and sentencing proceeding. Griffin has already waived a jury

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[3] Appellant concedes that §924.051 applies but contends that the error in the instant case is constitutional error which places the burden on the state to prove harmless error beyond a reasonable doubt. Assuming, *arguendo*, that it is the state's burden to establish harmless error, the state asserts that based on the substantial number of aggravating circumstances, balanced against the limited mitigating evidence, it is beyond a reasonable doubt that alleged error was harmless beyond a reasonable doubt.

recommendation. Further, where, as in the instant case, the error asserted is only in the written order, all that is required on remand is for the trial court to reevaluate the evidence before it and provide a new order for this Court's review. Crump v. State, 697 So.2d 1211, 1212 (Fla. 1997); Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995).

<u>ISSUE III</u>

WHETHER THE TRIAL COURT ERRONEOUSLY CONSIDERED TWO AGGRAVATING CIRCUMSTANCES THAT REFER TO THE SAME ASPECT OF THE OFFENSE.

Appellant next contends that the trial court's consideration of both during the course of a kidnapping and pecuniary gain was improper as both factors refer to the same aspect of the crime. It is the state's position that this claim is without merit and that the sentence was properly imposed.

While appellant concedes that this Court rejected this argument in <u>Green v. State</u>, 641 So.2d 391 (Fla. 1994), he contends that dicta in <u>Green</u> supports his claim of error. In <u>Green</u>, this Court stated, "If the sole purpose of the kidnapping had been to rob Flynn and Hallock, we would resolve this issue differently." *This identical argument was rejected by this Court in* <u>Hartley v. State</u>, 686 So.2d 1316, 1323 (Fla. 1996), wherein this Court stated:

> In his ninth claim, Hartley asserts that the trial judge erroneously doubled the aggravating circumstances of committed for pecuniary gain and committed during the course of a kidnapping. **This argument has been consistently rejected by this Court.** <u>Preston v. State</u>, 607 So.2d 404 (Fla.1992), cert. denied, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); <u>Bryan</u>; <u>Routly v. State</u>, 440 So.2d 1257 (Fla.1983), <u>cert. denied</u>, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). **Hartley's assertion that a contrary conclusion is compelled by <u>Green v. State</u>, 641 So.2d 391 (Fla.1994), cert. denied, --- U.S. ----, 115 S.Ct. 1120, 130 L.Ed.2d 1083 (1995), is misplaced. In <u>Green</u> we stated in dicta that, had the sole purpose of the kidnapping been to rob the victim, we would have resolved**

> **this issue differently**. Here, however, as set forth under the CCP discussion above, the victim was kidnapped, taken to a field, and robbed and murdered after Hartley and the other defendants decided to "get" the victim.

Hartley v. State, 686 So.2d 1323. (emphasis added) Accord Ferrell v. State, 686 So.2d 1324, 1330 (Fla. 1996).

In Green v. State, 641 So.2d 391, 395 (Fla. 1994), the lower court had found both pecuniary gain and during the commission of a kidnapping. Green argued that because the indictment alleged that the underlying intent for the kidnapping was to commit a robbery, the trial court improperly doubled these aggravating factors. Although the indictment for kidnapping also had the option that the kidnapping was done with the intent to terrorize, Green argued that because there was no jury finding on which theory existed, both aggravating factors must be disapproved. Relying on Brown v. State, 473 So.2d 1260, 1267 (Fla.), cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985), this Court rejected both arguments because the kidnapping had a broader purpose than to simply provide the opportunity for a robbery.

In Brown, this Court had previously rejected a similar argument concerning the pecuniary gain and during the course of a burglary aggravating factors:

> Appellant argues that the trial court erred in giving improper double consideration to a single feature of the criminal episode in finding the aggravating factors that the

> murder was committed in the course of a burglary and was committed for pecuniary gain. Appellant relies on Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981) and Provence v. State, 337 So.2d 783 (Fla.1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). In Maggard, the burglary and pecuniary gain factors were found to have been improperly doubled "under the peculiar facts of the case." 399 So.2d at 977. In Provence, the improper double consideration was given to pecuniary gain and robbery, both of which referred "to the same aspect of the defendant's crime." 337 So.2d at 786. The present case is significantly different. The factor of pecuniary gain was established by appellant's theft and subsequent sale of the victim's television set. The evidence showed, however, that the offense of burglary had a much broader significance than simply being the vehicle for a theft. The victim was beaten, raped, and strangled. While she was tormented, her home was ransacked. Thus the burglary had a broader purpose in the minds of the perpetrators than a burglary seen merely as an opportunity for theft. On the basis of these facts, we find that the burglary factor and the pecuniary gain factor were separate characteristics of appellant's crime and were properly given separate consideration.

Brown, at 1267

See, also, Foster v. State, 679 So.2d 747 (Fla. 1996)(kidnapping had a broader purpose than just to provide the opportunity to rob); Walls v. State, 641 So.2d 381 (Fla. 1994)(finding that murder occurred during commission of kidnapping was supported by evidence that defendant forcibly confined victim against her will, without lawful authority, for purpose of inflicting bodily harm and terrorizing victim, and that confinement was not slight,

inconsequential or merely incidental to other crime, was not inherent in nature of other crime of burglary, and it made other crime substantially easier to commit or lessened risk of detection.)

Similarly, in the instant case, the facts establish that the offense of kidnapping had a much broader significance than simply being the vehicle for a robbery or theft. In order to facilitate Griffin's plan to obtain money, it was completely unnecessary for Patricia McCallops and Tom McCallops to be taken from the loading area of Service America to the freezer area where they were locked inside and remained while the defendants cut open the change lockers. Griffin and Lopez had already confined them and taken the cash from Service America, when they returned to the freezer to kill the McCallops. The act of confining the victims served no other purpose than to simply terrorize them.[4] If robbery was the only purpose, the McCallops could have been shot and killed at the outset, rather than after the money had been obtained.

The lower court considered the foregoing in light of the facts of this case and found as follows:

> 2. The capital felony was committed while the Defendant was engaged, or was an accomplice, in the commission of, or attempt to commit, or in flight after committing or attempting to commit a kidnapping.
> The facts of this case show that one or

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[4] The defendant testified that their plan of bringing the guns and placing the victims in the cooler was to terrorize them. (SR4: 474-75)

> both of the victims knew this Defendant and after he and Lopez were given admittance to the Service America warehouse, they locked both victims in one of the freezers while they stole money bags from the storage lockers. Both victims were forcibly taken at gunpoint from the dock area where the perpetrators were let in to the freezer area, some fifty feet away. Testimony at the penalty phase showed that both victims remained in a freezer until all the money was taken from the lockers and placed in the get-away van and then the Defendants went back to the freezer and killed the victims. The Defendant testified that they brought the guns with them to place the victims in fear so they would not resist. The movement of the victims was not slight and was not necessary for the commission of the robbery. Clearly the victims were confined against their will, without lawful authority. Further, **the Defendants' acts of confinement or imprisonment were with the intent to either inflict bodily harm upon them or to terrorize them.**
>
> It is well settled that when a homicide occurs during a robbery, it would be impermissible "doubling" to use this aggravating factor and the pecuniary gain factor unless two or more enumerated felonies were committed during the course of the homicide and one of them does not include the taking of money and another one does. Clearly that is what we have here and both factors can be found to exist. Pecuniary gain will be discussed later.
>
> The State has proved this aggravating factor beyond a reasonable doubt. See Green v. State, 641 So. 2d 391 (Fla. 1994) and Faison v. State, 399 So. 2d 19 (Fla. App. 3D DCA, 1981).

(R11: 2063-64)

Based on the foregoing, the state urges that both factors were properly found. Walls v. State, 641 So.2d 381 (Fla. 1994). Assuming, *arguendo*, that it was error to find both, the finding is

harmless in the instant case. Even absent the pecuniary gain factor, the sentence is still supported by three other aggravating factors: 1) prior violent felony, 2) during the commission of a kidnapping, and 3) avoid arrest. (R11; 2064-68) Zakrzewski v. State, 717 So.2d 488 (Fla. 1998); Barwick v. State, 660 So.2d 685 (Fla. 1995); Hartley v. State, 686 So.2d 1316 (Fla. 1996).

Finally, while Griffin does not contend that his sentence was disproportionate, the state notes that a review of similar cases compared to the facts of the instant case shows that the sentence in the instant case was proportionate. This Honorable Court has upheld the imposition of the death penalty in numerous cases where victims were killed during the course of a robbery/burglary. Jennings v. State, 718 So.2d 144 (Fla. 1998)(multiple victims killed after being locked in a restaurant freezer during a robbery); Walls v. State, 641 So.2d 381 (Fla. 1994)(sentence proportionate and no improper doubling where defendant killed multiple victims during robbery and kidnapping). See, also, Sliney v. State, 699 So.2d 662 (Fla. 1997)(sentence proportionate for killing of pawn shop owner during commission of robbery, even though co-perpetrator received lesser sentence); Melton v. State, 638 So.2d 927 (Fla. 1994)(a sentence found proportionate where defendant convicted of a fatal shooting during a robbery where there were two aggravating factors and little mitigation); Hayes v. State, 581 So.2d 121 (Fla. 1991)(death sentence proportionate for

armed robbery); Jent v. State, 579 So.2d 721 (Fla. 1991)(sentence proportionate for murder committed during the course of burglary where court affirmed two aggravating factors balanced against little mitigation); Brown v. State, 565 So.2d 304 (Fla. 1990) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators); LeCroy v. State, 533 So.2d 750 (Fla. 1988)(affirming death sentence where, *inter alia*, murder was committed during course of armed robbery to avoid arrest, and defendant had no significant history of prior criminal activity). Accordingly, the trial court properly imposed the sentence in the instant case.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Appellee respectfully requests that this Honorable Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Kevin Briggs, Esq., Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, Florida 33831, this 16th day of August, 1999.

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