IN THE SUPREME COURT OF FLORIDA

**NORMAN GRIM,**

Appellant,

v. Case No. **SC01-256**

STATE OF FLORIDA,

Respondent.
_____/

# REPLY BRIEF OF APPELLANT

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## ARGUMENT

## ISSUE I

THE COURT ERRED IN GIVING THE JURY'S DEATH RECOMMENDATION GREAT WEIGHT BECAUSE, IN LIGHT OF THE EXTENSIVE MITIGATION PRESENTED AFTER IT HAD RECEIVED THAT RECOMMENDATION, IT DESERVED LITTLE OR NO CONSIDERATION, A VIOLATION OF THE PROCEDURE SET FORTH IN SECTION 921.14,1 FLORIDA STATUTES, AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The State's argument on this issue raises two points that merit some reply by Grim. First, on pages 31-32 of its argument it seems to contend that the defendant sort of waived his right to a penalty phase jury. "The State would first note that Grim told his trial counsel he did not care if there was any presentation to the jury and that he 'would waive that altogether'(5T 815)." The right to trial and sentencing by jury, however, cannot be so casually discarded. Rule 3.260, Fla. R. Crim. P., specifically allows the defendant to waive that right if it is in writing and the State agrees. This Court has added further restrictions. In Tucker v. State, 559 So. 2d 218 (Fla. 1990), it said,

> we emphasize that it is better practice for trial courts to use both a personal on-the-record waiver and a written waiver. An appropriate oral colloquy will focus a defendant's attention on the value of a jury trial and should make a defendant aware of the likely consequences of the waiver. If the defendant has been advised by counsel about the advantages and disadvantages of a jury trial, then the colloquy will serve to verify the defendant's understanding of the waiver. Executing

> a written waiver following the colloquy reinforces the finality of the waiver and provides evidence that a valid waiver occurred. Because the waiver of a fundamental right must be knowing and intelligent, the above-stated practice better promotes the policy of recognizing only voluntary and intelligent waivers

Id. At 220. Accord, Elmore v. State, 782 So. 2d 1016, 1017 (Fla. 4th DCA 2001) (Waiver must be by the defendant and in writing.); State v. Upton, 658 So. 2d 86 (Fla. 1995)(No affirmative showing Upton "knowingly, voluntarily and intelligently waived his right to trial by jury."); Kelly v. State, So. 2d (Fla 4th DCA 2001).

Here, the court never conducted any inquiry, formal or otherwise, to determine if Grim wanted to waive his right to a jury recommendation. Hence, the record is silent as to whether he "knowingly, voluntarily, and intelligently" waived that right. There is, moreover, no indication the State would have agreed to it. Finally, Grimm, personally or through his lawyer never signed a waiver of a penalty phase jury. So, the State's implied contention that the trial court could ignore its recommendation has no merit. There was a penalty phase jury, it made its recommendation, and the trial court gave it "great weight" as the law requires (2 R 236-37; 8 R 857). To pretend it somehow just was not there defies law, the facts, and fundamental fairness.

Second, the State says this issue focuses on the need for specially appointed counsel. "Secondly, this Court has consistently rejected suggestions that trial court should be required to appoint special counsel for a defendant who waives mitigation." (Appellee's brief at p. 32. Citations omitted.) Then, without any argument justifying its claim it declares "The court committed no error under this Court's precedents by failing to go even further beyond what was required and to order special counsel to present mitigation to the jury." Id.

Whether Grimm had special counsel or not is irrelevant. This issue does not concern that problem. When the trial court has significant mitigation, as it did in this case, that the jury could have had known about but did not, then their subsequent recommendation deserves no weight, or its verdict is suspect. Yet because Grim never waived his right to having the jury participate in his sentencing it had to be as well informed on the facts as the court so it could make a valid recommendation. It was not; hence its recommendation was flawed.

Of course, even if the court erred in not giving the jury the evidence found by special counsel, its mistake was harmless, says the State on page 30 of it brief, because it "independently weighed the evidence." That is, even if the jury incorrectly returned a death recommendation, the trial court reached the correct result because its analytical path "led to the same point" as the jury's

recommendation (2 R 237). But it did so only because the court knew of its vote. Would it have reached the same result if the jury had recommended life? Probably not, since the analysis would have been radically different and this Court's history has consistently rejected death sentences that overrode a jury's life recommendation.

Hence, the independent review statutorily imposed, Section 921.141(3), Florida Statutes (1998 Supp.), has significant limitations. Tedder v. State, 322 So. 2d 908 (Fla. 1975). The trial court can impose a sentence different from what the jury had recommended only if no reasonable person could have agreed with their vote. Otherwise, it must follow their verdict.

In short, the trial court's sentence of death is invalid because it kept legitimate, significant mitigation from the jury then gave its death recommendation great weight.

This Court should reverse the trial court's sentence of death remand for a new sentencing hearing before a jury.

## ISSUE II

THE COURT ERRED IN NOT CALLING, AS ITS OWN WITNESS, DR. JAMES LARSON, THE MENTAL HEALTH EXPERT WHO EXAMINED Grim, TO ESTABLISH THE STATUTORY MENTAL MITIGATORS, A VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The State has made several claims, statements, or arguments that merit reply. On page 34 of its brief it says, "Counsel's statements to the trial court in compliance with the Koon[1] rule are not themselves evidence in mitigation, but merely a proffer to the court for its determination of whether the defendant is making a knowing, voluntary and intelligent decision, as the trial court recognized (5T 826-27)." (Footnote omitted.) While true, the proffer in this case also put the trial court and the special counsel on notice that specific, significant mitigating evidence existed.

As such, the trial court abused the limited discretion this Court had given it in Muhammad v. State, 782 So. 2d 343 (Fla. 2001), in not calling Dr. Larson. (Appellee's brief at p. 35) That is, he specifically said both of the statutory mental mitigators applied to Grim, and Mr. Rollo, Grim's lawyer, told the court of that at the Koon hearing (5 R 12-14, 18) and the hearing immediately before the penalty

[1] Koon v. Dugger, 619 So. 2d 246 (Fla. 1993).

phase began (9 R 841-42).[2] As such, it and special counsel had an Eighth Amendment obligation to have Dr. Larson's testimony brought before the judge and jury. Cf., Lockett v. Ohio, 438 U.S. 586 (1978). That is, while the defendant may have wanted to waive mitigation, the Court is under no obligation to ignore that evidence. Indeed, if it knows of its presence, it and the jury must consider it. In Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993), this Court extended this duty to consider mitigation to cases where the defendant does not want the court to do that "We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted." (Emphasis supplied.); Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996). In Overton v. State, 26 Fla. L. Weekly S592 (Fla. September 13, 2001), this Court noted "That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence."

In Robinson, as here, the defendant wanted to waive his right to present mitigating evidence. During the subsequent Koon hearing defense counsel claimed, as here, that if allowed, he could present extensive evidence that Robinson

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[2] There was also a lot of other mental and non mental mitigating evidence discussed at that hearing (9 R 842-49).

qualified for at least one of the statutory mental mitigators and had other, extensive mental mitigation. The trial court, however, refused to consider it, and repeatedly said that he was to ignore it. Robinson, at p. 177-78. This Court reversed the subsequently imposed death sentence.

> Because the trial court failed to consider and weigh all of the available mitigating evidence in the record as required by Farr, we vacate the death sentence imposed by the trial court.

Id. at 180. (Footnote omitted.) This Court should do the same in this case for the same reasons.

Grim, or at least his appellate counsel, thus argues that unlike normal sentencings and indeed unlike "normal" capital sentencings, proceedings where a defendant faces a death sentence but wants nothing put into evidence that might mitigate that punishment require the trial court to be especially vigilant even "proactive" to ensure the punishment imposed is not only deserved but is fairly and justly imposed. We are, after all, focusing on the most terrible task the people of this state have laid on the backs of the judges and jury: deciding whether the State of Florida should deliberately end a person's life. Because of this horrible assignment, we, as a people, have demanded that the utmost correctness and justification for that punishment. It is, however, the least so when the defendant deliberately, no, when he "knowingly, voluntarily, and intelligently" waives his

right to present a defense against death. To somehow right the scales of justice that the defendant has deliberately skewed, this Court has required the trial courts to be more than passive recipients of evidence. If they know of any possible mitigating evidence in the record, they must consider it. They must actively seek to have it presented. Hence, the requirements for the PSI and appointed counsel articulated in Muhammad.

The State, however, presents three explanations why the court never abused its discretion in ignoring what Dr. Larson had said. First, the "court went well beyond what was required by law at the time of this sentencing in eliciting potential mitigation, by ordering a PSI and by appointing special counsel." (Appellee's brief at p. 37) Ok, but so what? The court, not special counsel and not the people who prepared the PSI, knew that Dr. Larson would have said, if he had been called to testify, that both statutory mental mitigators (as well as other mental mitigation) existed. That actual knowledge imposed on it the duty to investigate it further-ostensibly through appointed counsel-and to present the evidence to its cosentencer, the jury. The Eighth Amendment requires no less because, unlike non capital sentencing, sentencers who must consider whether a defendant should live or die must have the most evidence possible to make the most reliable decision.

Adequacy, contrary to the State's claim on page 38 of its brief, is not the standard by which trial courts are measured in this unique area of the law.

As a second reason the State argues to support the trial court's failure to call Dr. Larson, it says "the court disregarded the defendant's wishes by going as far as it did. Caution, and respect for the defendant's own rights, would seem to counsel against cavalierly ignoring the defendant's assertion of psychologist-patient privilege." (Appellee's Brief at p. 38) While the defendant is the so-called "captain of the ship" Nixon v. State, 758 So. 2d 618 (Fla. 2000)(Appellee's brief at p. 34 footnote 15), his is not the only boat in the harbor. The State also has its own fleet of interests that it has every right to put to sea. Primarily, it has the right to determine on its own, regardless of what the defendant wants or wishes, whether he deserves to die. See, Klokoc v. State, 589 So. 2d 219 (Fla. 1991)(This Court reduced Klokoc's death sentence to life despite the defendant's desire to be executed.) This Court's decision in Muhammad clearly established that obligation when it gave the sentencing court the right to obtain information beyond that which the defendant might want the court to consider.

Moreover, this Court has never approved a defendant being able to unilaterally control what evidence a trial judge or jury can consider. That is, he cannot raise an insanity defense through the evidence of a psychologist, or claim

statutory mental mitigators exist because some mental health expert said so without also having the State's experts examine him. Rules 3.202 and 3.216, Fla. R. Crim. P. All the defendant can control is the evidence he wants the court to consider. It cannot limit the State or the court from finding on its own or with the help of special counsel other proof that might mitigate a death sentence.

Now, as to the confidentiality issue (Appellee's brief at pp. 35-37), from reading Dr. Larson's deposition as well as the lengthy Koon hearing, Grim evidently wanted only to selectively invoke the psychotherapist/patient privilege authorized by Section 90.503, Florida Statutes (1998 Supp.). As to the purely psychological matters, he or his lawyer willingly waived the privilege. (Deposition at p. 121). As to matters that involved his family or "incriminating things," however, he wanted that protected (9 R 830-31) "My family is not on trial, and I don't want them to got through this." (9 R 830) Moreover, during the hearing defense counsel said that if Grim had presented a case for mitigation, Dr. Larson would specifically testify about the mental mitigation, and particularly the statutory mental mitigation present in this case (9 R 841-44). If Grim had wanted to assert his privilege, defense counsel would not have even mentioned the mental mitigation, statutory and nonstatutory, present. That he did so only partially, and that there is evidence in this record to support finding at least the statutory mental

mitigators, clearly shows that the trial court or special counsel should have called Dr. Larson to testify about his findings.

Finally, the State contends that Dr. Larson could not have testified because it never had a chance for any of its experts to have examined Grim. (Appellee's brief at p. 38). It cites Rule 3.202, Fla. R. Crim. P., to support that contention. Yet, that rule provides no impediment to calling Dr. Larson, even if the State's experts never examined the defendant. Rule 3.202(e) provides remedies if a defendant refuses to be examined by a state expert. The trial court can, of course, "prohibit defense mental health experts from testifying." On the other hand, it can allow them to speak at the sentencing hearing, but

> (1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health experts.

Thus, the trial judge could have allowed the State's expert to have examined Dr. Larson's files on Grim so it could rebut his testimony, if possible. That would have fully satisfied the law's interest in having a "level playing field." Dillbeck v. State, 643 So. 2d 1047 (Fla. 1994).

## ISSUE III

THE COURT ERRED IN REFUSING TO ADMIT STATEMENTS OF THE VICTIM, CYNTHIA CAMPBELL, MADE SHORTLY BEFORE HER DEATH THAT "IF SHE WERE EVER FOUND FLOATING IN THE BAY TO LOOK TO HENRY HOMES," THE LATTER BEING A PERSON AGAINST WHOM SHE HAD LITIGATED SEVERAL CASES, A VIOLATION OF Grim'S DUE PROCESS RIGHT TO PRESENT A DEFENSE.

Grim wanted the statements Cynthia Campbell made shortly before her death introduced into evidence to show that other, nefarious people wanted her dead. If that were all, he would have a valid claim. There was, however, other evidence that supported his defense that someone else murdered this woman.

Deputy Rutherford in response to a missing persons report made a consented to search of Grim's house between 9 and 10 a.m. and could not be "100%" sure he saw a cooler sitting on the back porch (6 R 315). Yet, almost five hours later, the police saw it there and quickly found several incriminating items in it (6 R 394-99). Rutherford also said he stayed at the scene for six hours (6 R 312), thus ensuring no one could sneak into either Grim's or Campbell's house to plant evidence, such as a cooler. Yet, for him to stay there for that long, doing nothing more than securing a house, simply because someone had been reported missing, seems hardly likely.

This evidence thus supported Grim's theory that someone other than him killed Campbell, and planted evidence in his house to shift police focus from him/her and onto the defendant.

## CONCLUSION

Based on the arguments presented here, Norman Grim, or his appellate counsel, respectfully asks this honorable Court to (1) Reverse the trial court's judgment and sentence and remand for a new trial, (2) Reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury, or (3) Reverse the trial court's sentence of death and remand for a new sentencing hearing.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to **CURTIS M. FRENCH**, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and Appellant **Norman M. Grim**, #282008, Florida State Prison, Post Office Box 181, Starke, FL 32083-0181, on this day, October 4, 2002.

## CERTIFICATE OF FONT SIZE

I HERBY CERTIFY that, pursuant to Rule 9.100(1), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

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**DAVID A. DAVIS**
Assistant Public Defender