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IN THE SUPREME COURT OF FLORIDA

**DAVID KELSEY SPARRE,**

Appellant,

v. **CASE NO. SC12-891**

**STATE OF FLORIDA,**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTH** JUDICIAL CIRCUIT,
IN AND FOR **DUVAL** COUNTY, FLORIDA

# REPLY BRIEF OF APPELLANT

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**STATE OF FLORIDA,**

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_____/

**REPLY BRIEF OF APPELLANT**

**Issue 1**

**THE TRIAL COURT ERRED IN NOT CALLING AS ITS OWN WITNESSES THE MITIGATION WITNESSES WHO WERE READY TO TESTIFY AT THE PENALTY AND SPENCER HEARINGS, INCLUDING FOUR MENTAL HEALTH EXPERTS, ONE OF WHOM WOULD HAVE TESTIFIED TO THE EXISTENCE OF BOTH MENTAL MITIGATING CIRCUMSTANCES, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.**

In his initial brief, appellant argued that logic, reason, and constitutional imperatives dictate that the rule of Mohammad v. State, 782 So. 2d 343 (Fla. 2001), should apply to mitigating information in a proffer. That is, when a proffer alerts the trial court to significant mitigation, the court must call the mitigation witnesses as court witnesses or appoint special counsel to present their testimony. Appellant further argued that the trial court abused its discretion in the present case

by not exercising one of these options when defense counsel's proffer alerted the court to significant mitigating evidence.

The state first argues this issue is waived. See State's Answer Brief at 16 (Sparre "waived this claim when he waived presentation of mitigation"); Answer Brief at 18 ("[a] defendant cannot waive presentation of evidence and then claim on appeal, that the trial court erred in not require [sic] the presentation of that evidence.").

This argument is without merit. The issue here is whether the trial court properly exercised its independent duty to consider all possible mitigating evidence, despite the defendant's waiver. A defendant cannot waive a trial court's independent obligation to consider and weigh mitigation. See, e.g., Farr v. State, 621 So. 2d 1368 (Fla. 1993)(requirement that trial court consider and weigh mitigation contained in the record "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").

The state next asserts at page 20 that this Court rejected appellant's argument in Grim v. State, 841 So. 2d 455 (Fla. 2003). Grim does not address the issue raised here, however, because in Grim, unlike in the present case, the trial court exercised one of the Mohammad options by appointing special counsel to present mitigation at the sentencing hearing.

Special counsel presented the report of a mental health expert as well as the testimony of Grim's family members and work supervisors. The trial court in Grim thus was apprised through special counsel of any possible mitigating evidence. While this Court held in Grim that the trial court did not abuse its discretion by not requiring special counsel to present the mitigation evidence to the jury, appellant has not argued that the trial court was required to present mitigating evidence to the jury. Appellant has argued that the trial court was required to call those persons with significant mitigating evidence as court witnesses either at the penalty hearing before the jury or the judge-only sentencing hearing, or appoint independent counsel to present the witnesses. Unlike Grim, the trial court here took no measures to hear the significant mitigation evidence that was available. Nor is the present issue resolved by the Court's holding in Grim that the trial court did not abuse its discretion by not calling Dr. Larson as its own witness. Again, although Dr. Larson's testimony was not presented to the jury, the trial court in Grim appointed special counsel to present mitigation, special counsel submitted Dr. Larson's report at the sentencing hearing, and the trial court was informed of Dr. Larson's conclusions through that report. Here, the trial judge did not appoint special counsel to present mitigation through witnesses or reports and did not call the

mitigation witnesses on its own. Accordingly, unlike Grim, the trial judge here did not consider all possible mitigating evidence.

On page 22, the state asserts that appellant's argument is a "plea for the judge to conduct her own penalty phase in direct contravention of the defendant's wishes and waiver."

First, current law already allows the trial judge to do just that--conduct his or her own penalty phase--despite the defendant's wishes not to present such evidence. See Mohammad; Barnes v. State, 29 So. 3d 1010 (Fla. 2012). Appellant has argued here and in Issue 2 that trial courts need additional guidelines as the current framework has resulted in inconsistent, arbitrary, and unreliable death penalty sentencing. See Initial Brief at 49-50. The specific argument here is that if a trial court must consider significant mitigation indicated in a PSI or records produced by the state, the trial court also must consider significant mitigating evidence indicated in a proffer by defense counsel. In both situations, the constitutional requirement of individualized sentencing overrides the defendant's decision not to contest the death penalty.

Last, the state contends any error in not calling the experts as mitigation witnesses is harmless. Any error is harmless, asserts the state, because the judge or jury may not

have viewed such evidence as mitigating. This argument is meritless. It is axiomatic that mental illness and child abuse are mitigating. More importantly, however, how can this Court determine if the failure to admit mitigating testimony is harmless without a record of that testimony? With all due respect to the state's cursory dismissal and denigration of the proffered mitigation, the testimony must be heard before it can be evaluated either by the trial court or by this Court. This Court cannot conduct a harmless error analysis without reviewing the evidence the state asserts wouldn't matter.

## ISSUE II

**THIS COURT SHOULD RECEDE FROM ITS PRIOR DECISIONS AND REQUIRE THE APPOINTMENT OF INDEPENDENT PUBLIC COUNSEL TO PRESENT WHATEVER MITIGATION REASONABLY CAN BE DISCOVERED IN CASES WHERE THE DEFENDANT ARGUES IN FAVOR OF THE DEATH PENALTY OR ASKS THE COURT NOT TO CONSIDER MITIGATION.**

At page 28, the state asserts that requiring appointment of special counsel in every case is "unworkable" because the defendant will refuse to assist special counsel. This argument is meritless. While defendants in some instances refuse to cooperate or participate in the development of mitigation, it is more often the case that defendants decide to waive the presentation of mitigation long after the case for mitigation has been developed. Furthermore, defense counsel has a duty to develop mitigation despite the client's wishes. See, e.g., State v. Lewis, 838 So. 2d 1102 (Fla. 2002)("Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision."). Finally, that a few defendants will not cooperate fully is not a sound basis for not requiring, as a general rule, presentation of as complete a case for mitigation as is possible.

Second, on pages 28-30, the state argues that requiring appointed special counsel in cases where the defendant refuses to contest the death penalty is unconstitutional as it would interfere with the defendant's decision not to present mitigation in violation of McKaskle v. Wiggins, 465 U.S. 168 (1984), or in the case of a pro se defendant, would violate the defendant's right to self-representation under Faretta v. California, 422 U.S. 806 (1975). This argument is without merit. Neither McKaskle nor Faretta addressed what procedures are constitutionally required or constitutionally prohibited when a defendant waives mitigation. Also, as argued in his Initial Brief, this Court already has determined that the public's and the state's interest in the reliability and integrity of the sentencing procedure trump a defendant's wish to die.

The state also cites United States v. Davis, 285 F.3d 378, 385 (5th Cir. 2002), for the proposition that appointment of special counsel would violate a defendant's right of self-representation. This Court already recognized in Barnes, however, that the decision in Davis is limited to the rare case where the mitigation presented by special counsel conflicts with a pro se defendant's strategy. There, the Fifth Circuit concluded that Davis's desire to assert his innocence as mitigation directly contradicted special counsel's approach.

The court thus held that an individual's right to represent himself outweighs an individual judge's discretion to appoint independent counsel '"when that appointment will yield a presentation to the jury that directly contradicts the approach taken by the defendant.'" Barnes, 29 So. 2d at 1024 (quoting Davis, 285 So. 2d at 381)(emphasis added in Barnes)). The Court noted that unlike Davis, the mitigation evidence presented by special counsel in Barnes did not conflict with anything presented by Barnes. The Court thus concluded that appointment of independent counsel did not violate Barnes' right to self-representation. This Court also disagreed with the reasoning in Davis, agreeing instead with the Supreme Court of New Jersey in State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004), that the state's and the public's interest in the reliability and integrity of a death sentencing proceeding transcends the preferences of individual defendants:

> [W]e agree with the Supreme Court of New Jersey in State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004), which refused to adopt the reasoning in Davis, stating
>
> > The Fifth Circuit concluded [in Davis] that because the "core" of a defendant's Faretta right is "his ability to preserve control over the case he chooses to present to the jury," this right must be honored during the penalty phase "regardless of whether society would benefit from having a different presentation of the evidence." Ibid. We respectfully disagree. In our view, it is difficult to square that conclusion with the Supreme Court's mandate in Gregg, supra, and Eddings, supra, that to

> constitutionally impose a death sentence, the sentencing jury cannot be deprived of an opportunity to make an individualized judgment based on a fair presentation of mitigating evidence.
>
> Id. at 1204.

29 So. 3d at 1024.

On page 31, the state argues that allowing special counsel to present mitigating evidence is a problem because cross-examination of mitigation witnesses may elicit unfavorable information, which the defendant could raise on appeal as a violation of Faretta and "probably the right to a fair trial." But, the trial court already has the authority to appoint special counsel to present mitigating evidence. See Barnes. Furthermore, the likelihood of unfavorable information coming in through cross-examination of mitigation witnesses is no greater than the possibility of unfavorable information coming to the court's attention through the PSI. Furthermore, if the case for mitigation is presented to the jury, the trial court has the authority to exclude information that is not relevant, including nonstatutory aggravating circumstances.

Finally, on page 32, the state asserts that the Court's current policy of requiring a comprehensive PSI and requiring the trial court to consider all the mitigation in that PSI "is a proper balance." This policy, according to the state, complies with the United Supreme Court's directive in Williams v. New

York, 337 U.S. 241, 247 (1949), that sentencing judges should have "the fullest information possible concerning the defendant's life and characteristics."

As for the state's first assertion re "balance," the state hasn't even addressed the heart of appellant's initial brief detailing how the case-by-case approach that has been followed in the twenty-five years since Hamblen v. State, 527 So. 2d 800 (Fla. 1988), has resulted in arbitrary, unreliable, and non-uniform sentencing at the trial level, which in turn has impeded this Court's statutory and constitutional duty to review every death sentence. See Initial Brief at 36-50.

As for the second assertion, the present case is a prime example of a case in which the sentencer clearly did not have "the fullest information possible concerning the defendant's life and characteristics."

Contrary to the state's suggestion, ordering a PSI does not satisfy the requirement of consistency and reliability in death penalty sentencing or the requirement of meaningful appellate review. Although a "comprehensive" PSI is required in those cases where a defendant waives mitigation, PSIs are not really comprehensive. Probation officers are not oriented towards developing mitigation, and PSIs are cursory and weak as vehicles for mitigation. The development of a comprehensive case for mitigation requires an unbiased advocate trained in what is

mitigating. As noted in the Initial Brief, this case is a prime example of the inadequacy of PSIs. The probation officer here gathered information about Sparre's background from an interview with Sparre and some sort of contact with his grandmother and possibly his mother (the PSI notes one statement by Sparre's mother at page 6). The only information in the PSI regarding Sparre's mental health history is Sparre's opinion ("denied being depressed or suicidal"), the probation officer's opinion ("showed no obvious signs of impairment"), and the grandmother's opinion (defendant is "'mentally challenged and had mental problems'"). Although the PSI notes that Sparre was in foster care for two years, no records from the Tara Hall Home for Boys were obtained. In contrast, four clinical experts were available to provide an accurate and comprehensive picture of Sparre's mental health history, linking his (four) diagnoses to his abusive upbringing on the one hand and to specific mitigating circumstances on the other. And while the PSI states that Sparre described his upbringing as dysfunctional and said he was beaten by one of his stepfathers, a much more complete picture of that abuse and its effects on Sparre would have been provided by Sparre's family members—all available and ready to testify.

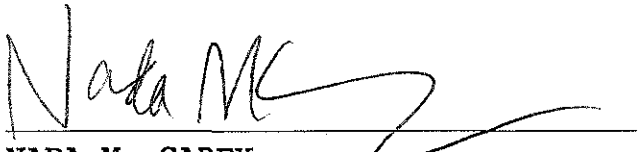
In sum, the state has not offered a single compelling argument for why this Court should not recede from Hamblen. If

the goal of fair, reliable, and uniform sentencing is to be taken seriously, as it must under our statutes and constitution, then something more than a PSI is needed. There must be some obligation on the trial court to develop mitigation further, either by appointing a trained advocate to develop and present mitigation, or, in cases where the mitigation has been developed and the witnesses are available and ready to testify, calling those persons as court witnesses. A sentence of death requires that all possible mitigating evidence be presented to the sentencer so that he or she may make an individualized determination that the defendant indeed deserves death. Moreover, in order to achieve proportionate sentencing, the same procedure for presenting mitigation must be followed in every case. This is best achieved by requiring appointment of independent counsel to present mitigation in every case where the defendant declines to do so. Appellant therefore asks this Court to recede from Hamblen.

## CONCLUSION

Appellant respectfully asks this Honorable Court to reverse and remand this case for the following relief: Issues 1 and 2, vacate appellant's death sentence and reverse for a new penalty phase proceeding; Issue 3, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,



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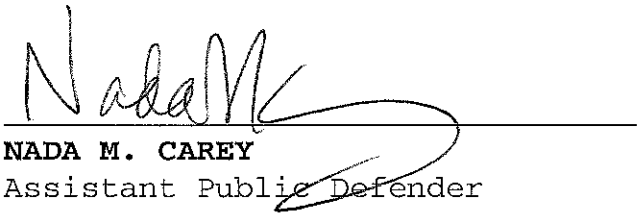
**CERTIFICATES OF SERVICE AND FONT SIZE**

I hereby certify that a copy of the foregoing has been furnished by electronic mail to **CHARMAINE MILLSAPS**, Assistant Attorney General, at capapp@myfloridalegal.com; and by U. S. Mail to David Kelsey Sparre, DOC #J46231, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026-1000, this 13th day of May, 2013. I hereby certify that this brief has been prepared using Courier New 12 point font.



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