

IN THE SUPREME COURT OF FLORIDA

MICHAEL JOSEPH GRIFFIN,

Petitioner,

v.

CASE NO. SC09-1894

L.T. No. CRC95-18753 CFANO-M

WALTER A. McNEIL,

Secretary, Florida

Department of Corrections, etc.

Respondents.

_____ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COME NOW, Respondents, WALTER A. McNEIL, Secretary, Florida Department of Corrections, etc., by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondents respectfully submit that the petition should be denied, and state as grounds therefore:

FACTS AND PROCEDURAL HISTORY

The State's answer brief on appeal from the denial of postconviction relief in case no. SC09-1, contains a detailed summary of facts and procedural history and is being submitted along with the instant response. As it is relevant to the instant claim, however, this Court's rendition of the facts is set forth below:

The following facts were developed during the sentencing hearing before the trial court. Sometime in 1989, after graduation from high school, Griffin started working for his father as a service and repair technician at Moore's Refrigeration (Moore's). Moore's dealt with companies which needed servicing for their vending machines and coolers. One such vending company was Service America Corporation (Service America). At various times, Griffin had been to Service America to fix or service their refrigerators and coolers. Consequently, Griffin had become very familiar with Service America's warehouse. Particularly, he had become aware that Service America kept a great deal of cash on site. That cash was deposited daily in lockers at Service America by drivers who had returned from replenishing and collecting the coins from the vending machines throughout various sites.

In 1995, Griffin stopped working for Moore's. He had become addicted to cocaine and started living his life mainly to procure the money to acquire the drug. At some point, Griffin moved out of his house and moved in with a drug dealer acquaintance, Nicolas Kocolis. Anthony Lopez, another addict, also resided at Kocolis's place along with Kocolis's girlfriend. From there, Griffin was able to sell drugs for Kocolis and would use the proceeds to support his addiction.

Sometime during his stay at Kocolis's, Griffin felt he needed more money. Griffin was in arrears with his child support, automobile, and pager payments. As a result, he decided to steal the money from Service America's lockers. He brought up the idea to Kocolis and Lopez while at Kocolis's place. He told them that he knew where the cash was at Service America and would be able to steal it. The three of them then started planning the theft. Although Kocolis was initially supposed to take part in the crime, he later decided against it. Instead, Griffin and Lopez agreed to go to Service America.

Prior to going to Service America, Griffin traded his gold chain to Kocolis for a 9mm pistol to use during the theft. He also had a shotgun, though the testimony is not clear as to who used which weapon during the commission of the crime. Finally on October

6, 1995, Griffin and Lopez set out to carry out their plan. At Shorty's, a bar located across from Service America, they sat and observed Service America for a while. Because of the locked gate and the alarm system, Griffin realized that he would not be able to get in. Having serviced the equipment at Service America many times, he then hoped that an employee would be present and would recognize him from past jobs and thus let him in. On that night, no employee showed up and the plan was thwarted.

The following night, on October 7, they went back to the bar, once again hoping that an employee would be at Service America. Tom McCallops (McCallops), an employee who had seen Griffin fix coolers many nights in the past, arrived with his wife, Patricia McCallops. As predicted by Griffin, when Griffin and Lopez went to Service America, McCallops immediately recognized Griffin and let them in. Once inside, they wielded their weapons. Lopez then took the McCallopses to a cooler and locked them inside while Griffin opened the money lockers with a crowbar. Griffin testified that while he was opening the money lockers, he heard a shotgun and ran back and saw Lopez shooting at McCallops as he attempted to rise off the floor. He then grabbed the shotgun from Lopez.

However, other witnesses testified that Griffin admitted otherwise after the murder. Immediately after the murder, Griffin had a celebration party at the Kimberly Hotel where he and the guests had champagne and cocaine. There, Griffin told Melissa Clark, Kocolis's girlfriend, that he and Lopez killed the McCallopses. Griffin told her that once the money bags were placed in his van, he went back inside, stood the McCallopses together and shot them with the shotgun. Afterwards, he told Lopez to clean up and finish the job (with the 9mm). Mary Hall, Griffin's girlfriend at the time, gave similar testimony. They also testified that Griffin's arms were all scratched up and his clothes bloody when they met him at the party. [FN2]

[FN2] Griffin testified to have worn a ski mask while Lopez wore a hooded jacket which helped him cover his face. However, Hall testified that Griffin told her that he did not wear a mask because he needed to be recognized by McCallops in order to be let into Service America.

The medical examiner testified with regard to the result of the autopsies and her observations. She stated that McCallops had five gunshot wounds, one from a shotgun and four from a handgun. The shotgun wound, which appeared to be the first shot McCallops received, was life-threatening in that it severed the aorta. Mrs. McCallops had two gunshot wounds (9mm), one in the head and one in the chest. Pictures were introduced at the penalty phase to show that the metallic grill of the money lockers was pried open and contained spots of blood. The spots of blood were found to be consistent with Griffin's.

The detectives testified as to the findings of their investigation. The findings establish that sometime after the celebration at the hotel, the money was taken to Kocolis's place. Since the loot (\$11,300) was made up mostly of coins, Kocolis, Lopez, Griffin, and some others proceeded to pack some of it in paper rollers. Afterwards, they took the rolled coins to Seminole Bingo and exchanged them for currency bills (about \$300). They then burned the empty coin bags. The investigators recovered some of the partially burnt bags. They were also able to match tire tracks left at the warehouse with the tires on Griffin's van.

After the above evidence was presented, testimony was offered with regard to Griffin's mental state. Griffin was found to be competent by the two doctors, Dr. Michael Maher, a psychiatrist and expert on forensic psychology, and Dr. Sidney Merin, a clinical psychologist. Some of the testimony, however, dealt with an accidental pellet gunshot injury Griffin suffered at the age of ten. After undergoing surgery, Griffin suffered a speech impairment for an unspecified number of months. Dr. Maher testified that while the injury did not cause any permanent damage, it left Griffin vulnerable to other impairments that

might occur in the future. For instance, Griffin's depression, attempted suicide at the age of sixteen as a result of complications with a girlfriend, and later cocaine use related in some way to the head injury. On the other hand, Dr. Merin testified categorically that the injury simply had no effect on Griffin's brain. He stated that due to the location of the injury, any defect would only have resulted in cognitive disability. Given Griffin's performance in high school (3.3 GPA) and his certification and work in refrigeration which required high-order brain-processing skills, his cognitive ability was definitely not damaged. Therefore, Dr. Merin concluded, there was no permanent damage.

Although Griffin denied killing the McCallopes, he pled guilty to the charges and accepted the factual basis of the plea. He stated that had he not taken Lopez to Service America, this would not have happened; therefore, he felt responsible for what happened. Sometime before or at the time he was put in jail, Lopez developed severe mental problems. Consequently, he has since been institutionalized in order to restore his competency to stand trial. As to Kocolis, he was incarcerated on a violation of probation.

Griffin v. State, 820 So. 2d 906, 909-911 (Fla. 2002).

Petitioner's habeas petition in this Court was timely filed along with his initial brief in the appeal of the denial of his motion for postconviction relief.

ARGUMENT

EVIDENCE THAT GRIFFIN'S CO-DEFENDANT WAS SENTENCED TO LIFE IS NOT PROPERLY RAISED IN A PETITION FOR HABEAS CORPUS, IS BARRED, AND IS WITHOUT MERIT AS THE EVIDENCE SHOWS GRIFFIN PLANNED THE CRIME AND THE CO-DEFENDANT HAD EXTENSIVE COMPETENCY ISSUES.

Griffin asserts in his state habeas petition a claim under *Scott v. Dugger*, 604 So. 2d 465, 468-469 (Fla. 1992) that his sentence should be reduced to life because his co-defendant Anthony Lopez received a life sentence in 2004, after this Court had affirmed Griffin's death sentence in 2002. *Griffin v. State*, 820 So. 2d 906 (Fla. 2002). The claim should be denied as it is not appropriately raised in a habeas petition, it is procedurally barred and it is without merit.

This Court in *Scott* held that "in a death case involving equally culpable codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence." *Id.* at 469. This Court, however, declined to consider it on habeas review, as it is a post conviction claim. *Id.* at 470. Accordingly, this Court should deny this petition.

Moreover, as this claim was not presented in the motion to vacate filed below, it is barred and Griffin cannot use habeas to resurrect the claim. *Denson v. State*, 775 So. 2d 288, 289 (Fla. 2000) (an extraordinary writ petition cannot be used to

litigate or relitigate issues that were or could have been raised on direct appeal or in prior postconviction proceedings.) Griffin attempts to avoid this bar by asserting only that he could not have raised the claim because Lopez was sentenced after the motion to vacate was filed" and because the "post-conviction court recognized Mr. Griffin's dilemma" it "addressed the issue *sua sponte* in its November 26, 2008 order." Petition at pg. 38. This contention is unsupported by the facts and the law.

It is true that the court below addressed the issue *sua sponte* in its order on the postconviction motion, but there is no support for the contention that it was because the court recognized "Griffin's dilemma" or because there was any impediment to Griffin properly raising the claim. (PCR9/1412-13) Griffin's only "dilemma" was that he had failed to timely assert the claim in a Rule 3.851 motion to vacate. The fact that Griffin filed his initial motion to vacate before Lopez was resentenced, did not preclude him from filing an amendment raising the claim.¹ *Scott* provides that such evidence qualifies as newly discovered. *Scott*, 604 So. 2d at 468.

¹ In fact, Griffin filed numerous amendments to his initial motion raising other newly discovered evidence claims. Defendant's initial Motion to Vacate was filed August 27, 2003, a First Amended Motion to Vacate was filed September 19, 2003, a Second Amended Motion to Vacate filed on July 25 2005, a Third

Accordingly, Griffin had a year after Lopez was sentenced to raise a claim of newly discovered evidence concerning that sentence. See Fla. R. Crim. P. 3.851(d)(2)(A). *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008) ("To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence.") Griffin makes no claim that he was unaware of Lopez's sentence. In fact, Griffin concedes that after the Lopez trial was concluded he was given access to previously excluded files and that on "July 22, 2005, based upon records received from the Lopez trial, Mr. Griffin filed a second amended 3.851 motion which amended the three claims for which he had been granted a hearing." Petition at pg. 4. To contend that he could raise some claims based on the Lopez records but, not the one raised herein is untenable. Accordingly, this claim should be denied as it is procedurally barred.

There is also a suggestion in Griffin's "Introduction" that appellate counsel was ineffective but no argument is presented as to how appellate counsel was deficient or how he was prejudiced. Accordingly, that claim, such as it is, is waived.

Amended Motion to Vacate filed on September 25, 2007, and a supplement to the motion filed on October 1, 2007. (PCR1/1-175; 2/176-215; 2/216-349; 3/350-431; 5/692-717; 6/779-944; 7/978-89)

Doorbal v. State, 983 So. 2d 464, 482 (Fla. 2008) (Arguments presented in a cursory fashion and not sufficiently briefed are considered waived); *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005); *Cooper v. State*, 856 So. 2d 969, 977 n.7 (Fla. 2003); *Reeves v. Crosby*, 837 So. 2d 396, 398 (Fla. 2003); *Lawrence v. State*, 831 So. 2d 121, 133 (Fla. 2002). Moreover, counsel cannot be deemed ineffective for failing to raise a claim that was not available.

Further, even if the disparate treatment claim was properly before this Court, it is without merit. Griffin asserts that he and Lopez were equally culpable but Lopez received a life sentence because "Griffin had already been sentenced to death, Lopez's attorneys were able to argue to Lopez's jury that Mr. Griffin was more culpable and that he had already been sentenced to death for the two homicides." Petition at pg. 37. He also contends "Lopez's attorneys used a voluntary intoxication defense which was viable and successful. The jury believed Lopez's attorneys. Mr. Lopez received two life sentences from a jury and Judge Federico on January 30, 2004." *Id.* He further suggests that the lower court recognized this relative culpability.

Griffin misstates the facts.

First, while the lower court raised the issue, it specifically noted that because the issue had not been affirmatively pled, it lacked sufficient record evidence to satisfactorily weigh the culpability of defendant Griffin to co-defendant Lopez. (PCR9/1413) On the other hand, Judge Federico did have this evidence before him and made extensive findings concerning the relative culpability of Lopez and Griffin. (Sentencing Order of Judge Federico of Juan Antonio Lopez (DEF A), a/k/a Anthony Lopez, Case No. CRC95-18753CFAN0-K, attached as Exhibit A)

This Court has held that a "trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." *Hernandez v. State*, 4 So. 3d 642, 671 (Fla. 2009), quoting, *Puccio v. State*, 701 So. 2d 858, 860 (Fla. 1997). ***Griffin's failure to properly raise this claim in a Rule 3.851, where factual findings could have been made after an examination of both the Lopez and the Griffin record, demonstrates the prejudice to the State resulting from his failure to comply with the rules.*** Nevertheless, the State notes that the findings By Judge Federico in the Lopez sentencing order are consistent with these findings are the findings made by Judge Downey in

Griffin's Sentencing Order. Additionally, as the following shows, every court that has reviewed the facts has determined that Griffin was not only the planner and driving force behind the crime, but, also, that he, along with Lopez, shot and killed the victims.

Judge Federico's findings, in Lopez, included the following:

Based on the evidence, the court finds that while witness elimination was a dominant motive for Griffin, the same is not true for Lopez. The evidence abundantly demonstrates that it was Griffin who had an interest in eliminating witnesses, for it was Griffin who frequented the Service America warehouse as a refrigerator repairman and who discovered the opportunity to rob. It was Griffin who was recognized by the employees of Service America, permitting him access into the warehouse that night. It was Griffin who was known to carry a shotgun, who drove the striped white van used at the crime scene, and who procured the shotgun and 9mm weapons.

This leads the court to another observation. Aside from their disparate roles in orchestrating and carrying out the robbery/double homicide, the evidence indicates that Lopez and Griffin had different intentions upon arriving at Service America that night. Melissa Clark, Kocolis' former girlfriend, explained that Lopez thought they were "just going to go in there and rob the people and leave" She testified that Lopez confessed to her "there was no reason that anything had to happen to those people because they weren't fighting back." Kimberly Ally, a friend of Kocolis', testified that Lopez admitted to locking the McCallops in the freezer, after which he cautioned them "nobody would get hurt as long as they cooperated." In addition, Lopez took precautions against being recognized. He later complained, after the murders, that Griffin did nothing to conceal his identity or prevent his hair from falling out at the scene.

In sum, the State has failed to prove beyond a reasonable doubt and by "strong proof" that Lopez possessed the motive to eliminate witnesses. Zack, 753 So. 2d at 20. This court is unwilling to attribute such a motive to Lopez merely because the record shows that Griffin had an overwhelming interest in eliminating witnesses. Accordingly, the court finds that this aggravating factor does not exist.

Order at pages 3-4.

The evidence does not permit application of this aggravator [CCP] to Lopez. Undoubtedly, the robbery was the product of calm and cool reflection and a prearranged design. It was unquestionably executed under a heightened premeditation. Griffin and Lopez discussed the plan extensively, traded personal property to procure weapons, observed Service America across from Shorty's bar the night prior, and returned the following night to commit the robbery.

That said, none of the evidence suggests that Lopez acted under a prearranged design, a calm and cool reflection, and a *heightened* premeditation in committing the murders. To the contrary, the evidence leads to the conclusion that Lopez acted out of emotion in repeatedly discharging his 9mm weapon, prompted by panic and Griffin's demand "to clean up and finish the job."

Order at pages 6-7.

The testimony presented at trial from several witnesses established that Kocolis provided Lopez with cocaine, money, girls, social connections, friendship, and transportation. The testimony portrayed Lopez as Kocolis' "do-boy," as a follower, doing whatever Kocolis would say, acceding to his wishes. According to the testimony, although Lopez desired to please Kocolis, he was also fearful of Kocolis. Clearly, Kocolis was the dominant figure in the relationship.

Order at page 11.

There is competent, evidence in the record to establish that the defendant felt remorse after the murders. Melvin Greene testified that Lopez seemed

"nervous" and "just different from himself." Melissa Clark testified that Lopez, at the after-party, was very antsy, crazy-like and vomiting, that he punched a hole through the closet door, and that he was very out of control. She also testified that Lopez told her that "those people did not need to die," and that "they weren't fighting back." Similarly, Mary Hall testified that Lopez did not seem his usual self, that he seemed "somber" and very quiet, and that he just sort of sat on the couch and observed. Kimberly Ally testified that Lopez was nervous, that he was not the same person, and that he seemed dazed and very upset.

Order at pages 13-14.

The jury found Lopez guilty of two counts of First Degree Murder as charged on June 12, 2003. Lopez voluntarily and knowingly waived his, right to a jury for purposes of the penalty phase." (Exh. A, Order at pg. 1) As the jury found Lopez guilty of first degree murder, it is obvious that it rejected Lopez's voluntary intoxication defense, contrary to Griffin's assertion that his voluntary intoxication defense was successful. Moreover, because there was no jury for the penalty phase, it follows that the jury could not have been persuaded by a voluntary intoxication defense with regard to the sentence.

The Lopez Order also reflects that Judge Federico rejected reliance on such evidence to establish the mental mitigator of "extreme mental or emotional disturbance" but did consider his drug use in support of the "capacity to conform his conduct" mitigator which he gave moderate weight. He stated:

The court finds that the cumulative impact from years of habitual cocaine use coupled with the euphoric effect of alcohol, marijuana, and crack cocaine use at or within hours of the murders is sufficient to find that Lopez's capacity to appreciate the criminality of his conduct was substantially impaired on the night in question. Accordingly, the court finds that this mitigating factor has been established by the greater weight of the evidence. The court assigns this mitigating factor moderate weight.

Order at page 13.

Perhaps mostly importantly, after having considered all of the evidence, Judge Federico considered the disparate treatment issue and found:

It certainly has not gone unnoticed that co-defendant Griffin received a death sentence for his involvement in the robbery/double homicide. It also has not gone unnoticed that Lopez would appear to be more culpable based on the number of gunshots he fired. However, the evidence abundantly demonstrates that Griffin was the more culpable individual, as he: (a) knew of the opportunity by frequenting the Service America warehouse on prior occasions; (b) organized and planned the criminal episode; (c) used his familiarity to gain access to the warehouse; (d) procured the shotgun and 9mm handgun; (e) used his van during the criminal episode; (f) directed Lopez to "clean up and finish the job"; (g) was seen with blood on his clothes after the murders; and (h) uttered inculpatory and celebratory remarks after the murders.

Order at page 15.

As in the Lopez Sentencing Order, Judge Downey in the Griffin Sentencing Order (attached as Exhibit B), also recognized that it was Griffin's plan that he could gain entry because the McCallops knew him and accordingly, they would need

to be eliminated. The court also considered Griffin's culpability with regard to being the shooter and the impact of his drug use. The court found, as follows:

a) The Defendant told several witnesses both before and after the crime that, in order to gain entry to Service America, an employee working there must recognize him to let him in under the pretense of working on the refrigeration units, as he had done in the past. He knew the plant's layout and where the money was stored in the storage lockers. He knew many of the workers there, including the victims. He could wear no mask as he had to be recognized. The Defendant told these same witnesses that he had to kill the victims because they recognized him.

b) After recognizing the Defendant and letting both of the Defendants into the plant, the victims were locked in a freezer. The Defendants then proceeded to break into the lockers and remove the money bags. This done, they returned to the freezer and killed the victims. They could have left the victims in the freezer and escaped. There was absolutely no reason to kill the victims except they knew of the robbery and would have eventually reported it to the police and since the victim knew the Defendant, capture was only a matter of time.

c) There was no testimony to show that these perpetrators had any type of back-up plan, even after planning the robbery for over two weeks. A contingency plan was unnecessary because Griffin knew he would have to kill whoever recognized him to allow him access to the plant. The day in question it just happened to be Tom McCallops and his Wife.

(TR11/2065-66)

. . . Testimony also showed that the Defendant was out of work and needed money, that he planned the robbery for over two weeks, and that he told a witness prior to the crime that he was going to "knock somebody over". After the robbery, the Defendant had plenty of money, enough to rent an expensive hotel room and

drink expensive champagne, whereas before the crimes he was broke and could not support his children.

(TR11/2066-67)

The Defendant planned the robbery and by his own statements told others of his plans to rob someone. He took Lopez to the plant the night before and they discussed the robbery plan. He procured both weapons to be used during the crime. He was known at the plant and was able to gain access. He told others about the killings afterward saying that they had to be killed since they could identify him. He admitted to others that he shot one of the victims but changed his testimony in Court.

It is clear then that the Defendant planned and actively participated in the crime. It is unclear from testimony as to who fired the fatal shots. It is clear that the Defendant made inconsistent statement on this point. At the very least the Defendant was an active and willing accomplice and this fact has been established but his participation was not minor. Since part but not all of this mitigating factor is established the Court must consider it. However for the reasons stated above the Court is giving it little weight.

(TR11/2070)

. . .it is this Court's opinion that the aggravating circumstances far outweigh the mitigating circumstances. The two victims in this case both died horrible deaths and for no good reason. The Defendants could have locked the victims in the freezer, taken the money and run. However because the victims knew this Defendant and because anyone who was going to let the Defendant into the plant was going to have to know this Defendant, this Defendant knew going into the plan to commit the robbery that he was going to have to kill whoever gave him access to the plant. In weighing the aggravating circumstances against the mitigating circumstances, the scales of life and death tilt unquestionably to the side of death.

(TR11/2073-74)

These findings are consistent with the factual findings made by the postconviction court regarding Griffin's culpability for the crime and a comparison of the domination of Kocolis on either defendant.

[] The Defendant further admitted to Montalvo that after he shot the victims he told the codefendant to go and finish the job while he started to load up the money. Id. Similarly, Melissa Clark Williams admitted at the evidentiary hearing that she testified truthfully in 1997 when she told law enforcement that it was the Defendant's idea to commit the robbery, that he is the one who got the 9mm gun, that he was the one who staked out the Service America the night before, and that he appeared happy at the party he threw after the robberies. See EHT 08/17/07, pgs. 29-32. Williams also testified that the Defendant admitted to her that he was the one who shot the victims first. Id.

(PCR9/1410)

While there was some testimony presented that described Kocolis as controlling, there was substantial evidence that the Defendant was not Kocolis' "can-do" person and that the Defendant acted independent of Kocolis. See EHT 08/17/07, pgs. 33-36. More importantly, however, this claim is clearly undermined by the Defendant's own penalty-phase testimony in which he admitted, one, that he planned the robbery because he was having financial problems, and, two, that he was involved in the murders. See Sentencing Transcript; Sentencing Order. Thus, the Defendant's claim that his culpability for the murders would have been reduced if the trial judge had information that he may not have been the sole architect of the robbery is completely belied by the Defendant's own testimony.

(PCR9/1411-12)

In *Scott*, this Court held that "[t]wo requirements must be met in order to set aside a conviction or sentence because of newly discovered evidence. First, the asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.' Hallman, 371 So.2d at 485. Second, 'the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.' Jones v. State, 591 So.2d 911, 915 (Fla. 1991).'" *Scott v. Dugger*, 604 So. 2d at 468.

While maintaining that the claim is procedurally barred, the State concedes that this evidence could not have been known at the time of trial. Therefore, if this claim was properly before this Court, prong one would be established.

As the foregoing, has shown, however, prong two cannot be satisfied. Unlike *Scott*, which involved equally culpable codefendants, the evidence discerned from the records in Griffin and Lopez, reflect that they were not equally culpable. Even in cases where the defendant is not the triggerman, this Court has consistently affirmed death sentences for the more culpable defendant where the evidence establishes he or she was the dominant force in the killing. For example, in *Johnson v. State*, 696 So. 2d 317 (Fla. 1997), the defendant argued, as

Griffin does, that his death sentence was disproportionate to that of a codefendant who was convicted of first-degree murder but sentenced to life imprisonment. This Court rejected the claim finding that he was the leader in the attack, recruited the others, obtained the weapons, and arranged the necessary transportation.

Likewise, in *Larzelere v. State*, 676 So. 2d 394, 407 (Fla. 1996), where the evidence was uncontroverted that Larzelere was not the triggerman, she was present for the murder, actively participating in carrying out the murder which she was the mastermind of and was the dominant force behind the planning and execution of this murder and behind the involvement and actions of the co-participants before and after the murder.

In the instant case, however, as all the courts who have reviewed these facts have found, it was Griffin's plan, Griffin procured the weapon, Griffin was not under anyone's domination and Griffin knew going in that the witnesses would have to be eliminated. Additionally, as both sentencing courts found, the evidence established that Griffin also shot the victims and this Court on direct appeal agreed. *Griffin v. State*, 820 So. 2d at 909-911 (noting despite Griffin's claim that Lopez shot victim other witnesses testified that Griffin admitted otherwise after the murder and that autopsy showed multiple weapons were used.)

Moreover, the evidence also shows that Lopez was a follower and, unlike Griffin, who was celebrating after the crime, thus, demonstrating it went according to plan, Lopez was "violent at the after-party, was very antsy, crazy-like and vomiting, that he punched a hole through the closet door, and that he was very out of control." And unlike Griffin who bragged about killing the McCallops, Lopez told witnesses that "those people did not need to die," and that "they weren't fighting back." Exh. A, Order at page 13-14.

As this claim is procedurally barred, not properly raised in the instant petition and fails to satisfy the newly discovered evidence standard, relief should be denied.

CONCLUSION

In conclusion, Respondents respectfully request that this Honorable Court DENY the instant petition for writ of habeas corpus.

Respectfully submitted,

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ATTORNEY GENERAL**

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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 Terri L. Backhus, Esquire, 13014 N. Dale Mabry Hwy., #746, Tampa, Florida 33618-2808 and to Glenn L. Martin, Jr., P.O. Box 5028, Clearwater, Florida 33758-5028, this 8th day of February, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(1).

COUNSEL FOR RESPONDENTS

IN THE SUPREME COURT OF FLORIDA

MICHAEL GRIFFIN,

Petitioner,

vs.

CASE NO. SC09-1894

L.T No. CRC 95-18753 CFANO

WALTER A. McNEIL,

Secretary, Florida

Department of Corrections,

Respondents.

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INDEX TO EXHIBITS

Exhibit A.....Sentencing Order, State of Florida v. Juan Antonio Lopez, a/k/a Anthony Lopez, filed February 2, 2004 in the Circuit Court of the Sixth Judicial Circuit, State of Florida, Case No. CRC95-18753CFANO

Exhibit B.....Sentencing Order, State of Florida v. Michael Griffin, filed July 10, 1998 in the Circuit Court of the Sixth Judicial Circuit, State of Florida, Case No. CRC95-18753CFANO