IN THE SUPREME COURT OF FLORIDA

MICHAEL GRIFFIN,

Appellant/Cross-Appellee,

vs. **CASE NO. SC09-1**
L.T No. CRC 95-18753 CFANO

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER/CROSS-INITIAL BRIEF OF APPELLEE/CROSS-APPELLANT

BILL McCOLLUM
ATTORNEY GENERAL

CANDANCE M. SABELLA
Chief Assistant Attorney General
Capital Appeals Bureau Chief
Florida Bar No. 0445071
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE/CROSS-APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Federal Cases

Other Authorities

PRELIMINARY STATEMENT

References to the trial record will be designated as TR followed by the appropriate volume and page numbers. (TR#/page#) References to the supplemental transcript from the direct appeal will be designated as TR S followed by the appropriate volume and page numbers. (TR S#/page #) References to the instant postconviction record will be designated as PCR followed by the appropriate volume and page numbers. (PCR#/page#)

STATEMENT OF THE CASE AND FACTS

Trial

Defendant was indicted on November 29, 1995 (TR1/1-2) and on June 13, 1997 he entered a guilty plea to two counts of first degree murder for the murders of Thomas and Patricia McCallops at the Service America. (TR9/1602-07) The assistant state attorney set forth bases for the charges on the record as follows:

> MR. MARTIN: Your Honor, on or about 7-19-95, Michael Griffin and Anthony Lopez entered the business of Service America by trickery and deceit. Michael Griffin previously worked for Morris Freezer, which had a contract for a previous opportunity to fix a freezer at Service America. Michael Griffin was known by several of the warehouse men at Service America.
>
> During the evening hours October 7th 1995, he and Anthony Lopez went to the front gate of Service America. Tom McCallo[p]s was a warehouse man at Service America and his wife was not employed, however, she was helping him load up a truck because she was going to sub for one of the drivers of Service America.
>
> Thomas McCallops knew Michael Griffin. They entered under the guise of fixing one of the freezers. Thomas McCallops got locked inside -- both Mr. McCallops and Mrs. McCallops were walked in one of the coolers at gun point by Mr. Lopez and Mr. Griffin. They were locked inside that 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 in United States currency was removed.
>
> After removing the money, both Anthony Lopez and Michael Griffin returned to the cooler of Service America, which was approximately a fourteen by fourteen foot room with only one door. Both Michael Griffin and Anthony Lopez stood at the door and fired their weapons into the room, thereby, inflicting mortal wounds upon Patricia and Thomas McCallops. Both of them died from the gunshots fired by Michael Griffin and Anthony Lopez.

The blood of Michael Griffin was found on one of the metal lockers that was forcibly opened and also on the floor. Both Michael Griffin and Anthony Lopez have both admitted their involvement to several of their friends prior to them being arrested by the police.

THE COURT: Is there any admission to the law enforcement after their arrest?

MR. MARTIN: There are some admissions, but no confessions

(TR9/1599-1601)

The trial 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?

(TR9/1602-1607)

The plea was accepted by the court without any regard as to what might ultimately happen to Mr. Lopez in this case. The court specifically noted that if they ultimately had a trial and guilt phase for Lopez it would be separate and distinct. (TR9/1606-07) Subsequently, defendant also waived 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 A 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.

(TR S1/03-15)

The case then proceeded to the penalty phase on December 8, 1997. (TR S1/01) 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 noted that he did not believe he would have told Griffin he was eligible for parole in 25 years. (TR S1/22-24)

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 was either the death sentence or life imprisonment with the possibility of 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. (TR S1/25) Judge Downey inquired whether Griffin had the opportunity to discuss this matter with his attorneys. Griffin agreed that 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. (TR S1/26-27)

During the penalty phase, the State presented the District General Manager of Service America Corporation, James Clesas who testified that 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. (TR S1/29, 32) He explained that Tom McCallops was their 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. (TR S1/29) Defendant 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. (TR S1/30) 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. (TR S1/31) Clesas was called in after the murders were discovered. He estimated 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. (TR S1/36-39)

Detective Robert Snipes, Jr., with the Pinellas County Sheriff's Office, testified explaining the time line that he compiled from statements obtained in his investigation. (TR S1/49, 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. (TR S1/52) The investigation indicated that they had made several trips to Shorty's Bar for the purpose of conducting surveillance on Service America. (TR S1/53-54) Blood that was found on the lockers came back as consistent with Griffin's. (TR S1/62) Tire tracks found on the northeast side of the building in the soft sand matched the tires they had taken from Griffin's van. (TR S1/63)

The detectives met with Griffin on October 29th, and read him his rights. (TR S1/63) They asked Griffin about his knowledge of employees. Griffin admitted he knew Tom McCallops and that he was a nice guy. (TR S1/65) 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. (TR S1/68-69)

Melissa Clark told the detectives 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 and they did not do the robbery that night. They went to Shorty's Bar the next night to watch Service America. (TR S1/71) The defendant admitted his involvement in the crime to her. (TR S1/72)

Mary Hall told them that she was dating Michael and that she was with him that night at the Camberley. He had scratches all over his arms. (TR S1/73) 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 Hotel upon their return and also Melvin Green saw blood on him. (TR S1/74)

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. (TR S1/75)

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 told her he 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. (TR S1/92)

Melissa Clark testified for the State that she heard Griffin and Lopez planning a robbery in Oldsmar. The robbery was Griffin's idea. (TR S1/116) Griffin traded Kocolis a gold chain for a nickel plated nine millimeter gun. (TR S1/118-19) Griffin also had a shotgun in his van. (TR S1/118) After the robbery, she met with them at the Camberley Hotel in the presidential suite, where Griffin ordered a bottle of Dom Perignon and strawberries. (TR S1/122-23) Griffin had scratches on his arms and bags filled with change. (TR S1/125-26) They rolled the coins and took them to Seminole Bingo to exchange for cash. (TR S1/130) 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. (TR S1/131) Griffin said that after he shot them he told

Lopez to clean up and make sure the job was finished. (TR S1/134) He was very calm about the whole episode. (TR S1/135) Griffin told her that 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. (TR S1/132) She saw him burn the coin bags on the grill. (TR S1/133)

Associate Medical Examiner Marie Hansen, M.D., testified concerning her examination of Mr. and Mrs. McCallops. (TR S1/159-163) The autopsies revealed that Mr. McCallops had five gunshot wounds. Four of the wounds were from a handgun and one was from a shotgun. (TR S1/164) Mrs. McCallops had two gunshot wounds to her body. Both wounds were from a handgun. (TR S2/192) Dr. Hansen testified that the shotgun wound suffered by the male victim was also a fatal shot, although the handgun wound likely followed the shotgun wound, and that the victim was alive for both. (TR S1/167, 175)

Accordingly, during the penalty phase, the defense presented several witnesses who supported this theory, including: 1) Deputy David Russo, who testified concerning Griffin's behavior while awaiting trial, 2) James Griffin, Griffin's father, who testified concerning Griffin's work ethic, the devastation of his brain injury at ten, the fact that Michael Griffin was a good father until he got into drug use, 3) Chuck Hash, a former co-worker of Griffin's who testified concerning the changes that came over

Griffin after he began using drugs, 4) William Schnitzler, a former classmate of Griffin's, who testified that when they were young Griffin was never violent; he concentrated on working and fishing until he got into drugs, 5) Tammy Young, who testified that she had known Griffin since they were in kindergarten, that she was the mother of his son and that he still kept in contact with his son who would miss him very much, 6) Matthew Griffin, Michael Griffin's younger brother, who testified that Griffin taught him the A/C business, that they were close until Griffin started doing drugs and everything went downhill, 7) Tracy Griffin, who testified she married Griffin two weeks prior to trial and that they had a child together but that prior to the murder when she found drugs on him she kicked him out and he went to live with Kocolis, 8) Sandy Griffin, Griffin's mother, who also testified about the changes her son went through after his accident, his work ethic, the drug use and his qualities as a father and 9) Dr. Michael Maher, who testified concerning the effects of drug use and the brain surgery at ten. (TR S2/204-212, 267-97; S3/349-360, 364-67, 368-71, 373-74, 387-397, 397-421; S4/427-440) Finally, Griffin testified on his own behalf, explained the events surrounding the murders and expressed his remorse for the crimes. (TR S4/442-507)

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. (TR S4/442) 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. (TR S4/443) 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. (TR S4/444) 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. (TR S4/445) Service America had a security system, so in order to obtain entry, there would have to be somebody there to let him in. (TR S4/446) Griffin testified that his plan was to use a disguise and put whoever was there in the cooler and leave them there. (TR S4/447) 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. (TR S4/448) 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. (TR S4/449) 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. (TR S4/449) 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. (TR S4/450) 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. (TR S4/453, 457)

On cross-examination Griffin conceded that the robbery was his idea and no one else had a connection to Service America. (TR S4/457) 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. (TR S4/458-59) Griffin testified that he could support his drug habit by selling drugs; he took the money because he was having financial troubles and wanted extra money because he was behind on child support, truck and beeper payments. (TR S4/460-61) He testified that he and Kocolis planned the Service America robbery for two weeks. (TR S4/463) The plan included having firearms there to be used. Griffin got the nine millimeter and he had several shotguns. (TR S4/464-65) Part of the plan was that someone had to be at Service America because he did not know the code for the security system. (TR S4/466, 472) He confirmed the existence of conversations testified to by the state witnesses. (TR S4/471) 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 and he was a very nice fellow. (TR S4/474-75) After hearing McCallops screaming in fear, Griffin continued about the business of stealing the approximately $12,000 in change. (TR S4/476) The money was very heavy; it weighed about 900 lbs. and was very difficult to load into the van. (TR S4/477) Griffin claimed that it was shortly after the scream that he heard Lopez shoot McCallops with the shotgun. (TR S4/478) The shotgun had a number four shot in it which would have a powerful impact. (TR S4/479) He saw Lopez shoot McCallops but not at close range. (TR S4/481) Tom McCallops would not have known Lopez but would have been able to recognize Griffin. (TR S4/481) He claimed that after they left, he felt horrible about the murders, but he then went to the Camberley Plaza Hotel and called all his friends to come up and join him for a party. (TR S4/483) He was in a good mood and had a good time. (TR S4/484) They had drugs and champagne. (TR S4/487) On the way to the hotel, they stopped and threw the guns off a bridge on Hillsborough Avenue. (TR S4/500)

After obtaining sentencing memoranda from both the State and Defense, Judge Downey entered two sentences of death on July 10,

1998. The trial court found four aggravating circumstances, including: 1) prior violent felony, 2) during the commission of a kidnapping, 3) avoid arrest and 4) pecuniary gain. (TR11/2064-68) In mitigation the court found: 1) no significant criminal history, 2) Griffin's drug usage, 3) Griffin's family and employment background, 4) Griffin's good jail conduct and courtroom behavior and 5) Griffin's remorse. (TR11/2069-73)

An appeal was taken to this Court which denied all relief. *Griffin v. State*, 820 So. 2d 906 (Fla. 2002). This Court set forth the relevant facts as follows:

> 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 McCallopses, 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)

The mandate issued on June 21, 2002.

Motion to Vacate/Postconviction Proceedings

Defendant's initial Motion to Vacate was filed August 27, 2003, (PCR1/1-175; 2/176-215) and his First Amended Motion to Vacate was filed September 19, 2003. (PCR2/216-349; 3/350-431) The State's Response was filed October 29, 2003. (PCR3/432-81) An evidentiary hearing was ordered. (PCR4/599-605) A Second Amended Motion was filed on July 25 2005 and the State's response was filed on September 21, 2005. (PCR5/692-717; 718-29) During the course of the evidentiary hearing, a third amended motion was filed on September 25, 2007 raising a newly discovered evidence/*Brady* claim regarding Nick Kocolis (PCR6/779-944) and a supplement to the motion was filed on October 1, 2007 raising a newly discovered evidence/lethal injection claim. (PCR7/978-89) The State filed

responses to each on November 6, 2007. (PCR7/990-95; 996-1123) Argument was heard on the motions on November 6, 2007 (PCR31/5279-5318) and the lower court allowed the amendment to the *Brady* claim but denied the lethal injection amendment and directed counsel to file a successive motion on the lethal injection issue. (PCR31/5298; 5303)

A motion to withdraw plea was filed on September 25, 2007. (PCR6/945-58)

The evidentiary hearing commenced on December 20, 2006, continued on January 18, March 19, March 30, April 23, May 7, June 1, August 15-17, September 25, December 17, December 21, 2007, February 4, 2008 and concluded on February 11, 2008. (PCR25/4150-4302; 26/4330-4361; 4362-4491; 27/4492-4603; 4603-4635; 4636-4770; 28/4771-4914; 29/4915-5105; 30/5106-5151; 5152-5278; 31/5320-5382; 5383-5395; 5396-5411; 32/5412-5495) Defendant's written closing arguments were filed on April 29, 2008. (PCR8/1168-1253) The State's written closing was filed on June 12, 2008. (PCR9/1359-1392)

At the evidentiary hearing, Griffin presented nineteen witnesses in support of his motion, including: Glenn Martin, Sandra Griffin, Nancy Price, Roger Mills, Downey Connolly, William Schnitzler, Dwight Wells, Robert Saline, Melvin Green, Nicholas Kocolis, Steve Montalvo, Dr. Robert Wayne Thatcher, Dr. Deborah C. Mash, Dr. Thomas Hyde, Melissa Clark-Williams, Mary Hall, Kimberly

Ally and Heather Hemline.

Assistant State Attorney Glenn Martin, testified that he had plea discussions with Dwight Wells and Roger Mills along with Craig LeValley, and Dave Parry, Lopez' attorneys. They suggested a plea deal. Martin explained that it is the policy of the State Attorney's Office that the State Attorney, Bernie McCabe approves all plea deals in death penalty cases. (PCR25/4165) If an offer is to be made it must come from defense attorneys and with input from victims; Mr. McCabe accepts or rejects it. When Wells and LeValley approached him as to the possibility of a deal, Martin told them that both of them would have to give him a firm plea offer and he would submit it to McCabe but he could not promise them anything. (PCR25/4166-68) There was no offer; there were no plea negotiations. (PCR25/4173) There were continuous competency issues with Mr. Lopez. (PCR25/4174) He put on the trial record that the State was seeking death, there was no deal; it was a straight up plea. (PCR25/4176) Martin was the trial attorney along with Jim Hellickson. (PCR25/4177)

Griffin's mother, Sandra Griffin, testified as to her background, the drinking habits of her father and other relatives, Griffin's injuries as a child, his marriage and children and his work ethic. (PCR25/4181-4210) She also testified that when she learned he had been arrested she called Roger Mills. (PCR25/4211) Mills told her he was not a criminal lawyer but he recommended

Dwight Wells. (PCR25/4212) About six or seven months later they told her they were recommending he plead guilty, saying he would get 25 to life. (PCR25/4213) She saw nothing in writing guaranteeing defendant a life sentence. (PCR25/4214-15) She says that she learned the first day of penalty phase that parole was not an option. (PCR25/4218) On cross, she testified that she was not aware that Griffin was working and going to Service America through July; she had thought Griffin was not showing up for work anymore at that time. (PCR25/4229)

Defendant's aunt, Nancy Price, testified concerning their family life and the defendants' drug use that she was hooked on drugs growing up. (PCR25/4234-42) She went to the sentencing hearing. When they got there, Wells pulled them aside and said he was afraid the defendant was going to get death. (PCR25/4248)

On cross she admitted that the first time she told Griffin's mother, Sandra Griffin, that defendant was hooked on drugs was while they were on vacation. She thought he stopped working in May; she didn't review records which showed he was still working in July of 1995 and going to Service America. (PCR25/4250-51) Mills was well known socially to the family; he performed defendant and his brother's marriages. (PCR25/4252) She made no attempt to talk to him about defendant's drug problems. (PCR25/4253)

Trial defense counsel, Roger Mills, began practicing in 1983. He had second chaired two capital cases which got reduced to 2nd

degree and he had a primarily criminal practice. (PCR25/4254) He shared space with Wells who was a very well known capital defense lawyer who had handled many, many capital cases. (PCR25/4255) They set it up that Wells would be lead counsel and Mills would assist and be the liaison with the family. (PCR25/4257) He did not remember money being an issue. (PCR25/4258) He then described their strategy, Griffin's focus and the input of the family. (PCR25/4259-95) He said their primary focus was not on showing defendant's mental state at the time, noting that they talked about his head injury, but their focus was on his lesser culpability. (PCR25/4276-77)

When the hearing continued on January 18, 2007, the defense presented Downey Connolly who testified he met defendant in 1989 and that he spent a lot of time with him in 1994 when he was going through a divorce, that they socialized and used drugs together. (PCR26/4338-45) Connolly believed defendant was afraid of Kocolis. (PCR26/4348-49) He tried to get defendant away from Nick, but defendant said Nick was good for him and he did not want anything to do with Connolly and Price. (PCR26/4351) Connolly testified that defendant's lawyers wouldn't talk to him. (PCR26/4352) Defendant owed Nick money because Nick was supplying him with drugs. (PCR26/4355)

On March 19, 2007, the defense continued with William Schnitzler, a high school friend of defendant's, who testified

consistent with his penalty phase testimony. (PCR26/4368)

Defendant's uncle, Robert Saline, testified about Griffin's childhood up to his drug years. (PCR26/4378-90)

Melvin Greene testified for the defense that he knew defendant through Lopez who had talked to him about the crime. (PCR26/4392-93) Wells questioned him during the deposition. (PCR26/4400) He admitted that during his deposition he said that he and Suzette Copley saw blood on Griffin's shirt after the robbery. (PCR26/4401)

Nicholas Kocolis testified next for the defense. (PCR26/4404) He met Griffin in 1995. (PCR26/4405-06) Defendant was purchasing seven grams every other day at the time of the crime. He came over to Nick's house frequently, where there were usually ten to fifteen other people. (PCR26/4407) Defendant would party all night. A lot of people stayed there, but defendant did not live there. (PCR26/4408) Defendant was purchasing cocaine so he could sell it. At first he paid for it but then he didn't, which was the witness's first clue that defendant was using. He was sniffing then smoking. (PCR26/4409) Defendant's drug usage was continual; he was part of the party group. Lopez was popular, defendant was not. (PCR26/4410) Defendant was not a follower but just withdrawn; he hung out on the fringes. (PCR26/4411-12) Hours before the crime, they were at Heather Henline's house; defendant had been doing coke all day, a stretch of continued drug use. (PCR26/4413)

On cross, he acknowledged that he gave a state attorney sworn statement. (PCR26/4423) He also clarified that he would have testified to defendant's drug use but not about anything else. In his sworn statement to the SAO, he said, Michael Griffin told him he "had to shoot those people because he was not wearing a disguise." He did not recall the part about the disguise, but did recall defendant saying he had to throw the guns in the river. (PCR26/4425-26) A few weeks before the murder Griffin told him he was going to go steal some money, that he was going to jack somebody. (PCR26/4426-28) It is common knowledge that you need to carry protection "if someone was in there and they were shooting at you." (PCR26/4429) Heather Hemline had a 9mm that she got from Kocolis. (PCR26/4430)

Kocolis claims he was told by the SAO that if he gave them the information they wanted they would not prosecute him, he was not told that he did not have immunity for what he was testifying to today. (PCR26/4431) He claimed collateral counsel told him if the State asked about the crime he could plead the fifth. (PCR26/4432) Kocolis then pled the fifth with regard to a number of questions. (PCR26/4433-43)

Steven Montalvo testified for the defense that he knew defendant a few months before the crime; they both lived at Kocolis' house. Montalvo was Nick Kocolis' supplier and Kocolis was defendant's. (PCR26/4447) Defendant would get a half ounce and

break it down. (PCR26/4448) When defendant's habit was greater than what he was selling, Nick would use him as a runner to work some of the money off. (PCR26/4450) At one point Nick told him that Anthony and defendant were out scoping out the joint for the robbery. (PCR26/4452) He does not know whose idea it was but he "feels" nobody does anything without Nick's approval. (PCR26/4459) Defendant always owed money but he would come every day with some money so it was okay with Nick. (PCR26/4461) Nick told everyone he was going on vacation to lay low. (PCR26/4463) Nick was mad they only got $15,000 from the robbery. (PCR26/4465) In his opinion Nick was in charge of planning the robbery. (PCR26/4466) The SAO gave him immunity; says he was not contacted by defendant's attorneys but he was deposed by Lopez' lawyers. (PCR26/4466-67)

On cross, Montalvo admitted that he was deposed by LeValley, with Mills and Martin present. (PCR26/4469) In the deposition he said he saw Griffin in possession of a shotgun. (PCR26/4471) Griffin told him that he went there through the fence like he was going to work, he hit the button and they buzzed him in. He had on his tool belt when he got out of the van. Griffin said he put them in the freezer, then he [shot them] and told Anthony to go in and finish up while he started loading up the money. Griffin told him he picked the place because it was easy for him. (PCR26/4474-75)

The hearing continued on March 30, 2007, with Dwight Wells testifying for the defense. He testified that he was a criminal

defense lawyer for 30 years. At time of trial he had done six (6) death penalty trials. (PCR27/4496) He represented Griffin for two (2) plus years, up to filing notice of appeal. (PCR27/4497-98) He hired investigator Barco to get as much information as he could on Kocolis and group. (PCR27/4499-4501) Kocolis was hard to speak with and he did not believe that Barco ever did speak to him for guilt phase. (PCR27/4501) For the penalty phase he relied on himself and he hired a psychiatrist to evaluate Griffin. This case was different because the family was right there, they were available and they were talking to him, cooperating, so he felt he was qualified to do the investigation by talking to family and friends. They talked about problems Griffin had, his hospitalizations, etc. (PCR27/4502) Mills was at the meetings; meetings were in groups and with individuals. (PCR27/4503) Leading up to the trial he took depositions; there were 283 potential witnesses. He went through the State's discovery. (PCR27/4504) When he learned that victim's family was not pushing for death, he went to see Griffin and it turned into a plea discussion which included both defendants in exchange for life. (PCR27/4505) The terms of the plea was that Lopez had to enter into it also. (PCR27/4506) He said that the plea offer came from the State and that they discussed it on the record in front of Judge Downey. (PCR27/4507) The tone from Judge Downey was that he was amenable to a life plea which figured into the equation as to

advising Griffin to go ahead and plead guilty and take his chances. (PCR27/4508) When he discovered that Mills had told them 25 to life he said "[w]hoa", then Downey went through a modified colloquy and they took a recess to discuss it. Defendant indicated even though he would spend the rest of his life in prison he wanted to go ahead with it. Wells told Griffin that he felt confident if he needed more time that Judge Downey would give it to him, so he could discuss it with his girlfriend and family. (PCR27/4510) Defendant said "no, he was okay with going ahead." The judge had decided to go ahead with the penalty phase because it did not look like Lopez was going to get competent anytime soon. The judge's demeanor had not changed to indicate he was not amenable to a life deal. He approached the State quite a bit about a renewed offer to plead without Lopez but he knew their stance from day one. (PCR27/4511) He would say "why can't we resolve this?" and they would say "because we are not offering you that." (PCR27/4512)

As far as guilt phase defenses, he knew he could have done a cocaine intoxication defense, but felt it was pretty unpopular in the best of circumstances and factually this case was very, very bad. He did not think it would be appropriate in this case to use the tactic of setting up the penalty phase by using a cocaine intoxication guilt defense because of the activities that happened after the murder. (PCR27/4513) Their theory of defense was that except for seven months of his life defendant was a decent guy, he

worked and he had a family. He was not your typical client in that he was not abused, he was a model prisoner, so they went for that. (PCR27/4514) Defendant's family and friends were very cooperative. He did not believe they had medical records of defendant's head injury but any records they gave him, he gave to Dr. Maher.[1] (PCR27/4515)

To support their good guy theory of defense, they presented family, friends, corrections officers, Dr. Maher, etc. (PCR27/4516) Dr. Maher did not find any statutory mitigation; if he had evidence that someone else masterminded the crime he would have put it on but they could not find it. (PCR27/4517) He had no indication that the judge was going to give him death until he saw the order; they were very optimistic. Griffin made a good witness; he was very remorseful, and wanted to plead. (PCR27/4519)

On cross, Wells noted that in 1995 he was board certified in criminal defense. Prior to 1997, he had done four murder trials, non death penalty, and was a public defender for nine years. He had done approximately sixty felony trials. (PCR27/4527) In seminars he had occasion to discuss the viability of the voluntary intoxication defense; it was seen as pretty much a last resort as juries are very unlikely to give people a break for voluntarily drinking or taking drugs. (PCR27/4530) He considered using it; he has used it as mitigation and put doctors and family members on to

[1] Dr. Maher is incorrectly referred to as Dr. Mayer in the transcript.

support it. (PCR27/4531) He saw no need for a DNA expert because defendant admitted being there and cutting his arm. (PCR27/4532) Nor did he see a need for a medical examiner. (PCR27/4533) His client's version of the events was consistent with the other witnesses' except for the fact defendant claimed he was not the shooter. He has used a mitigation specialist before, but did not feel it was necessary in this case because Mills was so close to the family and everyone was local. He was told by the family about the pellet gun injury. (PCR27/45434-35) He did not believe hospital records would have helped as they reported a full recovery, defendant graduated from high school and played sports. He was never told defendant suffered migraines or had trouble sleeping. (PCR27/4536) There were no motor coordination problems. Griffin had a steady job, a good work history, took care of his children and was married. (PCR27/4537) Wells was aware of defendant's cocaine use and that after his first wife threw him out because of the coke use, defendant went downhill. (PCR27/4538) Wells had a discussion with defendant regarding his use of cocaine within seventy-two hours before and after the crime, during which period he also obtained a firearm, did some surveillance from Shorty's bar and made the decision to not do robbery on a certain day. (PCR27/4539) He also knew that Griffin drove from Brandon to Oldsmar; that Griffin knew that the alarm was on and that someone who knew him had to let him in. (PCR27/4540) Wells felt those

facts diminished the impact of cocaine as mitigation because it showed a lack of impulsivity which is the side effect of coke. Rather, it shows defendant had control of his mind, he knew what was going on and he exercised goal related activities to increase the likelihood that he would be successful and not get caught. (PCR27/4541-42) Wells also had a discussion with defendant regarding putting on coke evidence with Dr. Maher and they did so. Dr. Maher testified regarding behavioral changes; Dr. Maher found no evidence of brain impairment. (PCR27/4543) At the time of the penalty phase, Wells was ready to go, he had done enough investigating. (PCR27/4544) Dr. Maher did a clinical interview. Wells put on thirteen witnesses. (PCR27/4545) There were twenty-two witnesses deposed on behalf of Griffin and either he, Mills or LeValley attended them all. LeValley would ask whatever he needed him too. (PCR27/4547) He read all the depositions, statements and police reports. (PCR27/4548) He and Mills knew that a plea deal would have to be approved by McCabe. He was prepared to go forward on penalty phase; there was nothing else he needed to do. (PCR27/4551) He looked for Kocolis because he wanted to spread the guilt. (PCR27/4554) He had discussed everything with his client and made the recommendations based on the facts. He was concerned that a jury would not look favorably on the fact that after the murders, they got champagne, Dom Perignon and celebrated at the Camberley Hotel after two people were brutally shot in very close

quarters in a freezer. (PCR27/4555) The State had a witness saying Griffin drove. They had evidence that tire tracks of Griffin's were found at the scene, that a shotgun shell and money wrappers were found in Griffin's van, and a witness who said Griffin had a lot of change and a shotgun and testimony regarding his demeanor after the murders. (PCR27/4556) Wells notes that another consideration he had was that after the arrest Griffin was very remorseful and ready to plead before most of the discovery was done. He gave him the benefit of his experience as to how a jury would react and so given his remorse, they went with "a good guy except for this seven month period of time" defense. (PCR27/4557)

He waived a penalty phase jury recommendation because the jury's recommendation carries great weight and the State would have to prove the aggravators so all the evidence would be before them. (PCR27/4563) He discussed the decision to just present it to the judge with defendant, but it was his recommendation. His decision was enhanced by the fact that Judge Downey had been seeing Griffin for two years, something a jury would not have and he was always a model prisoner in the courtroom. (PCR27/4564) Part of the strategy was to present Griffin as truly remorseful. He presented the evidence of the pellet gun injury through Dr. Maher. In his discussions with Griffin he did not see as an issue that Griffin was under Kocolis' domination like Lopez. (PCR27/4565) He brought Dr. Maher in to see if they could develop a mental health defense.

He found no statutory mitigators. (PCR27/4577) There were arguable facts as to the shooter and he felt they presented it to the benefit of Griffin. (PCR27/4578) He knew that Griffin was getting drugs for use and resale from Kocolis. (PCR27/4581) Wells notes he was not attempting to defend Griffin as a shooter because they denied he was the shooter so a cocaine defense would only go to his controlling the impulse to commit the robbery and just get the money out of the lockers. (PCR27/4588) As for Dr. Maher, in addition to the self report, he also told Maher the information he had gleaned from the family. (PCR27/4589) As for an affidavit from Kocolis, in 1997 he was not talking to them. (PCR27/4591)

The defense also presented Chad Neeld, a friend of Kocolis who testified about the effects of drugs on Griffin after he met him at Kocolis' in the summer of 1995. (PCR27/4610-18) He eventually learned what was supposed to happen at Service America on October 7, 1995; he saw defendant a few times in the weeks before, saw him that day partying and smoking coke. (PCR27/4620) He also saw him the next day and he was still partying. (PCR27/4621-22)

On August 15, 2007, the defense presented, Dr. Deborah C. Mash, professor of neurology and molecular and cellular pharmacology. (PCR28/4781) She was hired by CCRC in 2003 to interview Griffin to determine the effects of his cocaine dependency, reviewed expert reports, testimony and family history, and interviewed him at prison in June of 2003. (PCR28/4795-96)

She is not a medical doctor and she does not diagnose. (PCR28/4799) Dr. Mash testified that in general, cocaine addicts become socially disoriented, their ability to conform disintegrates, they isolate, the brain is fundamentally changed. (PCR28/4807) She noted that he graduated from high school but, based on Dr. Hyde's report, she believed he had difficulty with higher math skills. (PCR28/4819) Her opinion was that Griffin suffered from cocaine dependence disorder, that it was extremely severe, aggravated by his brain injury incurred as a youth and his family history for alcohol dependence disorder. (PCR28/4823) She believed he was under extreme mental and emotional duress from his dependence and spent every waking hour in pursuit of drugs. (PCR28/4824) She believed cocaine dependence significantly affected his behavioral state, his ability to use higher reasoning functions and to conform his behavior. (PCR28/4871)

On cross she conceded that her opinion as to the severity of any type of addiction would be directly affected by the amount of cocaine he used and she had no firm documentation as to the exact amount he was using. It runs from none which is what he told the police to 3 grams to over 2 ounces as reported by Montalvo; she did not know because she was not there to measure. (PCR28/4891) She admitted that the notion of them getting Dom Perignon to party after the murder sickens her and that cocaine did not prevent him from planning the robbery or staying with his plan. (PCR28/4896-

98) She thought that if not for the addiction to cocaine he would not have done it, but conceded other factors, character personality may affect motivation. (PCR28/4900-01)

On August 16, 2007, Dr Thomas Hyde, a neurologist, not licensed in the State of Florida, testified. (PCR29/4922) Griffin told him he used cocaine heavily, snorted it, freebased it. He wasn't clear if defendant was intoxicated at the time of the crime or coming off a binge but "he had certainly been using heavily right before that crime," based on affidavits. (PCR29/4947) In his opinion, Griffin had some residual brain damage from the gunshot wound he suffered at age eight, possibly amplified by some minor head injuries he suffered after that event; they are right hemisphere dysfunction. (PCR29/4953) Dr. Hyde testified that Griffin meets the DSM IV for cocaine dependence. (PCR29/4956) Dr. Hyde opined that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; his judgment was impaired due to his underlying brain injury and his either acute intoxication or withdrawal from cocaine and its affect on mood and impulse control at the time of the crime. (PCR29/4959)

On cross, Dr. Hyde admitted that he reached his conclusion in this case after two hours with defendant and without speaking to the family. (PCR29/4962-64) During the interview, Griffin was alert, communicated well and was cooperative. He scored almost

perfectly on the mini mental state exam, 29 out of 30. At the time he evaluated him, he was largely cognitive and intellectually intact. (PCR29/4965) The only deficit he had was in serial sevens, which is attention deficit and that would be mild. (PCR29/4966) Dr. Hyde testified that there was no evidence of right-sided brain damage. Griffin's MMPI showed an elevated scale 4 which is the psychopathic deviant scale and measures antisocial traits, but Dr. Hyde didn't think the defendant met the strict criteria for antisocial personality disorder. (PCR29/4995-96)

The hearing continued on August 17, 2007, with Melissa Clark Williams, who testified she and Michael Griffin used to live with Kocolis in October of 1995. (PCR30/5111) She testified against Griffin in the 1997 penalty phase. She was Kocolis' girlfriend. She did not know of Griffin having a job at the time; Kocolis supported everyone. (PCR30/5112) She knew Griffin for six weeks before the crime and did not know Griffin before he used cocaine. When she first met Griffin, he was nice and easygoing. His use was progressively getting worse and he used cocaine all the time. (PCR30/5113-14) Kocolis was very controlling, very evil and manipulative to everyone. She was 17 at the time. (PCR30/5115) People were scared of him; he was mean to his sister. (PCR30/5116) He pimped her out. (PCR30/5117-18) Kocolis had a conversation with Griffin and Anthony about how he needed money and that they basically needed to plan a robbery of some sort. (PCR30/5119) In

a later conversation Griffin brought up Service America as a possible location. (PCR30/5120) After the crime the money was divided in three ways; Griffin, Anthony and Nick all got a share. (PCR30/5121) She believed Griffin used his portion to buy drugs. After the crime his drug use got worse. He seemed angry and more aggressive. She saw him buy an ounce from Montalvo and he paid him in coins. (PCR30/5122-23) Melissa helped police because they had evidence that they were all involved. (PCR30/5124) Steve Porter told her that defendant had already pleaded guilty and that he was going to receive a life sentence and this was just a formality. (PCR30/5132)

On cross she admitted that she testified truthfully under oath in 1997 that it was defendant's idea to rob the Service America. She testified that it was just Griffin and Anthony the first time. (PCR30/5134) She testified about defendant getting the 9mm, casing the Service America the night before and to a conversation she had with Griffin in a van while Nick was in the probation office, where Griffin admitted to her that he was the one who shot the two victims at the Service America. (PCR30/5135) She also testified about the after party. She was not afraid of Griffin at all until after the robberies when he threatened her. (PCR30/5136) She attended the party at the presidential suite at the Camberley Plaza Hotel. Griffin was happy and having a good time and he ordered the Dom Perignon. He talked about the robbery and appeared boastful.

(PCR30/5137) Griffin was not like Lopez who was Nick's can-do person; Griffin did not report to Nick. Defendant was his own man, different from Lopez. Defendant was his own individual. (PCR30/5138-41)

Psychologist, Dr. Sidney Merin, testified as a state witness that he had spoken to Griffin in 1995 but did not give an exam. Then in 2004, he was asked to go to Starke and evaluate Griffin with a specific reference to the effects that cocaine and other toxins may have on defendant's prefrontal lobe. (PCR29/5036-5038) He testified in 1997 that Griffin had no brain damage. (PCR29/5039) Medical reports for the pellet gun injury show that the pellet did not enter the brain; only hairs and some flesh from the scalp but not the pellet itself. (PCR29/5055) With regard to defendant taking sleeping pills (Benadryl), he said he felt like he let his family down, he did not consider it a suicide attempt. He told Dr. Merin he began to use alcohol at age 19 and started using cocaine in high school. (PCR29/5056) He stopped using it as a junior in high school but began to use it again at age 24 at about the time he left his second wife. At about that time he began selling it because he did not care anymore. He sold coke for six months and stopped when he was arrested. Defendant told Dr. Merin he would use an ounce a week. Other illicit drugs might be used when he partied on the weekend. He never had treatment for drug use. Cocaine made him feel like he was walking on the edge.

(PCR29/5057) Dr. Merin administered psychological tests because defendant's conversations showed logical thinking, even the manner in which he planned the robbery, and that was started two weeks before the event. Defendant made the decisions and those decisions were self serving, they were always favorable to him, and had to do with his own safety. (PCR29/5058) Dr. Merin gave defendant the Wechsler Adult Intelligence Scale III which has 13 subtests, 11 of which are used to compute IQ. His tests revealed just the opposite of Dr. Mash who said he had problems with arithmetic. (PCR29/5059) His IQ ranged from a low of 90 to a high of 110 and his score on arithmetic subtest was 110. With regard to the prefrontal lobe itself, Dr. Merin noted that you look at two functions, verbal and nonverbal. (PCR29/5060) Griffin's verbal IQ was 116, high average range, the average college student is in that range. (PCR29/5061) His working memory earned a 126, superior range; in processing speed he earned a score of 91, which is at the lower end of the average range and that was his lowest score. That means he takes his time in coming up with a conclusion. None of his scores fell in the below average range. (PCR29/5062) These test results would be representative of Griffin in 1995. If there were true brain damage, particularly in the area that the pellet hit, then we should see it all the way through his life and we don't see it, we see excellent scores. (PCR29/5064) He did a BETA III examination, which taps into the large area of the right side of the brain

having to do with visual-spatial understandings. Griffin came out on the upper end of the average range. They administered a Ray 15 Item Test which is designed to see if an individual is under or over reporting symptoms of memory problems and he recalled all 15 very easily. (PCR29/5065) He gave him a Trails A and B. On the Trails B which shows frontal lobe function, he came out on the average range. On the trails A he got below average. Dr. Merin believed it was a matter of motivation because the IQ test showed he does a good job recalling numbers. (PCR29/5066) On the Peabody Picture Vocabulary Test III, he got a 112 which is above the upper end of the average range. In the Boston Naming Test, he came out in the bright average range. Both of these tests have to do with the prefrontal lobe in that they require shifting, switching, decision making, planning, understanding things from memory and then proceeding with it, and he performed very well. (PCR29/5067)

On the Halstead-Reitan Category Test, another prefrontal lobe test, he scored in the 54 percentile level which is a very good score. Griffin is able to shift mental gears, to see errors and to make choices and judgments. On the Wisconsin Card Sorting Test, another prefrontal lobe test, he scored very well. (PCR29/5068) On the Stroop Interference Procedure, a reading test, he was at the low end of average. Since his IQ showed he does not have a reading problem, he suspected motivation again was the explanation. Also, there were two young professional looking female attorneys in the

room and defendant did a lot of smiling. He appeared to be flirting. There was no evidence of depression during his stay. (PCR29/5069-70)

On the next test, his difficulty with the test reflects that he has difficulty inhibiting old patterns of learning. Dr. Merin testified this was not a defect but provided insight about difficulties he may have as he attempts to solve a problem. That has to do with the prefrontal lobe but shows no indication of prefrontal lobe damage that would rise to the statutory level of capacity to conform. (PCR29/5071) There was no evidence that defendant was acting under duress due to any brain impairment other than what could be residual of the pellet incident. That was very minor and it struck an area of the brain that test results show was not badly affected at all. (PCR29/5071-72)

On the Minnesota Multiphasic Personality Inventory II, MMPI a standardized personality test defendant's results showed no pathological inclination to acquiesce. (PCR29/5072) He is a defensive person and he will give you answers that are favorable to himself; they are logical but not necessarily true. He is on the borderline of pathological, with no evidence of psychosis. On the hysteria scale emotional immaturity, suggestibility, conversion of emotions into symptoms, his scores fell in the moderate area of pathology. Also close to the range of psychopathic deviant were his scores with regard to willingness to manipulate, willingness to

give false answers, insensitivity to the feelings of others, impulsivity, found in persons who do in fact break the law. There was no evidence of depression. (PCR29/5074-75) Considering claims of multiple head injuries there was no indication of injury to the prefrontal lobe area. (PCR29/5078) His opinion was that Griffin was not suffering from any type of brain injury and did not meet the statutory mental mitigators. (PCR29/5079-80)

Dr. Merin explained and gave a "cocaine 101." Cocaine is a powerful stimulant, can produce psychotic thought processes, affect hallucinations and allows one to let their fantasies take over. (PCR29/5081) Cocaine can affect levels of serotonin, dopamine and the norepinephrine, which makes you feel very good and encourages you to continue to behave in the way you do under cocaine; judgment goes out the window depending on how much cocaine you use. Chronic users may find themselves always looking for cocaine, seeking it out. (PCR29/5082) It reduces inhibitions just as frontal lobe damage would do, and people become more impulsive, another frontal lobe function. They are willing to take chances. (PCR29/5083)

Upon being given a hypothetical with the facts of this case, Dr. Merin questioned whether defendant really was using cocaine because the thinking was very logical, very well planned, and the description of his actions does not suggest that the use of cocaine had so disrupted his thinking; his planning was too well developed. It raises the question of whether he had used it and if he had used

it, it would have been a minimal amount. (PCR29/5086-89) It would have been certainly not enough to disrupt his thinking as to cause the person to develop plans that were near psychotic and bizarre, which would be consistent with heavy use of cocaine. (PCR29/5090) He found that the postponement of the robbery for 24 hours did not suggest any kind of impulse control impairment, and that the planning showed reasoned judgment. (PCR29/5091) Again his conclusion was that no statutory mental mitigators were established by a claim of cocaine use. (PCR29/5092-93) In fact, Griffin told him he was not under duress, he was not told what to do but if he was asked to do something he would do it; Griffin said no one dominated him. (PCR30/5220) The tests he administered indicate the prefrontal lobe is working pretty well. (PCR30/5264) The deficits in the asymmetry in the reflexes can be explained by damage to right side of the brain; chances are very good that you are going to have some problems on the left side of the body but they are only physical problems, not impairment in judgment because you are not dealing with that part of the brain. (PCR30/5265)

The evidentiary hearing continued on December 17, 2007, with Mary Hall testifying for the defense that she knew the defendant. She testified at penalty phase because she was forced to by detectives. (PCR31/5336-5344) She described Griffin's cocaine use in 1995. (PCR31/5335) She said they were using daily by October of 1995. (PCR31/5337)

Kimberly Ally testified telephonically. (PCR31/5358) She also did cocaine with defendant, freebasing and snorting. (PCR31/5361) Kocolis threatened to cut off defendant's supply of drugs because it wasn't free. (PCR31/5367) She was in jail at the time they committed the instant murders. (PCR31/5369) She says the police threatened her and she was given immunity - that her sworn statement would not be used against her. (PCR31/5371)

On February 11, 2008, Heather Henline testified regarding a statement she gave to the State Attorney's office. She did not testify at penalty phase. (PCR32/5436) She knew Griffin, Kocolis and Lopez. (PCR32/5441) She did not consider herself a friend of Griffin's. (PCR32/5442) They were in the drug business together. (PCR32/5443) She was questioned when she was arrested for her drug case. (PCR32/5444) She gave a statement concerning the burned money bags found at her house. (PCR32/5445) She testified that unnamed officers threatened her and offered to help her with her custody case which she ended up not pursuing until years later. (PCR32/5448, 5451) She was aware of the planning of the robbery in October of 1995. Kocolis brought it to her attention that he might have something lined up that they were looking at. (PCR32/5449) On cross, she conceded that Mr. Martin was there for her questioning and that no promises were made. (PCR32/5453-54) And, despite testifying that no one from the defense talked to her, she admitted she was deposed by Dwight Wells on September 9, 1996 and

that she told the truth during that deposition. (PCR32/5455-57)

Chief Assistant State Attorney Bruce Bartlett testified he interviewed Nicholas Kocolis in November, 1995 at the State Attorney's Office. (PCR32/5464-65) Mr. Bartlett explained during his testimony that only Mr. McCabe, the elected State Attorney has the authority to grant immunity in the Sixth Judicial Circuit of Florida. (PCR32/5466) Mr. Bartlett testified prior to interviewing Kocolis that he did not contact Mr. McCabe and obtain authorization to grant Kocolis immunity from prosecution relating to the double murders at Service America nor did he, on his own, grant Kocolis immunity. (PCR32/5466)

Defendant Michael Griffin did not testify at the evidentiary hearing.

The hearing concluded with this Court ordering written closing statements. Griffin's Closing Argument in Support of Motion to Withdraw Guilty plea was filed simultaneously with the written closing argument on April 29, 2008. (PCR8/1134-67; 1168-1253)

On November 26, 2008, the lower court entered an Order dismissing defendant's motion to withdraw guilty plea, denying in part and granting in part defendant's motion for postconviction relief, vacating the death sentence and granting a new penalty phase hearing. (PCR9/1395-1415) Griffin's Notice of Appeal was filed on December 24, 2008 and the State filed a Notice of Cross Appeal on December 31, 2008.

SUMMARY OF THE ARGUMENT

Issue I

The trial court did not have jurisdiction to entertain the untimely motion to withdraw plea. The claim of ineffective assistance of counsel with regard to the plea was properly denied as Griffin failed to show that counsel's performance was deficient or that he was prejudiced by that performance.

Issue II

The trial court properly denied Griffin's claim that material, exculpatory evidence was withheld as Griffin failed to establish that immunity was given to any witness that was not disclosed to the defense.

Cross Appeal

In light of the extensive evidence, including his mental health expert, that was already presented to the sentencing judge, the fact that Griffin himself was remorseful, wanted to plead guilty and express that remorse, the addition of this newest testimony does not establish that a reasonable probability that had any of the mental health experts, whose testimony at the postconviction evidentiary hearing was as damaging as it was helpful, testified at the penalty phase, Griffin would have received a life sentence so as to undermine confidence in the outcome of the proceeding. The lower court's order granting a new penalty phase should be reversed.

ARGUMENT

ISSUE I

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S CLAIMS REGARDING HIS GUILTY PLEA BASED ON A CLAIM HIS GUILTY PLEA WAS NOT KNOWING, VOLUNTARY, OR INTELLIGENT, WHERE DEFENDANT HAS FAILED TO ESTABLISH THAT COUNSEL'S PERFORMANCE IN ADVISING HIM TO PLEAD GUILTY WAS DEFICIENT AND THAT HE WAS PREJUDICED BY SUCH DEFICIENCY.

On June 13, 1997, the defendant pled guilty to two counts of First Degree Murder and waived a jury recommendation. He was sentenced on July 10, 1998 to two sentences of death. On direct appeal Griffin argued that his waiver of a jury recommendation was invalid. This Court, likening it to a defendant's failure to timely move to withdraw a plea on voluntariness grounds foreclosing review on direct appeal, found that claim procedurally barred on appeal. *Griffin v. State*, 820 So. 2d 906, 912-913 (Fla. 2002). Griffin then proceeded to challenge the validity of his guilty plea for the first time in his initial 3.851 motion, wherein he alleged that his plea was not voluntary, knowing, or intelligent due to trial counsel's "ineffective and unreasonable representation and advice." (PCR1-2/1-215, Claim III). The motion asserted that trial counsel did not adequately investigate his case before counseling him to take the guilty plea, and, therefore, he was not fully informed as to his possible defenses, thereby invalidating his plea. Further, he contended that he was induced to enter the plea based on trial counsel's advice that if he would take the

plea, he would receive a life sentence. On September 25, 2007, over nine (9) years after the rendition of the sentence, the defendant also filed a motion to withdraw his plea pursuant to Florida Rule of Criminal Procedure 3.170(l) alleging that trial counsel never informed him that he had the right to move to withdraw his plea. (PCR6/945-58)

After conducting an evidentiary hearing on the issue, the court denied the claim raised in both motions. "When reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance claim, this Court gives deference to the trial court's factual findings to the extent they are supported by competent, substantial evidence, but reviews *de novo* the trial court's determinations of deficiency and prejudice, which are mixed questions of fact and law. *See Arbelaez v. State,* 898 So.2d 25, 32 (Fla.2005)." *Morris v. State*, 931 So. 2d 821, 828 (Fla. 2006). A trial court's denial of a motion to withdraw plea is reviewed for an abuse of discretion. *White v. State*, 15 So. 3d 833, 835 (Fla. 2d DCA 2009); *Davis v. State*, 783 So. 2d 288, 289 (Fla. 5th DCA 2001).

The lower court then went through each of the specified allegations and delineated the facts that refuted the claim that counsel was ineffective in recommending a guilty plea. As the following will show, the lower court's order denying relief on both the 3.170 motion and the claim of ineffective assistance of counsel with regard to the entry of the guilty plea was proper.

Rule 3.170

As previously noted, this Court considered aspects of this issue on direct appeal in the instant case, and concluded that the defendant may raise the claim of involuntariness of his plea pursuant to Fla. R. Crim. P. 3.851 on postconviction review. *Griffin v. State*, 820 So. 2d 906, 912-13 (Fla. 2002) (Thus a defendant's failure to timely move to withdraw a plea on voluntariness grounds forecloses review on direct appeal, and the defendant's sole avenue of review is through a collateral attack.) In *Dooley v. State*, 789 So. 2d 1082, 1084 (Fla. 1st DCA 2001), the Court explained the involuntary-plea claim "is precisely the type of claim that is unlikely to be made in a motion to withdraw under rule 3.170(l). A defendant proceeds through the criminal process relying upon his lawyer . . . thus it can be reasonably assumed that the defendant will be relying upon the same lawyer if he or she elects to file a rule 3.170(l) motion. Under those circumstances, it would be most unlikely that the defendant's attorney would file a motion asserting that he or she coerced the defendant into entering the plea." *Id.*

Here, the defendant did not file a motion to withdraw plea within 30 days after the rendition of his two death sentences, therefore the Court did not have jurisdiction or the authority to consider the defendant's motion to withdraw plea filed pursuant to Fla. R. Crim. P. 3.170(l).

Griffin now contends that the lower court erred in finding that it did not have jurisdiction to address the motion to withdraw plea on the merits. He contends that under certain circumstances that courts, including this Court in *Kilgore v. State,* 688 So. 2d 895, 897 (Fla. 2002), have entertained motions to withdraw filed outside of the 30 day time period. This claim is without merit.

A defendant is required by Rule 3.170(l) to file a motion to withdraw plea within thirty (30) days after rendition of the sentence. Fla. R. Crim. P. 3.170(l). By failing to timely file a motion to withdraw his plea, defendant deprived the lower court of the authority to consider the motion to withdraw his guilty plea. *Gafford v. State*, 783 So. 2d 1191, 1192 (Fla. 1st DCA 2001) (Accordingly, the 30-day limit under 3.170(l) is also jurisdictional; therefore, the trial court did not have the authority to consider Gafford's motion below, and the issue was not preserved for appeal.)

Griffin argues that:

> "In *Kilgore v. State*, 688 So. 2d 895, 897 (Fla. 2002), this Court permitted a capital defendant to withdraw his plea after sentencing, and even well into his appellate process. In *Kilgore*, the defendant was indicted for first-degree murder and possession of contraband by an inmate. *Id.* Originally, Kilgore pleaded *nolo contendere* to both charges. After he was sentenced to death and his case was on appeal, Kilgore moved to withdraw his plea on the grounds that his attorney had mistakenly advised him that the death sentence would not be imposed because of the plea. *Id.* In an affidavit with the motion, Kilgore's trial counsel stated that he advised his client to plead guilty based upon repeated representations by the trial court and the State which led trial counsel to believe that a life sentence would ultimately be imposed.

> However, as in Mr. Griffin's case, there was never a guarantee, written or otherwise, that a life sentence would be the end result. Despite the fact that Kilgore had filed his motion outside of the 30-day time limit, this Court relinquished jurisdiction to the circuit court so that it could address Kilgore's motion to withdraw the plea. The lower court ultimately granted the motion, and Kilgore was tried by a jury. *Id.*"

Initial brief of Appellant, pg 63.

It is true this Court relinquished jurisdiction to the circuit court for an evidentiary hearing on Kilgore's motion to withdraw plea and the circuit court, after an evidentiary hearing, granted his motion to withdraw his guilty plea and Kilgore was ultimately given a jury trial. However, the facts as alleged by defendant are not correct and the applicability of *Kilgore* to the case at bar is woefully misplaced.

This Court in *Kilgore*, explained:

> Kilgore was indicted for first-degree murder and possession of contraband by an inmate. Originally, Kilgore pleaded nolo contendere to both charges. **When a sentence of death was announced, however, Kilgore moved to withdraw his plea** on the grounds that his attorney had mistakenly advised him that the death sentence would not be imposed because of the plea. Although a notice of appeal had been filed, this Court relinquished jurisdiction to the circuit court in order that it might address the motion. The lower court granted the motion to withdraw the plea and Kilgore was tried by a jury.
>
> *Kilgore v. State*, 688 So. 2d 895, 897 (Fla. 1996)(emphasis added)

Upon relinquishment, Kilgore changed his plea to nolo contendere. (PCR9/1387) One of the motions assigned to Judge Bucklew to hear was Kilgore's Supplemental Motion to Withdraw Plea,

filed July 19, 1990, *16 days after he had changed his plea*, not after Kilgore filed his appeal as asserted by defendant. (PCR9/1386-92) Thus, Kilgore's motion was timely and the court in *Kilgore* had jurisdiction to consider the defendant's timely filed motion to withdraw his plea. Whereas, under no scenario is Griffin's motion timely. Thus, the trial court correctly determined that it did not have jurisdiction or the authority to consider the motion to withdraw his guilty plea, filed pursuant to Fla. R. Crim. P. 3.170(l).

Griffin also suggests that jurisdiction was proper under the holding in *Johnson v. State*, 834 So. 2d 384 (Fla. 2d DCA 2003). In *Johnson*, the court determined that it was improper to not allow the defendant to withdraw his plea where he was offered a sentence over the objection of the State; the State took an appeal and won reversal of the sentence. On remand the defendant's attempt to withdraw his plea was denied. The opinion does not state under which rule relief was sought but the Second District granted relief finding Johnson was prejudiced by the trial court's failure to warn him of the minimum mandatory sentences and that he entered his pleas based on a mistake or misapprehension concerning the sentences that could be imposed by the trial court. That is the standard set forth for motions filed under Rule 3.170(f), which might be based on any one or a combination of myriad grounds. Griffin filed a motion under rule 3.170(l) which is limited to

those grounds listed in Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)(a) to (e). Griffin's motion to withdraw his plea pursuant to Fla. R. Crim. P. 3.170(l), which requires the motion be filed within thirty (30) days of the rendition of sentence, was correctly denied. (PCR9/1397)

The significance between Fla. R. Crim. P. 3.170(1) and Fla. R. Crim. P. 3.850 and 3.851 is the defendant's burden of proof required to obtain relief. Under Fla. R. Crim. P. 3.170(l) a defendant has the burden of proving that a "manifest injustice has occurred," such that withdrawal is necessary to correct the manifest injustice. *LeDuc v. State*, 415 So. 2d 721, 722 (Fla. 1982); *Snodgrass v. State*, 837 So. 2d 507 (Fla. 4th DCA 2003); *Scott v. State*, 629 So. 2d 888, 890 (Fla. 4th DCA 1993). Even if the trial court had jurisdiction to consider the motion, the facts do not show anything more than Griffin hoped for a better sentence with the full knowledge that a death sentence was possible and being sought by the State. No manifest injustice has been shown.

Rule 3.851; Ineffective Assistance of Counsel: Guilty Plea

The lower court denied this claim after an evidentiary hearing explaining:

> The Defendant's first claim, that his straight-up guilty plea was involuntarily made, is refuted by the record which shows that the Defendant entered his plea knowing that he did not have an agreed upon, guaranteed sentence, and that the maximum sentence that could be imposed was the death penalty. See Change of Plea Form; Change of Plea Transcript. The record also shows that the trial court conducted a thorough plea colloquy with the Defendant before accepting his guilty plea, and that the

Defendant "was extremely remorseful and ready to plead before most of the discovery was done." See Id.; EHT (Evidentiary Hearing Transcript), 03/30/07 (date), pg. 66 (page number). A review of the colloquies shows that the trial court advised the Defendant, not once, but twice, that he was facing the death penalty or life without the possibility of parole. See Change of Plea Transcript; Sentencing Transcript. The plea colloquy further shows that trial counsel consulted with the Defendant, that the Defendant knew the potential sentences he was facing, and that he was entering his plea knowingly and voluntarily. Id. There is nothing in the record indicating that the Defendant did not understand the gravity and effect of his actions and waivers, and therefore the Court finds that his guilty plea was voluntarily entered. As such, the Defendant's allegation that his plea was involuntarily made because he relied on counsel's misadvice is denied.

(1) The Defendant's claim that trial counsel failed to find and present expert evidence is denied for failure to demonstrate prejudice. See Grosvenor, 874 So. 1176, 1179 (Fla. 2004) (finding that to establish prejudice the defendant must show a reasonable probability exists that, but for counsel's error, he would not have pled guilty and instead would have insisted on going to trial. . . a reasonable probability is a probability sufficient to undermine confidence in the outcome of the case).

In support of this claim, the Defendant presented two expert witnesses at the evidentiary hearing. Dr. Thomas Hyde, a neurologist, testified that he conducted a two-hour limited examination of the Defendant and that he did not talk to the Defendant's family. See EHT 08/16/07, pg. 39. During the examination, the Defendant admitted to Dr. Hyde that he planned the robbery on some level, that he knew where the money was, and that he was the one who raised the idea of robbing Service America. Id. at *73 He also told Dr. Hyde that he used cocaine heavily, but it wasn't clear to the doctor if the Defendant was intoxicated at the time of the crime or if he was coming off of a binge. Id. at *33 On a mini mental-state exam administered by Dr. Hyde, the Defendant scored 29 out of 30 points, almost a perfect score. After conducting the examination, Dr. Hyde concluded that the Defendant was alert, that he communicated well, that he was largely cognitive, that he was cooperative, and that he was intellectually intact. Id. at *51. More importantly, considering the information the Defendant

gave to Dr. Hyde about planning the crime and his attempts to cover it up, Dr. Hyde concluded that the Defendant's acts were not impulsive, and that his behavior directly exhibited an intention to avoid getting caught. Id. at **75-76, 79-81.

Dr. Deborah C. Mash, a professor of neurology and molecular and cellular pharmacology who testified for the Defendant, stated that she believed the Defendant committed the robbery to get money for drugs. See EHT 08/1 5/07, pg. 108. Dr. Mash also believed that the Defendant's drug use accelerated rapidly from recreational to binging. Id. at 118-120. Dr. Mash believed that the Defendant's behavior around the time of the robbery and murders was not typical of individuals suffering from cocaine excited delirium. Rather the Defendant's actions of (1) interacting with other people to plan the robbery; (2) securing a weapon; (3) conducting surveillance; (4) developing a plan to get past the security system; and, (5) partying after the murder, showed control and consciousness of thought, rather than the paranoid behavior of someone suffering from a cocaine excited delirium. Id. at **115-116, 127-128.

At the evidentiary hearing, the State introduced expert testimony from Dr. Sidney Merin to refute the Defendant's expert testimony. Dr. Merin testified that there was no evidence of brain damage and that none of the Defendant's IQ scores fell below the average range. See EHT 08/16/07, pgs. 147-148.

The Defendant additionally claimed that trial counsel was ineffective for failing to present a DNA expert and an independent medical examiner. To refute this claim, trial counsel testified at the evidentiary hearing that calling a DNA expert to testify would have been irrelevant because the Defendant confessed to being at the crime scene and to cutting his arm while there. See EHT 03/30/07, pg. 41. Counsel further testified that he saw no relevance in calling an independent medical examiner to testify because the Defendant denied being the shooter.

Considering the totality of the evidence, the Defendant has not established that a reasonable probability exists that he would not have entered a plea, but for counsels failure to present the aforementioned expert evidence. This finding is supported by the fact that the two doctors whom collateral counsel argues trial counsel should have called, would have been in the position to present damaging evidence that the Defendant was the one who decided on the target of the robbery,

that he was actively involved in planning the robbery, and that he is the one who obtained the weapons used to kill the victims. This is additionally true because trial counsel presenting a DNA expert to disprove what the Defendant had already admitted and was going to admit to, likely would not have changed the outcome of the Defendant's decision to plea, and evidence from an independent medical examiner would have contradicted the actual defense agreed upon by the Defendant and presented by him to the court. Accordingly, the Defendant fails to satisfy the prejudice test under Strickland and therefore his expert witness claim is denied. 466 U.S. 668 (1984)

(2) The Defendant's claim that trial counsel failed to present evidence that Nicholas Kocolis was the mastermind behind the robbery is refuted by the record. Accordingly, this claim is denied.

Trial counsel, Dwight Wells, testified at the evidentiary hearing that he hired an investigator to obtain as much information as possible on Kocolis in an attempt to get Kocolis indicted for the murders. See EHT 03/30/07, pgs. 9-10, 62-63. However, trial counsel further testified that Kocolis was difficult to speak with, "especially in the context of where [counsel] was coming from," and therefore he does not believe the investigator ever spoke to Kocolis. Id. at **10, 69-71. Nevertheless, even if the investigator had spoken to Kocolis and Kocolis was subpoenaed to the stand, trial counsel testified that he had learned, during the postconviction proceedings, that Kocolis had been granted immunity from the State and therefore he likely would have hid behind his Fifth Amendment rights. Id. at **69-71.

(3) The Defendant's claim that trial counsel failed to make a plea-offer to the State that did not involve the co-defendant is refuted by the record. Accordingly, this claim is denied.

Trial counsel testified at the evidentiary hearing that once he learned the victim's family was not "favorably disposed" to the death penalty and therefore was not pushing for it, he discussed with the State Attorney's Office the possibility of a package plea where the Defendant and the co-defendant would both plead guilty in exchange for life sentence recommendations. See EHT 03/30/07, pgs. 13-17. Shortly after this discussion, however, the co-defendant was adjudged incompetent.

Consequently, trial counsel testified that he approached the State "quite a bit" with an offer for the Defendant to plead without the co-defendant, even though he knew the State had not previously been amenable to an independent deal. Id. at **20-21 And, when it became abundantly clear that the co-defendant's competency was not going to be quickly restored, trial counsel testified that he pleaded with the State as to why they couldn't resolve the Defendant's case for a life sentence without the co-defendant. [fn5] Id. According to trial counsel, the State responded to his plea by stating "[W]ell, we can't resolve it that way because we're not offering you that." Id.

(4) The Defendant's claim that trial counsel failed to consider and/or present a voluntary intoxication defense is refuted by the record. Accordingly, this claim is denied.

Trial counsel testified at the evidentiary hearing that he was aware of the Defendant's cocaine use around the time of the crime, but, he explained, the evidence showed that the Defendant exercised reasonable control and judgment in planning and executing the robbery, thus negating a voluntary intoxication defense. See EHT 03/30/07, pgs. 5-7, 22-25, 36-40, 48-51, 64; Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992); Cherry v. State, 791 So. 2d 1040, 1047 (Fla. 2000). Specifically, the evidence showed that within 72 hours before and after the murders the Defendant was using cocaine. However, during this time, he obtained a firearm, staked out the robbery location, consciously decided not to commit the robbery on a particular day, drove from Brandon to Oldsmar solely to commit the robbery, and devised a plan to get around the security alarm. See EHT 03/30/07, pgs. 48-49. In trial counsel's professional opinion, this evidence (1) diminished the possible impact of a voluntary intoxication defense because it showed a lack of impulsivity, which is the side effect of cocaine; (2) showed that the Defendant had control over his mind; (3) showed that he knew exactly what he was doing; and, (4) most importantly, showed that the Defendant exercised goal related judgment to increase the likelihood that the robbery would be successful and that he would not get caught. Id.

[fn5] The co-defendant's competency was not restored until four years later.

Furthermore, trial counsel testified that in his experience, juries were "very, very unlikely to give a person a break for voluntarily either drinking alcohol or for taking drugs and using that as a defense for something that they had done to another person," and that this defense was regarded as a "last resort." Id. at *39 Consequently, trial counsel made the strategic decision not to pursue a voluntary intoxication defense because, based on the totality of his professional experience, he believed it was not that effective even under the best circumstances, and, given the facts of this case, it would have been an extremely bad defense.

Additionally, trial counsel did not think it would be appropriate to set up the penalty phase by presenting a voluntary intoxication defense during the guilt phase because of the Defendant's behavior after the murders. Id. at *22. Specifically, counsel explained that the evidence showed that after the Defendant brutally shot the victims and left them in a freezer to die, he robbed them, and with the money he bought Dom Perignon champagne and threw a party for his friends at a hotel. Id. at *64. Trial counsel also took into consideration that the State's witnesses identified the Defendant as the driver of the van used to commit the robbery, that the tire tracks of the Defendant's van were found at the crime scene; and, that a shotgun shell, money wrappers, and a host of other evidence linking the Defendant to the crime were found in his van. Id. at **23, 46, 65-67. Therefore, counsel believed, and rightfully so, that the evidence, in its entirety, would not be considered favorably by a jury, even if, and maybe even more so, if a voluntary intoxication defense was relied upon.

After discussing the totality of these circumstances with the Defendant, trial counsel concluded that the best way to save the Defendant's life was for him to enter a plea. Therefore, contrary to the Defendant's unsupported assertion that if he had known about this defense he would not have pled guilty, the record shows that he was advised of said defense and that he chose to follow learned counsel's advice in deciding not to rely upon it. For the foregoing reasons, and because trial counsel's strategic decisions will not be second guessed on collateral attack, this claim is denied. Johnson v. State, 769 So. 2d 990, 1002 (Fla. 2000) (citing Remeta v. Dugger, 622 So. 2d 452 (Fla. 1999)).

(PCR9/1399-1405)

The lower court properly analyzed this claim as a *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) claim under Fla. R. Crim. P. 3.851 as required by *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 367 (1985) (The two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.) In *Hill* the defendant alleged his guilty plea was involuntary by reason of ineffective assistance of counsel because his attorney had misinformed him as to his parole eligibility date. *Id.* at 54-55. The *Hill* court reasoned "the voluntariness of the pleas depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases'". *Id.* at 57. (cites omitted) The *Hill* court applied the *Strickland* 'prejudice' requirement based on its conclusion that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error has no effect on the judgment". *Id.* at 57. (cites omitted) To satisfy the "prejudice" requirement of the *Strickland* test, a defendant who seeks to challenge the validity of his plea on the ground of ineffective assistance of counsel "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial". *Id.* at 59.

The defendant did not testify at his Rule 3.851 evidentiary hearing that at his penalty phase hearing when he learned that life

did not mean the possibility of parole after 25 years he insisted on going to trial; he did not testify that he would have insisted on going to trial had his counsel not "assured" him that if he pled guilty he would receive a life sentence; he did not testify had his defense counsel told him of voluntary intoxication defense he would have insisted on going to trial; nor did he testify that had Kocolis been available to testify, he would have insisted on going to trial.

As argued above, it is the defendant's burden to show "prejudice". The defendant did not testify at his evidentiary hearing. There is nothing in the record at trial, in the defendant's sworn amended motions to vacate judgment or at the evidentiary hearing establishing the defendant was "prejudiced" in any way when he pled guilty. *Winkles v. State*, 21 So. 3d 19, 23 (Fla. 2009) (declining to find prejudice where defendant did not testify during the evidentiary hearing that he would not have pleaded guilty but for counsel's advice.) Even though he had the opportunity at his Rule 3.851 evidentiary hearing, he did not rebut the sworn testimony of his defense counsel, Dwight Wells, who testified Griffin was extremely remorseful and ready to plead. (PCR27/4557) The only logical conclusion is that the defendant told the truth when he testified at his penalty phase hearing that even though he knew parole was not an option he still chose to plead guilty. (TR S4/452-453, 456-457)

The testimony of family members at the defendant's evidentiary hearing was insufficient to establish the "prejudice" requirement of *Hill*. The defendant's mother, Sandra Griffin testified at the evidentiary hearing that she would not have recommended that her son, the defendant, plead guilty if she thought that life with 25 years with the possibility of parole was not an option. (PCR25/4215) She conceded, however, she was present when it was announced on the record that parole was not an option and the defendant was given an opportunity to consult with his family before entering the plea. (PCR25/4218-19) Nor did the defendant's aunt Nancy Price offer any evidence that established prejudice. She simply testified that she told him that if it would keep him from getting the death penalty he should plead guilty. (PCR25/4247) Price never testified about what the defendant said was important to his decision to plead guilty and to maintain his guilty plea at the penalty phase hearing. Price only testified to her conversations with defendant's counsel, specifically her belief that the defendant would receive a life sentence based on what the attorneys explained to her. (PCR25/4247-48)

The only uncontradicted, unrebutted testimony about how the defendant felt about pleading to the charges was the sworn testimony of his trial counsel, Dwight Wells, who testified the defendant was extremely remorseful and ready to plead even before the discovery process had been completed, (PCR27/4556-57), and the

sworn testimony of the defendant at his penalty phase hearing. (TR S4/452-453, 456-457)

Here, as in *Hill*, it is unnecessary to determine whether the alleged erroneous advice by defense counsel or alleged performance deficiencies demonstrate constitutional ineffective assistance of counsel, because the defendant has failed to establish in the record the requirement of "prejudice," in that he has failed to establish that there is a reasonable probability that he would not have pled guilty but for the alleged ineffective assistance of counsel.

As the Court reasoned in *Ey*,

> . . .To raise a facially sufficient claim, however, a defendant must do more than allege that counsel provided erroneous advice . . . had counsel not erroneously advised the defendant, the defendant would have exercised his right to a trial. To prevail on such an ineffective assistance claim, a defendant must ultimately prove deficient performance and that under "the totality of the circumstances surround the plea," there is a reasonable probability the defendant would have gone to trial instead of entering a plea. *Grosvenor v. State*, 874 So.2d 1176, 1181-82 (Fla. 2004).
>
> *Ey v. State*, 982 So. 2d 618, 623-624 (Fla. 2008)

Moreover, even though it is the defendant's burden to demonstrate "a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial," *Grosvenor v. State*, 874 So. 2d 1176, 1179 (Fla. 2004) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)), courts also look to the merits of any defense as relevant

to "the credibility of the defendant's assertion that he would have insisted on going to trial." *Id.* at 1181. Accordingly, in determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the "totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial." *Id.* at 1181-82 (quoting *Hill*, 474 U.S. at 60). It is inconceivable that the defendant's decision to enter the plea would have been altered by receiving more information in support of the weak defense of voluntary intoxication.

Defendant's detailed confession to his actions before, during and after the robbery/murders negated that he had any legal defense in the guilt phase of voluntary intoxication or brain damage. See, *Henry v. State*, 862 So. 2d 679 (Fla. 2003); *State v. Williams*, 797 So. 2d 1235, 1239 (Fla. 2001); *Cherry v. State*, 781 So. 2d 1040, 1047 (Fla. 2000); *Occhicone v. State*, 768 So. 2d 1037, 1048 n.9 (Fla. 2000).

In light of his own testimony, the defendant could not seriously allege an intoxication defense. See, *Gurganus v. State*, 451 So. 2d 817, 822-23 (Fla. 1984). Defendant's position was that

he had pled guilty because he felt responsible for having taken Mr. Lopez to Service America to participate in the robbery that defendant admitted planning for two weeks. (TR S4/444-445, 456-457, 463) Defendant gave a detailed account of the planning, including his acquiring the 9mm handgun that Lopez carried and used in the robbery and homicides and his taking Lopez to Shorty's Bar across the street from Service America on the night before and the night of the robbery/homicides to surveil Service America to assure that someone was there so they could gain entrance. (TR S4/445-448, 464) Defendant drove his own van both nights for the hour-long round trip. Defendant related the difficulty he had breaking into the money lockers using his own crowbar and that he had cut himself on one of the lockers while getting the heavy money bags out. Defendant described loading the money bags into plastic milk crates after removing the milk cartons and that the dolly was so heavily laden with milk crates full of heavy money bags that they had trouble steering it. (TR S4/476-477) Defendant related in detail his version of Lopez having fired both guns and all of the shots that hit and killed the victims. (TR S4/478-481) Defendant described his actions after the robbery, of returning to the Tropicana to retrieve Lopez' car and of his having personally thrown both guns off a bridge off Hillsborough Avenue during the 35 minute drive from Service America after parking his van with the flashers on to make it appear he was having vehicle problems. (TR

S4/498-500) He described renting a room at the Camberley Plaza Hotel, inviting friends for a party there, and ordering the best champagne and paying over $100.00 for the bottle and generously tipping for the room service delivery of it. (TR S4/483-488) He described paying others to help roll the stolen coins and burning, within the next few days, the money bags and a shirt of Lopez' that defendant used to stop the bleeding of his arms after cutting them on the locker. (TR S4/489, 497-498) This detail negated any defense of voluntary intoxication during the robbery/homicides. See, *Mendyk v. State*, 592 So. 2d 1076, 1079 (Fla. 1992); *Cherry v. State*, 781 So. 2d 1040, 1047 (Fla. 2000).

A defendant cannot expect defense counsel to assist in any perpetration of fraud upon the court by claiming innocence contrary to facts known to defendant. See, *DeHaven v. State*, 618 So. 2d 337, 339 (Fla. 2nd DCA 1993). Defendant has not shown that he was deprived of a fundamentally fair guilt phase proceeding. It is defendant's burden to show prejudice and that but for some omission or legally defective advice of counsel he would not have pled. See, *State v. Seraphin*, 818 So. 2d 485 (Fla. 2002). Defendant's confession in the penalty phase to planning the robbery, obtaining the guns, and taking Lopez to the scene, resulting in the death of the victims, and admissions to several persons that he shot the victims, negates any prejudice from counsel's failure to depose or investigate the witnesses on the State's witness list.

Moreover, the allegation that defense counsel failed to investigate by not attending depositions is refuted on the record. Wells attended 13 of the 22 transcribed depositions. Wells testified at the evidentiary hearing he took depositions and was fully aware of the statements made by the defendant and co-defendant Lopez. (PCR27/4504). Defendant's co-counsel Mills attended an additional four depositions, as well as some of those attended by Wells. Although not attending the remaining five depositions, which were conducted by codefendant Lopez' counsel, defendant's counsel had access to four of them prior to his change of plea on June 13, 1997, as filed prior to that date. (Penny Cyr, TR3/515-522; Anthony Frushon, TR3/523-530; Paul Sauer, TR3/531-563, all filed June 10, 1997; and Dr. Hansen's filed October 22, 1996). Dr. Hansen's autopsy report was discovered to defense on December 21, 1996. (TR1/08)

Only the deposition of George Sylvester, filed August 21, 1997, TR9/1617-1653, was unavailable to defendant until after his change of plea, but before his penalty phase. However, the police report documenting this statement was discovered to the defense October 15, 1996. Sylvester's statement was detrimental to defendant and not used by the State against defendant in the penalty phase. Defendant, therefore, cannot show prejudice even if he was unaware of the facts in the deposition.

Prejudice to the defendant is not shown by the allegation that

counsel failed to investigate the backgrounds or to attack the credibility of Melissa Clark, Mary Hall, Cynthia Lambert and others who claimed to have heard statements of defendant and Lopez about defendant's involvement. Defendant's confession in the penalty phase, confirming all such statements except for his own participation in the shooting, negates that defendant suffered any prejudice in the guilt phase from the testimony in the penalty phase of Melissa Clark and Mary Hall (Cynthia Lambert did not testify.). By defendant's own admission, the extent of his involvement in the murders was sufficient for the guilt phase determination and to support his guilty plea.

It is sheer sophistry to suggest that the defendant would have gone to trial had defense counsel conducted further investigation into the role of Kocolis in the planning of the robbery that lead to the double murders. Wells testified at the evidentiary hearing he hired a private investigator to interview Kocolis, however Kocolis would not speak to him or the private investigator. (PCR27/4501, 4572-73) Wells further testified that he would not have wanted Kocolis to "take the fifth" while on the stand. (PCR27/4561). Wells also testified he discussed with the defendant his relationship with Kocolis and determined from the information provided by the defendant that the defendant was not under the substantial domination of Kocolis at the time of the double murders. (PCR27/4565)

As the lower court found in denying relief, "even if the investigator had spoken to Kocolis and Kocolis was subpoenaed to the stand, trial counsel testified that he had learned, during the postconviction proceedings, that Kocolis had been granted immunity from the State and therefore he likely would have hid behind his Fifth Amendment rights," as he did at the evidentiary hearing. (PCR27/4560-62)

As Griffin has failed to establish either prejudice or deficient performance and the lower court had competent substantial evidence to support the denial of relief, this Court should affirm.

ISSUE II

THE LOWER COURT PROPERLY DENIED GRIFFIN'S CLAIM THAT THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL, IMPEACHING AND EXCULPATORY IN NATURE AND/OR KNOWINGLY PRESENTED FALSE OR MISLEADING EVIDENCE AND/OR ARGUMENT AT HIS CAPITAL TRIAL.

During the course of the evidentiary hearing, a third amended motion was filed on September 25, 2007 raising a newly discovered evidence/*Brady*[2] claim regarding Nick Kocolis and the Court allowed the amendment to the *Brady* claim over the State's objection that Griffin's filing was too late under Rule 3.851[3] and that Griffin

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

[3] See, *Doorbal v. State*, 983 So. 2d 464, 485 (Fla. 2008) (defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by refining his or her claims to include additional factual allegations after the postconviction court concludes that no evidentiary hearing is required)

had failed to satisfy his burden to establish that this claim is newly discovered in order to avoid the time bar. (PCR31/5298) The lower court denied relief on the claim, stating:

SUPPLEMENTAL CLAIM

The Defendant's newly discovered evidence/Brady claim alleges that Nicholas Kocolis was granted immunity by the State in exchange for his testimony against the Defendant.

Under Brady v. Maryland, 373 U.S. 83 (1963). the State must disclose to the defense knowledge of material that is exculpatory or impeachment evidence. To establish that the State committed a Brady violation, the defendant has the burden of showing (1) that favorable evidence—either exculpatory or impeaching—was (2) willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Examining each of these factors below, the Court finds that this claim is without merit.

(1) The existence of favorable exculpatory or impeaching evidence

Evidence is prejudicial or material under Brady if there "is a reasonable probability that had the evidence been disclosed, the result of the trial would have been different." Jones v. State, -— So. 2d ----, 2008 WL 4067325 (Fla.), 33 Fla. L. Weekly S622 (citing United States v. Bagley, 473 U.S. 667, 678 (1985)). "Thus, the critical question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light to undermine confidence in the verdict." Id. (citing Strickler, 527 U.S. at *290). Here, because the Defendant entered a plea and did not proceed to trial, the Court determines whether the evidence tends to exculpate the Defendant, whether it would reduce the punishment, or whether it would have impeached a State witness at trial. See United States v. Ruiz, 536 U.S. 622, 629 (2002) (noting that disclosure of impeachment material relates to the fairness of the trial). As further explained below, any evidence that Kocolis was given immunity would
not exculpate the Defendant of guilt for the murders, nor would it otherwise reduce his culpability and thereby

reduce his sentence.

The defense witnesses that testified at the evidentiary hearing generally admitted that they were truthful when they originally told the police that the Defendant planned the robbery and committed the crime. See EHT 08/17/07, pgs. 29-32; EHT 03/19/07, pgs. 40, 54, 65, 80, 113-14; EHT 02/11/08, pg. 45. Specifically, Steven Montalvo testified that the Defendant admitted to him that he entered the Service America property as if he was going to work, but, after he was buzzed in, he placed the victims in the freezer. See EHT 03/19/07, pgs. 113-114. 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.

Nevertheless, the record refutes whether or not Kocolis was even granted immunity. Chief Assistant State Attorney, Bruce Bartlett, testified at the evidentiary hearing that he interviewed Kocolis in November of 1995 at the State Attorney's Office. See EHT 02/11/08, pgs. 53-54. Mr. Bartlett explained that only Bernie McCabe, the elected State Attorney, has the authority to grant immunity. And Mr. Bartlett testified that prior to interviewing Kocolis, he did not contact Mr. McCabe to obtain authorization to grant Kocolis immunity from prosecution, nor did he, on his own, grant him immunity. Id. at *55. Mr. Bartlett further testified that if any other investigating officers, who, likewise do not have authority to grant immunity, had suggested to Kocolis that he had immunity, those officers would have told him. Id. at **70, 72.

More importantly, however, Kocolis' claim that the State granted him immunity was undermined by collateral counsel's own statements. At the hearing on the motion to amend, collateral counsel told this Court that she "point-blank" asked Kocolis during the course of the postconviction investigation if he was promised anything and he said no. See EHT 11/06/07, pgs. 18-19. Consequently, the Court does not find Kocolis' claim that he was granted immunity to be credible, nor does it find

that such a grant of immunity amounts to favorable exculpatory or impeaching evidence. Therefore, the Defendant fails to satisfy the first factor under Brady.

(2) The evidence was willfully or inadvertently suppressed by the State

For the court to find that the State willfully or inadvertently suppressed Brady material it would first have to make an affirmative determination that the material in fact existed. In this case, the Court finds that Kocolis' claim of immunity is not credible; therefore, it is unable to make such an affirmative determination. Accordingly, the Defendant cannot satisfy the second factor under Brady.

As to the Defendant's allegation that trial counsel was ineffective for failing to properly investigate Kocolis' involvement in the crime and thereby discover the immunity deal, this claim, which is identical to the second sub-claim under claim three, is without merit. The Defendant argues that trial counsel had a duty to investigate the possibility of Kocolis' receiving immunity; however, the Defendant fails to recognize that trial counsel did in fact conduct an investigation into Kocolis in an attempt to have him indicted, but, for obvious reasons, Kocolis was not cooperative.

(3) The evidence was material therefore the Defendant was prejudiced

As to the third and final factor of the Brady test, it is clear that the evidence at issue here was neither material nor prejudicial. Prejudice under a Brady claim, like an ineffective assistance claim, is established by the defendant demonstrating that nondisclosure of the evidence undermines confidence in the conviction. Pardo v. State, 941 So. 2d 1057, 1065-66 (Fla. 2006). Applying that standard to this case, the Defendant must show that confidence in his conviction and sentence for the murders is reduced by evidence that the State granted immunity to a non-testifying witness. The prejudice, the Defendant contends, would be that he could have shown that he was under Kocolis' domination and control when he committed the robbery and murders, even though the evidence clearly shows that Kocolis was not at Service America at the time of the offenses.

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. Consequently, the Defendant fails to satisfy the third factor under Brady.
>
> **Conclusion**
>
> For the foregoing reasons, the Court finds that even if the Defendant had met the burden of proving that Kocolis received immunity, he fails to explain how granting immunity to a non-testifying witness constitutes Brady material. See Sochor v. State, 883 So. 2d 776, 785 (Fla. 2004) (unlike the cases where immunity is given in exchange for testimony, there is nothing exculpatory where the witness is not called to testify). Therefore, the Defendant fails to satisfy the requirements necessary to establish a Brady claim and he fails to establish that newly discovered evidence exists. Accordingly, this claim is denied.
>
> (PCR9/1409-12)

This Court has held that postconviction *Brady* claims present mixed questions of law and fact and that where, as here, the trial court has conducted an evidentiary hearing, this Court will defer to the factual findings of the trial court that are supported by competent, substantial evidence, but will review the application of the law to the facts *de novo*. *Hurst v. State,* 18 So. 3d 975, 988 (Fla. 2009), citing, *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004) and *Lowe v. State*, 2 So. 3d 21, 29 (Fla. 2008). Moreover, "'this Court will not substitute its judgment for that of the trial

court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Id*., quoting *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997).

The lower court conducted an evidentiary hearing and applied the proper standard necessary to the defendant's burden of establishing a *Brady* violation, i.e. (1) that favorable evidence--either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *Doorbal v. State*, at 33-34, citing, *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Way v. State*, 760 So. 2d 903, 910 (Fla. 2000). As the following will show this finding was supported by the facts and the law and should be affirmed.[4]

1) <u>No favorable exculpatory evidence existed</u>

Evidence is considered favorable when it tends to exculpate the defendant, reduces the punishment or impeaches a state witness at trial. See, *United States v. Ruiz*, 536 U.S. 622, 629, 122 S. Ct. 2450, 2455 (2002) (noting that disclosure of impeachment material relates to the fairness of the trial); *United States v.*

[4] Additionally, the State maintains, as it did below, that Griffin failed to establish that the evidence it contends was "newly discovered" could not have been discovered with due diligence at the time of the initial Motion to Vacate. Accordingly, the claim should have been denied as untimely. *Tompkins v. State*, 980 So. 2d

Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); *Brady*, 373 U.S. at 87. Here, Kocolis' claim that he was given immunity does not exculpate the defendant of guilt for the murders or otherwise reduce Griffin's culpability.

First, the lower court rejected this claim that Kocolis was given immunity based on a credibility determination. *Sochor v. State,* 883 So. 2d 766, 785 (Fla. 2004) (deferring to the circuit court's credibility determination on issue of immunity as a finding of fact) Chief Assistant State Attorney Bruce Bartlett explained during his testimony that only State Attorney McCabe has the authority to grant immunity in the Sixth Judicial Circuit of Florida. (PCR32/5466) Bartlett testified he interviewed Nicholas Kocolis in November, 1995 at the State Attorney's Office and that prior to interviewing Kocolis he did not contact Mr. McCabe and obtain authorization to grant Kocolis immunity from prosecution relating to the double murders at Service America nor did he, on his own, grant Kocolis immunity. (PCR32/5466) He also testified that if any of the other investigating officers, who do not have authority to grant immunity, had suggested to Kocolis that he had immunity, they would have told him. (PCR32/5481, 5483) Kocolis' credibility on this issue is further undermined by collateral counsel's own statements. At the hearing on the motion to amend, collateral counsel told this court that she had "point-blank" asked

---

451, 459 n.8 (Fla. 2007); *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991).

Kocolis during the course of their investigation if he was promised anything and he said no. (PCR31/5296-97)

Even if Griffin had carried his burden to prove that Kocolis received immunity, Griffin does not explain how the granting of immunity to a non-testifying witness constitutes *Brady* material. Unlike the cases where immunity is given in exchange for the testimony, there is nothing exculpatory where the witness is not called to testify and he is equally available to both parties.

2) Evidence was not suppressed by the State

In addition to showing that exculpatory evidence existed, Griffin must also show that it was suppressed. A "*Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant," *Owen v. State*, 986 So. 2d 534, 547 (Fla. 2008) (quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000), or where the defense "could have obtained it through the exercise of reasonable diligence." *Peede v. State*, 955 So. 2d 480, 497 (Fla. 2007). Griffin's second amended motion asserted that counsel was ineffective for failing to properly investigate Kocolis' involvement in the crime and law enforcement's knowledge of Kocolis. Griffin's collateral counsel clearly was aware that Kocolis was not charged, and it was incumbent upon him to investigate to support the claim. Clearly, under the circumstances, reasonable diligence would have produced this same

incredible story from Kocolis.

Any suggestion that *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256 (2004) relieves him of the responsibility to investigate his own claims and, thus, satisfies cause is simply without merit. *Banks* did not purport to recognize a new fundamental constitutional right. Instead, the Court noted it was merely applying preexisting precedent regarding *Brady* claims and the determination under federal law of the existence of cause to excuse a procedural default in a federal habeas proceeding, an issue that the United States Supreme Court has characterized as an issue of federal law that does not have to depend on a constitutional claim. *Murray v. Carrier*, 477 U.S. 478, 489, 106 S. Ct 2639, 2646 (1986).

3) Evidence was not material

When this claim is considered in light of all of the evidence presented below and compared with Kocolis' and Griffin's testimony, it is clear that it is neither material nor prejudicial. Prejudice under a *Brady* claim, like an ineffective assistance claim, is established if the nondisclosure undermines confidence in the conviction. *Pardo v. State*, 941 So. 2d 1057, 1065-66 (Fla. 2006). Thus, Griffin must show that confidence in his conviction and sentence for the murder of two people would have been reduced by the existence of evidence that the State gave immunity to a non-testifying witnesses where the only alleged prejudice is that they might have been able to show that Griffin was under the domination

of Kocolis and that while Kocolis clearly did not go to Service America, Griffin's culpability is reduced by evidence that Kocolis helped plan the robbery/murders. This claim of prejudice is clearly undermined by Griffin's own testimony that he planned the robbery and that he was involved in the murders. When asked on direct examination how it came about it was decided to rob Service America the defendant testified:

> BY MR. WELLS
> Q. You wanted to buy more drugs?
> A. Yes, sir.
> Q. Okay, And was Mr. Kocolis in any way involved in that decision?
> A. Yes, he was.
> Q. All right. Could you tell the Court how that happened?
> A. We were sitting around one day talking about different places and different things he's done, and I mentioned that I knew there was a place with a lot of money because I knew that that is what him and Anthony did. And it got kicked around a lot, and he asked if he thinks it could be done.
> Q. Who asked?
> A. Nick. And then we started planning it.
> (TR S4/444-445)

During cross-examination, the defendant admitted that it was his idea and denied that Kocolis, or anyone else in the group, had a connection to the Service America, which resulted in two murders. (TR S4/457-58, 460) He also denied that he did it to support his drug habit and instead explained that he needed extra money because he was having financial problems. (TR S4/460-461) He also conceded:

> Q. You're the person who helped develop the plan that necessitated confronting the people and terrorizing them to effect your plan?

A. Yes.
Q. You're the person who out of all the people involved in this were the only person that could be identified by the employees of Service America?
A. Yes, sir.

(TR S4/502-503)

Thus, the claim the defendant was prejudiced because the judge and jury did not have accurate information as to whether Griffin was the sole planner is completely belied by Griffin's own testimony.

Moreover, a review of Kocolis' testimony at the evidentiary hearing also refutes any contention that Griffin has been prejudiced. At the hearing the defense introduced Kocolis' sworn statement to the State Attorney taken during the investigation of the murders. During that statement, Kocolis told the investigators a story that very much tracked Griffin's own statements except Kocolis claimed that Griffin had told him that he had to shoot the victims because he was not wearing a disguise. (PCR26/4425) Further, even at the evidentiary hearing, Kocolis took the fifth and refused to answer any questions which might incriminate him. Clearly, he would have done so if called to testify and defense counsel expressly stated he would not have wanted to call a witness who invoked the fifth. (PCR27/4561)

Again, it defies logic to suggest that the State gave this witness immunity and, after he gave them information identifying Griffin as the shooter, did not call him to testify. It also

defies logic that somehow not presenting testimony which incriminated Griffin could have prejudiced him and would have resulted in a reduced sentence.

Griffin also asserts that the state offered immunity to "several key state witnesses," including Kimberly Ally and Heather Henline. Griffin does not assert that this alleged immunity resulted in any relevant information being withheld. In fact, the direct appeal record shows that none of these witnesses were called to testify. This claim was properly denied as there is no credible evidence alleged that any of these witnesses had immunity nor is there any real claim that Griffin was prejudiced. As defendant has failed to satisfy any of the requirements to establish a claim under *Brady*, relief was properly denied.

CROSS APPEAL ISSUE

THE TRIAL JUDGE ERRED IN GRANTING GRIFFIN A NEW PENALTY PHASE PROCEEDING

The collateral court granted Griffin a new penalty phase on the grounds that counsel was ineffective for failing to investigate and present additional mitigation during the penalty phase of his capital trial. In order to prevail on a claim of ineffective assistance of counsel, Griffin bears the burden of showing "that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 104 S.

Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003)(affirming the *Strickland* two-prong analysis for claims of ineffective assistance of counsel)." *Kormondy v. State,* 983 So. 2d 418, 428 (Fla. 2007). A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Chavez v. State*, 12 So. 3d 199, 208 (Fla. 2009). Where, as here, relief is granted after an evidentiary hearing and the trial court makes factual findings, this Court defers "to the factual findings that are supported by competent, substantial evidence but reviews the legal conclusions *de novo*." *Ferrell v. State*, 2010 WL 114481, 15 (Fla. 2010). The lower court granted the penalty phase relief finding both deficient performance for a failure to investigate further and prejudice because it "ultimately led to the Defendant being sentenced to death." (PCR9/1408-09)

In finding deficient performance, the lower court was persuaded by Griffin's argument that instead of the "good guy" defense presented by defense counsel, the mitigation counsel should have presented "concerned the severity of his cocaine addiction and the impact it had on his participation in the crimes; his history of depression; the impact of his prior brain injury; and, his family history of mental illness and substance abuse addiction." Despite the fact that most of this evidence was presented to the

sentencing court and that the sentence was for the execution style slaying of two innocent victims known to the defendant, the court found this argument persuasive and, therefore, found that Griffin was deprived of a reliable penalty phase hearing. (PCR9/1407) The lower court's order suggests that counsel's decision to go with a "good guy" presentation was unreasonable as a matter of law and a result of counsel doing nothing once the decision was made to enter a guilty plea and waive the presentation of evidence to a penalty phase jury, without considering what was done, how it compared to the evidence presented and how it undermined confidence in the outcome on balance with the facts of the crime.

It is well recognized that the presentation of "good guy" mitigation is a reasonable strategy. Accord, *Stephens v. State,* 975 So. 2d 405, 415 (Fla. 2007); *Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998). Further, defense counsel's actual testimony was that their theory of defense was that except for seven months of his life defendant was a decent guy, he worked and "he had a family, was a father, husband, wage earner, had done a lot of good things in his life." He was not your typical client in that he was not abused and once he got detoxed in jail, he was a model prisoner so they made the decision to go with the positive events in his life and retain Dr. Maher in order to show Griffin was a different man when he was using drugs. (PCR27/4514-15)

More importantly, the ruling ignores the investigation and

presentation done on behalf of the defendant. During the penalty phase, the defense presented several witnesses who supported this theory, including; 1) Deputy David Russo, who testified concerning Griffin's behavior while awaiting trial, 2) James Griffin, Griffin's father, who testified concerning Griffin's work ethic, the devastation of his brain injury at nine, the fact that Michael Griffin was a good father until he got into drug use, 3) Chuck Hash, a former co-worker of Griffin's who testified concerning the changes that came over Griffin after he began using drugs, 4) William Schnitzler, a former classmate of Griffin's, who testified that when they were young Griffin was never violent; he concentrated on working and fishing until he got into drugs, 5) Tammy Young, who testified that she had known Griffin since they were in kindergarten, that she was the mother of his son and that he still kept in contact with his son who would miss him very much, 6) Matthew Griffin, Michael Griffin's younger brother, who testified that Griffin taught him the A/C business, that they were close until Griffin starting doing drugs and everything went downhill, 7) Tracy Griffin, who testified she married Griffin two weeks prior to trial and that they had a child together but that prior to the murder when she found drugs on him she kicked him out and he went to live with Kocolis, 8) Sandy Griffin, Griffin's mother, who also testified about the changes her son went through after his accident, his work ethic, the drug use and his qualities

as a father and 9) Dr. Michael Maher, who testified concerning the effects of drug use and the brain surgery at ten. (TR S2/204-212, 267-97; S3/349-360, 364-67, 368-71, 373-74, 387-397, 397-421, S4/427-440) Finally, Griffin testified on his own behalf, explained the events surrounding the murders and expressed his remorse for the crimes. (TR S4/442-507)

These numerous witnesses each addressed many of the matters that Griffin now claims were overlooked. Accordingly, Griffin's claim should have been denied. cf. *Sliney v. State*, 944 So. 2d 270, 285 (Fla. 2006) (denying relief where defendant put forth no other mitigation evidence that penalty-phase counsel was unaware of or should have presented that could have reasonably resulted in a different verdict.); *Pietri v. State*, 885 So. 2d 245, 264 (Fla. 2004) ("*Strickland* mandates that we look at the evidence that was actually presented compared to that presented at the postconviction evidentiary hearing.")

Specifically, Dr. Michael Maher, a psychiatrist and an expert on forensic psychology, testified that at the penalty phase Griffin was remorseful: he cried on the occasions that Dr. Maher spoke to him and expressed regret for the harm he had caused. (TR S2/271) Although Dr. Maher said he could have done further testing and investigation, he did not believe this effort would change his opinions regarding defendant. (TR S2/281) Dr. Maher testified that Griffin told him he had used drugs since his late adolescence

and had used crack cocaine for the six to twelve months prior to the offenses. (TR S2/271) Dr. Maher testified that such usage of crack cocaine would result in a change in personality. (TR S2/272) The change in personality would include "a relentless pattern of indifference to the things that once were important in the person's life and a relentless pattern of focusing more and more on those factors which are associated with getting and using the drug, the crack cocaine." (TR S2/272) Dr. Maher explained this pattern by noting that an addicted mother might totally and indifferently neglect her small child. (TR S2/273) After recovery from the addiction, the mother would work hard to become a good mother. (TR S2/273) According to Dr. Maher, the addiction would manifest itself by "a change in their moral values and their behavior and a decline in their capacity to appreciate the feelings and well-being of other people." (TR S2/273)

Dr. Maher explained that Griffin had been shot with a pellet gun and undergone brain surgery when he was ten years old. (TR S2/274-75) Consequently, he had a severe speech impairment for months afterwards. (TR S2/275) Dr. Maher testified that Griffin had a subtle injury that affected the global overall functioning of his brain and most importantly made him vulnerable to other things that would interfere with brain functioning, that it left him vulnerable to other impairments that might come along down the road later. The impairments that came later were severe depression and

a suicide attempt when defendant was sixteen. (TR S2/276-77) Dr. Maher said the depression and suicide attempt indicated Griffin had abnormal brain functioning. (TR S2/277)

Griffin told Dr. Maher that he had no direct involvement in the death of either of the victims, but he acknowledged being present during the offenses and having knowledge of what occurred. (TR S2/286) Griffin did not relate to Dr. Maher anything about his financial concerns, but he did relate that he was using cocaine all of the time and that his life was falling apart. (TR S2/287)

At the evidentiary hearing, Griffin presented Drs. Mash and Hyde in support of his mental health mitigation which the State rebutted with the testimony and testing of Dr. Merin. Dr. Deborah C. Mash is a professor of neurology and molecular and cellular pharmacology. (PCR28/4781) Her opinion was that Griffin suffered from cocaine dependence disorder, that it was extremely severe, aggravated by his brain injury incurred as a youth and his family history for alcohol dependence disorder. (PCR28/4823) She believed he was under extreme mental and emotional duress from his dependence and spent every waking hour in pursuit of drugs. (PCR28/4824) She believed cocaine dependence significantly affected his behavioral state, his ability to use higher reasoning functions and to conform his behavior. (PCR28/4871) On cross she conceded that her opinion as to the severity of any type of addiction would be directly affected by the amount of cocaine he

used and she had no firm documentation as to the exact amount he was using. It runs from none which is what he told the police to 3 grams to over 2 ounces as reported by Montalvo; she did not know because she was not there to measure. (PCR28/4891) She admitted that the notion of them getting Dom Perignon to party after the murder sickens her and that cocaine did not prevent him from planning the robbery or staying with his plan. (PCR28/4896-98) They also presented, Dr Thomas Hyde, a neurologist, not licensed in the State of Florida. (PCR29/4922) In his opinion, Griffin had some residual right hemisphere dysfunction from the gunshot wound he suffered at age eight, possibly amplified by some minor head injuries he suffered after that event. (PCR29/4953) Dr. Hyde noted that if defendant was acutely intoxicated or withdrawing from cocaine, it might amplify some quite subtle behavioral deficits, so his judgment and reasoning would be impaired. (PCR29/4957) Dr. Hyde opined that defendant's capacity to appreciate the criminality of the conduct or to conform his conduct to the requirements of the law was substantially impaired; his judgment was impaired due to his underlying brain injury and his either acute intoxication or withdrawal from cocaine and its affect on mood and impulse control at the time of the crime. (PCR29/4959) He based this on his finding that defendant has deep tendon reflexes in the left knee and left ankle and that is a reflection of a right frontal lobe dysfunction; hypersexuality and hyposexuality are symptoms of

frontal lobe damage. (PCR29/4961)

On cross, Dr. Hyde admitted that he is always a defense expert and that he is opposed to the death penalty except perhaps in cases of genocide. He spent only two hours with the defendant and his notes consisted of four pages which reflect the testing he did, the mini mental status and the neurological testing; before the day of his testimony, he had not spoken to Griffin's family members. (PCR29/4962-64) He reached his conclusion in this case without speaking to them. During the interview, Griffin was alert, communicated well and was cooperative. He scored almost perfectly on the mini mental state exam, 29 out of 30. At the time he evaluated him, he was largely cognitive and intellectually intact. (PCR29/4965) The only deficit he had was in serial sevens, which is attention deficit and that would be mild. (PCR29/4966) He checked his visual constructional skills, his motor system, physical appearance, cranial nerves, and he was normal. (PCR29/4967) Dr. Hyde admitted there are no medical records that defendant ever sought treatment for headaches from the age of eight until he was incarcerated. (PCR29/4971) There is no evidence of psychotic thought disorder, no evidence of seizures, and the only medication he was taking for headaches was Tylenol. His mother mentioned for the first time today that there may have been other head injuries for which there was no evidence he was treated. (PCR29/4972-75) Dr. Hyde testified that there was no evidence of

right-sided brain damage. Frontal lobe damage can but not always evidence itself with impulsivity or violence. (PCR29/4980) People who have right-sided brain injury are more likely to have psychiatric and behavioral problems in their life. (PCR29/4981) He admitted that there was no evidence of defendant acting out violently or dangerously in high school and that he had no evidence as to the amount of cocaine defendant used. (PCR29/4983) Griffin's MMPI showed an elevated scale 4 which is the psychopathic deviant scale and measures antisocial traits, but Dr. Hyde didn't think the defendant met the strict criteria for antisocial personality disorder. (PCR29/4995-96)

Conversely, Dr. Merin testified, as he and Dr. Maher had previously, that neither statutory mental mitigator applied. (PCR29/5092) Medical reports for the pellet gun injury show that the pellet did not enter the brain; only hairs and some flesh from the scalp but not the pellet itself. (PCR29/5055) Dr. Merin administered psychological tests because defendant's conversations showed logical thinking, including the manner in which he planned the robbery, and that was started two weeks before the event. Defendant made the decisions and those decisions were self serving, they were always favorable to him, and had to do with his own safety. (PCR29/5058)

Dr. Merin gave defendant the Wechsler Adult Intelligence Scale III used to compute IQ. His tests revealed just the opposite of

Dr. Mash who said he had problems with arithmetic. (PCR29/5059) His IQ ranged from a low of 90 to a high of 110 and his score on the arithmetic subtest was 110. Griffin's verbal IQ was 116, working memory earned a 126, processing speed earned a 91, which is at the lower end of the average range and that was his lowest score. None of his scores fell in the below average range. (PCR29/5061-62) These test results would be representative of Griffin in 1995 also. If there were true brain damage, particularly in the area that the pellet hit, Dr. Merin testified, "we should see it all the way through his life and we don't see it, we see excellent scores." (PCR29/5064) He did additional testing having to do with the prefrontal lobe but none showed an indication of prefrontal lobe damage that would rise to the statutory level of capacity to conform. (PCR29/5071) There was no evidence that defendant was acting under duress due to any brain impairment other than what could be residual of the pellet incident. That was very minor and it struck an area of the brain that test results show was not badly affected at all. (PCR29/5071-72) His opinion was that Griffin was not suffering from any type of brain injury and did not meet the statutory mental mitigators. (PCR29/5079-80)

This Court has made it clear that "counsel's reasonable mental health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'" *Gaskin v. State*, 822 So. 2d 1243, 1250

(Fla. 2002) (quoting *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000). See also, *Downs v. State*, 740 So. 2d 506, 509 (Fla. 1999) ("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.")(citations omitted); *Jones v. State*, 732 So. 2d 313, 317-318 (Fla. 1999) (finding no deficient performance for failing to procure Doctors Crown and Toomer noting that trial counsel is not "ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case.") Griffin had a well respected mental health expert at trial whose testimony was that additional testing was not necessary. In fact, the extensive additional testing done by Dr. Merin established that to be true.

With regard to the lay witnesses Griffin now asserts should have been presented. Wells' and Mills' testimony reveals that they had either deposed these witnesses, had police reports containing their statements or they were family members that trial counsel knew well and met with often.[6] After reviewing the known evidence,

[6] The only "evidence" that Wells testified he did not know was Kocolis' claim that he had been granted immunity. Of course, the lower court made a factual finding that Kocolis was not given immunity. (PCR9/1410) Moreover, the contention that defense counsel should have put on Kocolis is sheer sophistry. Kocolis gave statements which were damaging to the defendant and took the fifth with regard to any questions concerning his own involvement with the crime. This is hardly the type of evidence needed to support the unrefuted contention that Griffin was a cocaine user. More likely, if counsel had presented Kocolis, collateral counsel

counsel made reasonable strategic decisions to present their client in the most favorable light, focusing on his years as a law abiding citizen and the changes brought on by his drug use. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Pace v. State*, 854 So. 2d 167, 172 (Fla. 2003), quoting, *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). "Along with examining what evidence was not investigated and presented, we also look at counsel's reasons for not doing so." *Grim v. State*, 971 So. 2d 85, 99-100 (Fla. 2007), quoting *Sliney v. State*, 944 So. 2d 270, 281-82 (Fla. 2006). The focus is on whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable under prevailing professional norms, which includes a context - dependent consideration of the challenged conduct as seen "from counsel's perspective at the time." *Sliney*, 944 So. 2d at 282, quoting *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) (citations omitted), quoting *Strickland*, 466 U.S. at 688-89, 691. Griffin failed to establish that trial counsel were ineffective for seeking to avoid the death penalty by employing the course of action that they

---

would now be claiming he was ineffective for presenting such clearly prejudicial evidence.

considered to be their best chance of saving the defendant's life or that counsel's decisions in the context of Griffin's desires and the information available was deficient.

More importantly, the lower court improperly found that prejudice was established merely because counsel's strategy "ultimately led to the Defendant being sentenced to death." (PCR9/1409) The fact that a strategy was not successful is not the test for determining prejudice. If that were so, then every death sentenced defendant could establish prejudice. *Wong v. Belmontes,* 130 S. Ct. 383, 390-91 (2009) (*Strickland* does not require the State to "rule out" a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a "reasonable probability" that the result would have been different.) See, also, *Sireci v. State,* 469 So. 2d 119, 120 (Fla. 1985) (The fact that counsel's strategy was unsuccessful does not mean that representation was inadequate.)

In *Henry v. State*, 948 So. 2d 609, 623 (Fla. 2006), this Court rejected an ineffective assistance of counsel claim where, as in the instant case, the evidence of the defendant's guilt for a double homicide was overwhelming. Concurring specially, Justice Wells, noted: "In hindsight in this case, as in *Nixon*, counsel's studied strategy can be criticized since it did not succeed. But success in this case, utilizing any strategy, was not probable. The fact that the strategy did not succeed does not equate to the

strategy being unreasonable." *Id. at* 622-23.

As previously noted, the bulk of the evidence presented at the evidentiary hearing was heard and considered by the sentencing judge. In the original sentencing order, the court found:

> 1. The Defendant's drug usage and dependency
>
> The Defendant testified that he had used marijuana and cocaine for a number of years; that drug usage had caused him to lose some jobs; that he was unemployed at the time of the crimes. However there was no testimony that the Defendant committed the crime while under the influence of any narcotic drug. Nor was there any testimony that at the time of the crimes the Defendants ability to comprehend what was going on was in any way impaired. Therefore while it was established that the Defendant had a drug problem, this Court is giving it very little weight.
>
> 2. The Defendants family background
>
> During the penalty phase there was testimony from the Defendant's Mother, Father, Brother and new Wife. All testified that the Defendant had a normal childhood, with the exception of a head injury he sustained at age 10. There were no lasting effects from this. All agreed the Defendant was doing fine until the break-up with Tammy. He attempted suicide and started using cocaine. Up until then he was a loving son and brother. He worked hard and supported his children. The drugs changed all this. This factor has been established and the Court is giving it great weight.
>
> (TR11/2071)
>
> 3. Employment background
>
> As stated above, until the Defendant started using drugs he was a steady worker. He was a good provider. This factor is established and the Court is giving it great weight.
>
> 4. Minor mental problems
>
> There was some limited testimony during the penalty phase that the Defendant suffered from some emotional and

> mental problems. Dr Maier [sic] testified that the Defendant suffered from depression as a result of the head injury and cocaine usage and had attempted suicide at least once. Dr. Merin testified for the State that his examination of the Defendant revealed no such mental defect or problem. This factor has not been established and therefore, the Court is giving it no weight.
>
> (TR11/2072)
>
> * * *
>
> b) The Defendant's remorse
>
> The Defendant showed great remorse while testifying. This Court feels he is truly sorry that Tom and Pat McCallops died. He freely admitted his complicity in the crimes with Lopez, however he did state that it was Lopez who shot the victims with both weapons and that he (Griffin) did not shot [sic] either victim with either weapon. This testimony conflicts with the testimony of other witnesses, including some called by the defense. He did plead guilty to both murders. He did waive a jury penalty phase. However these decisions were made with the full knowledge of the State's case and what the likely outcome would be. This does not show remorse in this Court's opinion. The Defendant's remorse of the two deaths has been established and this Court is giving it moderate weight.
>
> (TR11/2073)

The only thing that was added to that which was considered by the sentencing court was more evidence of bad behavior on the part of the defendant with regard to his drug dealings and the testimony of his newest mental health experts. *Jones v. State*, 998 So. 2d 573, 586 (Fla. 2008) (prejudice cannot be demonstrated by testimony that was cumulative to that presented at the penalty phase; counsel is not ineffective for failing to present cumulative evidence.) This Court has repeatedly held that the fact current counsel can obtain more favorable experts does not render trial counsel

ineffective. Nor does it render Griffin's prior mental exams constitutionally deficient. "Expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." *Hoskins v. State*, 965 So. 2d 1, 16 (Fla. 2007). Although both of defendant's current experts agreed that the statutory mitigators should have applied, those findings were refuted by Dr. Merin. The trial court did not find that either mitigators should have been found or make credibility determinations as to how he reconciled differences in the testimony.

In fact, in considering this same testimony with regard to the guilt phase, the lower court made several factual findings regarding the value of their testimony. The court noted that Dr. Hyde concluded:

> . . . the Defendant was alert, that he communicated well, that he was largely cognitive, that he was cooperative, and that he was intellectually intact. [] More importantly, considering the information the defendant gave to Dr. Hyde about planning the crime and his attempts to cover it up, Dr. Hyde concluded that the defendant's acts were not impulsive, and that his behavior directly exhibited an intention to avoid getting caught.
>
> (PCR9/1401)

And although Dr. Mash believed the defendant was using cocaine heavily, the court noted that she also admitted:

> . . . the Defendant's behavior around the time of the robbery and murders was not typical of individuals suffering from cocaine excited delirium. Rather the

> Defendant's actions of (1) interacting with other people to plan the robbery; (2) securing a weapon; (3) conducting surveillance; (4) developing a plan to get past the security system; and, (5) partying after the murder, showed control and consciousness of thought, rather than the paranoid behavior of someone suffering from a cocaine excited delirium.
>
> (PCR 9/1401)

The court concluded that:

> . . .the two doctors whom collateral counsel argues trial counsel should have called, would have been in the position to present damaging evidence that the defendant was the one who decided on the target of the robbery, that he was actively involved in planning the robbery, and that he is the one who obtained the weapons used to kill the victims.
>
> (PCR 9/1402)

As the court recognized this evidence used to support the presence of the mental mitigators cannot be reconciled with the evidence which clearly shows that rather than being under extreme mental or emotional duress, Griffin had bailed on his familial and financial responsibilities in order to live his "party" lifestyle and that the plan to rob the Service America, using the McCallops to gain entry was not a spur of the moment event but, rather, was planned out over days. Griffin's own planning shows that he knew what he was doing and that he needed to eliminate both Mr. and Mrs. in order to avoid being identified as the perpetrator. In light of the extensive evidence, including his mental health expert, that was already presented to the sentencing judge, the fact that Griffin himself was remorseful, wanted to plead guilty and express

that remorse, the addition of this newest testimony does not undermine confidence in the outcome of the proceeding. The lower court's order granting a new penalty phase should be reversed.

CONCLUSION

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

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

CANDANCE M. SABELLA
Chief Assistant Attorney General
Capital Appeals Bureau Chief
Florida Bar No. 0445071
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Terri L. Backhus, Esq., Backhus & Izakowitz, P.A., 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 brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

MICHAEL GRIFFIN,

Appellant/Cross-Appellee,

vs. **CASE NO. SC09-1**
L.T No. CRC 95-18753 CFANO

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

INDEX TO EXHIBIT

Exhibit A.....Corrected Order, Dean Kilgore v. State of Florida, Florida Supreme Court Case No. SC76521