No. SC17-1071

IN THE

Supreme Court of Florida

NORMAN M. GRIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S BRIEF
IN RESPONSE TO JULY 19
ORDER TO SHOW CAUSE

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INTRODUCTION

This appeal seeks review of the circuit court's failure to hold an evidentiary hearing and denial of Appellant Norman Grim's claim for relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), based on the "harmless error" doctrine. Here, unlike in any other case this Court has assessed for harmless error, Appellant requested a hearing in the circuit court based on a substantial evidentiary proffer showing the harmfulness of the *Hurst* error. This Court's long-established precedent encourages circuit-court hearings to establish the impact of constitutional errors like *Hurst* in capital sentencing proceedings. In light of Appellant's proffer, the circuit court should have held a hearing before ruling whether the *Hurst* error was harmless, and this Court should remand for a hearing.

Appellant's proffer alerted the circuit court, and a hearing would establish, that the *Hurst* error in his case was not harmless. Appellant's proffer included declarations from multiple sources—prior counsel, a psychological expert, and multiple witnesses—that undermine the sufficiency and weight of the aggravating circumstances that went unchallenged by defense counsel at his penalty phase, and would have provided the jury with reasons to vote for life. Based on his proffer, Appellant could establish at a hearing that (1) the aggravators were not challenged by his penalty-phase counsel because of a pre-*Hurst* practice followed by counsel here and other lawyers at the time; (2) in a constitutional proceeding without *Hurst*

error, Appellant's counsel would have—and a reasonable counsel would have—presented evidence of the sort proffered in the circuit court to diminish the weight and sufficiency of the aggravation in the mind of at least one juror; and (3) the result of the penalty phase would have been different.

Further, even if this Court does not remand for a hearing, the circuit court's harmless-error ruling should not be affirmed and Appellant should be granted relief because the State cannot establish harmless error on the present record.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal presents important issues of first impression regarding the need for evidentiary development in the harmless-error analysis of *Hurst* claims. Appellant respectfully requests the opportunity for his counsel to present oral argument on this and related issues pursuant to Fla. R. App. P. 9.320, and also requests that the Court allow him the opportunity to brief this case in accord with the normal, untruncated rules of appellate practice.

BACKGROUND

In 1998, Appellant was convicted of murder in the Circuit Court of the First Judicial Circuit, Santa Rosa County. *Grim v. State*, 841 So. 2d 455 (Fla. 2003). At the conclusion of the penalty phase, the jury returned a unanimous generalized recommendation to impose the death penalty. The court, not the jury, then made the findings of fact required to impose a sentence of death under Florida law. The court,

not the jury, found beyond a reasonable doubt that three aggravating circumstances had been established,[1] those aggravators were "sufficient" to impose the death penalty, and the aggravators were not outweighed by the mitigation.[2] Based upon this fact-finding, the court sentenced Appellant to death.

On direct appeal, Appellant argued that Florida's capital-sentencing scheme was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). *Grim*, 841 So. 2d at 465. Relying on now overruled precedent, this Court rejected that argument and affirmed Appellant's conviction and sentence. Appellant's death sentence became final in 2003, when his petition for a writ of certiorari was denied by the United States Supreme Court. *See Grim v. Florida*, 540 U.S. 892 (2003).

Appellant continued to challenge the constitutionality of Florida's capital-sentencing scheme under *Ring* in his initial state post-conviction proceedings, but was unsuccessful. *See Grim v. State*, 971 So.2d 85, 102-03 (Fla. 2007).

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[1] The three aggravators the judge found were that Appellant (1) was under sentence of imprisonment, (2) had prior convictions for violent felonies, and (3) committed the offense while engaged in a sexual battery.

[2] Although Appellant did not want his attorney to present mitigation, the court appointed special counsel to present mitigation to the court during a *Spencer* hearing. The mitigation the court found included that Appellant (1) experienced a disruptive home life and child abuse, (2) was a hard-working employee, (3) had mental health problems (4) suffered from a lack of long-term psychiatric care, (5) had marital problems and situational stress, (6) made errors of judgment under stress, (7) was model prison inmate, and (8) entered prison at a young age.

In June 2016, Appellant filed a motion under Fla. R. Crim. P. 3.851, seeking relief under *Hurst v. Florida*. The State filed a response, and Appellant filed a reply. After this Court issued its decision in *Hurst v. State*, the parties filed memoranda of law addressing both *Hurst v. Florida* and *Hurst v. State*.

Appellant argued that notwithstanding his jury's unanimous recommendation to impose the death penalty, an evidentiary hearing was necessary on the issue of harmless error to establish how defense counsel's approach to diminishing the aggravating factors would have been different without the *Hurst* error. Appellant's Mem. at 20-40. Appellant proffered substantial evidence in support of his hearing request, describing and attaching records and declarations from prior counsel, a psychological expert, and witnesses, showing the reasonable probability that (1) defense counsel's approach to diminishing the weight of the aggravation would have been different had counsel known that the jury, not the judge, would make the required findings of fact, and (2) there would have been a different sentencing result.

The circuit court denied relief without addressing Appellant's proffer or request for a hearing on the dispositive issue of harmless error. The court acknowledged that *Hurst* was retroactive to Appellant under this Court's decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), but ruled that the *Hurst* error in his case was harmless and denied relief on the grounds that (1) Appellant's prior violent felony aggravators remove Appellant from the protections afforded by *Hurst*; (2) the

advisory jury's recommendation was unanimous; and (3) Appellant instructed his attorney not to present mitigation.

This Court directed the parties to file briefs addressing why the circuit court's order should not be affirmed based on this Court's precedent in *Hurst v. State*, *Mosley*, and *Davis v. State*, 207 So. 3d 142 (Fla. 2016).[3]

ARGUMENT

I. This Court should remand for a hearing on harmless error based on Appellant's evidentiary proffer in the circuit court, which was sufficient under this Court's precedent to afford him the opportunity to present evidence and testimony establishing the harmfulness of the *Hurst* error

A. The circuit court correctly found that the only issue in this case is harmless error, and that *Mullens* "waiver" analysis does not apply

The circuit court was correct that the only issue in this case is whether the *Hurst* error in Appellant's sentencing was harmless beyond a reasonable doubt. Order at 6 ("The only question is whether the *Hurst* error is harmless beyond a reasonable doubt."). As the circuit court recognized, the *Hurst* decisions apply retroactively to Appellant under Florida law because his death sentence became final in 2003, after *Ring*. *See Mosley*, 209 So. 3d at 1283.[4]

[3] Appellant has provided a condensed brief here per this Court's July 19, 2017 order, but requests the opportunity to provide a standard initial brief, consistent with Fla. R. App. P. 9.210, so that he can fully present all of his issues on appeal.

[4] In addition, as Appellant argued in the circuit court, the *Hurst* decisions are retroactive as a matter of federal law. *See* Defendant's Memorandum of Law at 12-13 (filed Nov. 11, 2016) (discussing federal cases, including *Montgomery v.*

The circuit court was also correct that although Appellant instructed his counsel not to present mitigation, this does not foreclose *Hurst* relief under this Court's "waiver" cases, such as *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). In *Mullens*, this Court held that waiver of an advisory jury recommendation may foreclose *Hurst* relief under certain circumstances. Here, though, as the circuit court recognized, this is not a "waiver" case within the meaning of *Mullens* because Appellant did not waive a jury recommendation and "a jury did in fact consider what sentence should be imposed in this case." Order at 7. Accordingly, as the circuit court recognized, harmless error in this case must be "fully analyzed." *Id.*

B. Under this Court's precedent, Appellant should have been afforded an evidentiary hearing on harmless error after proffering evidence showing the harmfulness of the *Hurst* error with respect to the effect on defense counsel's challenges to the aggravation

Although this Court has found *Hurst* errors harmless in some cases without further evidentiary development, the Court has never made such a ruling when a defendant has proffered harmless-error evidence and is denied a hearing. Here, Appellant requested a hearing in the circuit court based on a substantial evidentiary proffer showing the harmfulness of the *Hurst* error on his sentencing. Appellant's proffer cast real doubt on whether the outcome of his penalty phase would have been

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Louisiana, 136 S. Ct. 718, 731-32 (2016) (holding that federal law requires states to make substantive rules retroactive on collateral review)).

the same without the *Hurst* error, particularly in light of the unconstitutional statute's effect on defense counsel's approach to challenging the aggravation.[5] In light of Appellant's proffer, the circuit court should have held a hearing before ruling whether the *Hurst* error was harmless. This Court should remand for such a hearing.

As a general matter, this Court has explained that Florida defendants should be granted evidentiary hearings. *See Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). A circuit court should only find a defendant's presumption of entitlement to an evidentiary hearing overcome if the motion is legally insufficient or the alleged facts and claims are conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). A circuit court's decision to grant an evidentiary hearing on a Rule 3.851 motion is tantamount to a pure question of law, and thus subject to de novo review. *Long v. State*, 183 So.3d 342, 344 (Fla. 2016). When reviewing the record, this Court does not look beyond the filings submitted before the circuit court and all allegations made by the defendant must be accepted as true unless they are "conclusively refuted by the record." *Ventura*, 2 So. 3d at 197-98.

[5] In positing that counsel's approach to the penalty phase would have been different without the *Hurst* error, Appellant is not arguing a claim that counsel was ineffective at the unconstitutional proceeding, but instead that counsel's approach would have been different had Florida required, as the *Hurst* decisions now require, a unanimous jury, not the judge, to make the findings of fact required for a death sentence. *See infra*, discussing cases.

And this Court's precedent makes clear that the effect of an unconstitutional death penalty statute on defense counsel must be considered as part of a harmless error analysis. That is how this Court proceeded after the United States Supreme Court held that a capital jury must be allowed to consider non-statutory mitigating circumstances in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In response to arguments from the State that *Hitchcock* errors were harmless, this Court did not confine the inquiry to the original record. Instead, it permitted defendants who proffered evidence of the harmfulness of the constitutional error the opportunity to present and develop that evidence at a hearing.

There are several examples. In *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), the defendant proffered evidence of how Florida's pre-*Hitchcock* capital scheme affected his penalty-phase counsel. This Court found that the proffer warranted a hearing in the circuit court, observing that the evidence was "sufficient to negate the conclusion that the *Hitchcock* error was harmless" and ruling that "the merits of [Meeks'] claims can only be determined by an evidentiary hearing." *Id*. In *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989), this Court granted relief on the basis of the extra record proffer concerning the effect of the constitutional error on defense counsel, even though the Court had found the error harmless on the basis of the original record alone. *Compare id.* (granting relief based upon the extra record evidence), *with Hall v. Dugger*, 531 So. 2d 76, 77 (Fla. 1988) (denying relief based

on the original record); *see also Smith v. Singletary*, 61 F.3d 815, 817 (11th Cir. 1995) (considering impact of penalty-phase evidence that could have been presented and granting relief due to the effect of the unconstitutional error on defense counsel).

This Court has made clear that *Hurst* claims require individualized harmless error review, and that the burden is on the State to prove that the error did not impact the death sentence. *Id.* at 67-68. The Court has also emphasized that the "State bears an extremely heavy burden" in this context, *id.* at 68, and that meeting that burden will be "rare." *King v. State*, 211 So. 3d 866, 890 (Fla. 2017).

Appellant proffered evidence in the circuit court regarding the adverse effect of a constitutional error on defense counsel, and under this Court's precedent, he should be granted the same opportunity to present his evidence at a hearing. Without a hearing, the circuit court could not reasonably conclude that there is "no reasonable probability that the [*Hurst*] error contributed to the sentence." *Hurst v. State*, 202 So. 3d at 68. The circuit court should have at least addressed Appellant's proffer and explained whether an evidentiary hearing was necessary.

C. Appellant's proffer alerted the circuit court, and a hearing would establish, that the *Hurst* error in his case was not harmless due to the effect of the unconstitutional statute on defense counsel's approach to the aggravation

Appellant proffered substantial evidence in the circuit court, and would establish at a hearing on the harmfulness of the *Hurst* error, that (1) the aggravators were not challenged by his penalty-phase counsel because of counsel's practice, a

practice followed by Florida lawyers at that time; (2) in a constitutional proceeding without *Hurst* error, Appellant's counsel could have—and a reasonable counsel would have—presented evidence of the sort proffered in the circuit court to diminish the weight and sufficiency of the aggravation in the mind of at least one juror; and (3) the result of the penalty phase would have been different.

The State sought to establish the following aggravators: Appellant was (1) previously convicted of a felony and under a sentence of imprisonment, and (2) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. The State introduced prior convictions in Escambia and Duval Counties and Bell County, Texas. Because of his pre-*Hurst* approach, counsel did not present evidence challenging those aggravating factors, and did not raise any objection when the State introduced evidence to establish the factors.

The proffered evidence below, which is also attached to this brief, highlights that the State cannot establish that the *Hurst* error in Appellant's case was harmless beyond a reasonable doubt.

1. Declarations of prior counsel

Appellant proffered declarations from prior counsel who represented him on previous felony charges that were used by the State as aggravation in his penalty phase. *See* Exhibits 1-2. Michael Van Cavage was counsel for Appellant in 1983, when Appellant was convicted in Escambia County of robbery, burglary,

kidnapping, and weapons offenses. John Bigham is a retired lawyer who formerly practiced criminal defense in the State of Texas. In 1991, Mr. Bigham was appointed to represent Appellant on a burglary charge in Bell County, Texas.

Michael Rollo, Appellant's counsel for his capital trial in Florida, did not contact either lawyer before or during the penalty phase. Had Mr. Rollo contacted either, both would have provided information concerning Appellant's prior convictions that would have been relevant to diminishing the weight of the prior-felony/parole status aggravating factors or other aggravators alleged by the State.

For instance, before trial on the 1982 offenses, Mr. Van Cavage moved for the appointment of two psychiatric experts to evaluate Appellant's competency and his mental state. In his motion, Mr. Van Cavage stated that he had reason to believe that Appellant may have been incompetent at the time of the offense and incompetent to assist counsel. The court agreed to appoint the State's expert, Dr. B.R. Ogburn, M.D., to conduct a psychiatric evaluation of Appellant.

Dr. Ogburn examined Appellant on three separate occasions, reviewed court documents, and interviewed Mark Bowden, a friend of Appellant's who was with him on the evening prior to the 1982 offenses. Dr. Ogburn concluded that, on the night of the crimes, Appellant was intoxicated and succumbed to loss of control stemming from a woman turning him down for another man. Dr. Ogburn further concluded that Appellant's crimes were not planned or premeditated, but the result

of emotional "triggering" that had occurred on the previous night. Dr. Ogburn concluded that Appellant was unable to form specific intent for the 1982 crimes.

Prior to Appellant's sentencing in 1983, Mr. Van Cavage presented arguments to the court seeking leniency in addition to psychiatric care during incarceration. In a motion to mitigate, in which Mr. Van Cavage argued that Appellant should not spend the majority of his adult years in prison, Mr. Van Cavage referenced Dr. Ogburn's report and stated that Appellant could function and work as a productive member of society if he was provided with adequate psychiatric care. Mr. Van Cavage also noted that, during his pretrial detention in the Escambia County jail, Appellant did not have any problems with jail officials and had exhibited the ability to function properly within the jail system.

Additionally, Mr. Bigham would have relayed that Appellant's plea-negotiated 20-year sentence of imprisonment more reflected the fact that he had a prior felony, rather than the seriousness of the Texas burglary. In Mr. Bigham's experience as a criminal defense attorney in Bell County, Texas, a first-time offender likely would have been charged with second-degree burglary and been permitted to plead to a lesser charge and receive probation. However, because Appellant had a prior felony record, he likely would have been tried for a first-degree felony with a possible sentence of up to 99 years had he decided to plead not guilty. By entering into a plea agreement, Appellant was permitted to plead guilty to a second-degree

felony with a recommended sentence of 20 years. In Mr. Bigham's experience, the State would not have accepted a reduction in the burglary charge if prosecutors felt that the offense itself was too serious to reduce to second-degree burglary.

2. Declaration of psychological expert

Appellant also proffered a declaration by Dr. Jethro Toomer, Ph.D., setting forth the following. *See* Exhibit 3. Dr. Toomer is a licensed psychologist. His practice includes clinical and forensic psychology. He has been qualified by federal and state courts in several jurisdictions to testify about psychological questions arising in capital cases and other forensic issues. He has served as an expert witness in capital cases for over four decades. He also serves as a professor of psychology. Dr. Toomer provided a declaration to undersigned counsel setting forth his opinion regarding the nature, weight, and significance of Appellant's aggravating circumstance arising from his prior convictions.

Dr. Toomer's review of the witness statements, in combination with the records relating to Appellant's convictions, revealed that Appellant has deep-seeded psychological and substance abuse problems. Witnesses who knew Appellant around the time of his prior offenses related that, when Appellant was drinking, he lost control and engaged in acts that he never would have engaged in while sober. When he was drunk, Appellant's friends described him as a different person. One

of the victims of his prior crimes, Nona Young, described Appellant as "a mess, didn't look right and his eyes were strange."

Dr. Toomer's review of the records of Appellant's prior offenses also shed light on the psychological and substance-abuse issues underlying his prior convictions. For example, Mr. Van Cavage moved for the appointment of psychiatric experts to evaluate Appellant's mental state at the time of the crimes. Dr. Ogburn, concluded that on the night of the 1982 offenses, Appellant was intoxicated and succumbed to a loss of control. After Appellant pleaded guilty, Mr. Van Cavage filed a motion to mitigate and wrote a letter to the judge, stating that Appellant's drinking and psychological issues may have been a contributing factor in his crimes, and recommended that Appellant receive counseling. Dr. Toomer or a similarly qualified expert could express the opinion at a hearing that the nature, weight, and significance of the priors, under all relevant circumstances, is not substantial or especially weighty in a capital sentencing context.

3. Declarations of witnesses

Appellant also proffered declarations from multiple witnesses, none of whom were ever contacted by Mr. Rollo. Had they been, they would have been willing to provide the following information relevant to challenging aggravation.

Mark Bowden was with Appellant the night before and the morning of his September 1982 arrest for kidnapping and other charges. *See* Exhibit 4. Bowden

had been out drinking hard liquor with Appellant late at night and into the morning for three days straight. Appellant was very drunk. Bowden could tell based upon Appellant's conversation and bizarre behavior that he was not straight or doing well. In the early morning, at a bottle club, Appellant attempted to pick up a woman. When she left with another man, Appellant got unusually upset. Bowden had never seen Appellant so upset about a girl. It did not make sense to Bowden. Appellant's behavior was totally bizarre; he was not making any sense. Bowden believes that there is no way that Appellant would have tried to abduct anyone if not for being "so crazy drunk and not in his right mind." As far as Bowden knows, every time that Appellant has been arrested it has involved alcohol. All of Appellant's poor decisions seem to Bowden to have been alcohol related.

Ronald Horton met Appellant when they worked together on a job in Pensacola, Florida in the 1990s. *See* Exhibit 5. After about four or five months of working together, Horton and Appellant were offered a job in Texas. Horton remembers Appellant as a quiet guy at work. Appellant worked alone and kept to himself. But all that changed when Appellant was drinking. Appellant drank Busch beer by the case, and afterwards he would drink rum and Cokes and smoke marijuana. Appellant was an alcoholic with a serious drinking problem that he could not control. Immediately after Horton and Appellant arrived in Texas on Christmas Eve of 1990, they went out to a bar. They had been drinking and smoking marijuana

at the motel. It was a "serious drinking night," and Appellant was drunk by the time he started playing pool at the bar. Appellant and Horton left in Horton's car, which had a bad front tire. On the way back, they spotted a car that Horton believed had the same size tires as his car, and Horton decided to steal the tires. He and Appellant pulled into the parking lot of an auto shop. The next thing Horton knew, he and Appellant were stealing tools from the garage. It was totally unplanned, according to Horton. It was just "stupid, drunken behavior by both of us." The next morning, Horton and Appellant awoke surprised at what they had done. They would not have stolen the tools if they had not been drunk. They were both arrested for burglary. Horton was sentenced to three years. Horton feels sorry for Appellant. "He was a bad drunk, and he couldn't handle it well," according to Horton. "He got into a bad situation he never would have gotten into if he had not been drinking so much."

Multiple codefendants, including Kathy Smith, Charlotte May, and Charles Raab, all provided declarations regarding the 1981 convenience store robbery in Duval county, Florida. *See* Exhibits 6, 7, 8. All stated that they would have been willing to testify, and would have explained that the 1981 robbery "was the stupid and immature behavior of young people under the influence." In September 1981, Raab was dating Sharon Clough. Sharon was friends with Charlotte and Kathy. Immediately preceding the robbery, the five of them started binge drinking and did not stop until they left Florida and were arrested in Maine. "We drank and kept

drinking for about four weeks straight." Raab and Appellant quickly spent the $1,000 they had on alcohol. They were drinking hard. Appellant was drinking beer by the case and whiskey by the bottle. When he was awake, Appellant was drinking until he passed out. When he woke up, he started drinking again. Appellant drank more in that three-to-four week time span than most drinkers would consume in a year. Raab is surprised Appellant did not die from alcohol poisoning. Before the robbery, they were drinking and smoking marijuana daily. On the night of the robbery, Charlotte, Sharon, Appellant, and Raab were drinking, and it was clear they were using other drugs. Smith could tell they were all intoxicated. Smith believes that, if not for the substance abuse, the robbery would not have happened. "We were just stupid kids who made a rash decision. We took beer and cigarettes from the store. There were no guns used." According to Smith, Sharon Clough was the mastermind behind everything the group did. May feels that the "robbery itself was stupid and immature. We were just dumb kids who made a very poor decision." The robbery took place at a convenience store across the street from the trailer park where Sharon lived. There were no guns. "Basically we just walked into the store and took money and beer. It was a drunk prank by stupid kids more than a robbery." According to May, Sharon Clough was the catalyst for everything the group did.

Victoria McKee lived in Escambia County, Florida in September 1982. Appellant was charged with burglary and aggravated battery as a result of him

breaking into McKee's residence. *See* Exhibit 9. McKee recalls that Appellant pleaded guilty to that offense. McKee is against the death penalty. If asked, she would have been against the death penalty for Appellant in 1998, especially in light of Appellant's mental health issues. If contacted by defense counsel, McKee would have provided this information. McKee does not wish to see Appellant executed.

Nona Young lived in Pensacola, Florida in September 1982. *See* Exhibit 10. She worked as a radio personality and also for the WRSE television station. Appellant was charged with attempting to kidnap her. Young recalls Appellant's disheveled state during the crime: "I recall that he was wearing nothing but shorts and his hair was windblown. He was a mess, didn't look right and his eyes were strange." She is aware of the bizarre circumstances surrounding the other crimes he committed that day. Appellant's crimes did not appear planned to Young. She attended his sentencing. She recalls that the judge ordered psychiatric treatment. In 1998, Young was working in a news room in Mobile, Alabama and was there when the story broke that the police were looking for Appellant in connection with a murder. At some point in the following year, Young was contacted by a prosecutor, who told Young that Florida was seeking the death penalty for Appellant. Young was asked her opinion on the death penalty and if she was willing to testify for the State. Young told the prosecutor that she did not want any part in assisting in Appellant being sentenced to death. Young did not hear from the prosecutor again.

Young did not wish for Appellant to be sentenced to death in 1998 and she does not wish him to be on death row now. Young was never contacted by Appellant's trial counsel. If she had been contacted, she would have provided the above information.

4. Records

In addition to the affidavits and declarations described above, Appellant also proffered that he would introduce records at an evidentiary hearing to demonstrate the State's inability to show, beyond a reasonable doubt, that defense counsel would not have pursued a different strategy absent the *Hurst* error, and that there would have been no impact on Appellant's sentence. The records Appellant would introduce include former counsel Van Cavage's motion to mitigate and sentencing letter in the 1982 Escambia County case, the court's order appointing the State's expert, and Dr. Ogburn's psychiatric evaluation. *See* Exhibits 11, 12, 13.

D. Based on Appellant's proffer, this Court should remand with instructions to hold an evidentiary hearing on harmless error

As demonstrated above, Appellant's proffer alerted the circuit court, and a hearing would establish, that the *Hurst* error in his case was not harmless. Unlike in any other case this Court has assessed for harmless error, Appellant requested a hearing in the circuit court based on a proffer showing the harmfulness of the *Hurst* error on his sentencing. This Court's precedent encourages such hearings. In light of Appellant's proffer, the circuit court should have held a hearing before ruling whether the *Hurst* error was harmless. This Court should remand for such a hearing.

II. Even if this Court does not remand for a hearing, the circuit court's harmless-error ruling should be vacated and relief should be granted

A. The circuit court contradicted this Court's precedent by ruling that the prior felony aggravator precluded *Hurst* relief

The circuit court contradicted this Court's clear precedent in ruling that "[t]he fact that the jury did not make any findings regarding the Defendant's prior convictions is not a violation of the Sixth Amendment." Order at 8. This Court's precedent establishes the opposite. Because Florida law requires a separate finding that the aggravation is "sufficient" to warrant the death penalty, a judge's finding of prior or contemporaneous felony aggravators does not reveal whether a particular jury, even if it found those same aggravators, would have agreed that the aggravators were "sufficient." That is why this Court has repeatedly rejected the logic invoked by the circuit court and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Bailey v. Jones*, SC17-433, 2017 WL 2874121, at *1-2 (Fla. July 27, 2017); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016).[6]

B. Appellant's opposition to mitigation does not preclude *Hurst* relief or render the *Hurst* error harmless

Appellant opposed mitigation, but that does not preclude *Hurst* relief and is not a "waiver" within the meaning of *Mullens* because Appellant did not waive a jury recommendation and a jury did in fact make a recommendation. Appellant's

[6] In addition, the Supreme Court recently denied certiorari in *Florida v. Hurst*, No. 16-998 (May 22, 2017), where the State advanced the same logic as the circuit court.

decision not to present mitigation during the penalty phase is also insufficient to rule that the *Hurst* error in his sentencing was harmless. Even without mitigation, the *Hurst* decisions require the jury, not the judge, to make the findings of fact regarding (1) the existence of specific aggravators, and (2) the sufficiency of the aggravators to justify the death penalty, which are both "elements" subject to the Sixth Amendment. *See Hurst v.* State, 202 So. 3d at 53-59. Even if a jury would have agreed with the judge as to the third "weighing" element, there is no way to conclude whether the jury also would have agreed on the same aggravators as the judge or arrived at the same "sufficiency" conclusion as the judge. Accordingly, the absence of a mitigation presentation to the jury in this case is not sufficient for this Court to conclude that the *Hurst* error here was harmless.

C. The advisory jury's unanimous recommendation does not render the *Hurst* error harmless because it does not allow this Court to reliably conclude that the jury would have unanimously found all of the required elements in a constitutional proceeding, especially given Appellant's proffer of evidence

This Court has indicated, in *Davis* and other cases, that a unanimous jury recommendation is a factor in *Hurst* harmless error analysis, but not necessarily a dispositive factor in every case. Here, this Court cannot reliably infer from the unanimous jury *recommendation* in Appellant's case that the same jury would have unanimously found that each of the required *elements* for a death sentence were satisfied in a constitutional proceeding. Notwithstanding any issues regarding

mitigation, this Court held in *Hurst v. State* that the jury must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, as to (1) which aggravating factors were proven, and (2) whether those aggravators were "sufficient" to impose the death penalty. 202 So. 3d at 53-59. The jury's unanimous findings on those elements must precede the jury's vote as to whether to recommend a death sentence. *See id.* at 57. Therefore, even where the jury unanimously *recommended* death, there is no way to know whether the jury would have unanimously found the other preceding elements satisfied beyond a reasonable doubt. *See Hall*, 212 So. 3d 1001, 1037 (Quince, J., dissenting) ("Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown."). Appellant's jurors may have reached a unanimous overall *recommendation*, but the record does not reveal the basis for the recommendation, and there is a reasonable probability that each juror, or groups of jurors, may have based their recommendations on a different calculus. This Court has made clear that all jurors must be on the same page with respect to *each* of the underlying elements.

As the Court cautioned in *Hurst v. State*, engaging in speculation about the jury's fact-finding "would be contrary to our clear precedent governing harmless error review." 202 So. 3d at 69; *see also Mosley*, 209 So. 3d 1248, 1283. The reasoning in *Hurst v. State* applies equally here:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a

> reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death.

202 So. 3d at 68. Here too, this Court cannot determine which aggravators Appellant's jury found proven beyond a reasonable doubt or how many jurors found which particular aggravators sufficient for death.

This uncertainty as to what the advisory jury would have decided if tasked with making the required findings of fact takes on additional significance in light of the principles articulated in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), which held that a death sentence cannot be imposed by a jury that believed that the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere and not with the jury. The Supreme Court explained that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility," and that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id.* at 328-29, 341 (internal quotation omitted).

Appellant's jury was led to believe that its role in sentencing was diminished when the Court instructed it that its sentence was advisory. It was with these instructions in mind, which informed Appellant's jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere,"

id. at 328-29, that the jurors rendered a unanimous recommendation to impose the death penalty. Given the jury's belief that it was not ultimately responsible for the imposition of Appellant's death sentence, this Court cannot even be certain, to the exclusion of all reasonable doubt, that the jury would have made the same unanimous *recommendation* without the *Hurst* error. In light of the principles articulated in *Caldwell*, this Court therefore also cannot be certain that the jury would have unanimously found all of the other required elements satisfied.

And, as explained in Section I, *supra*, the jury's unanimous recommendation also does not account for the possibility that defense counsel's approach to the penalty phase may have been different in a constitutional proceeding, and this may have impacted the jury's ultimate decision. The impact of the unconstitutional scheme on defense counsel may have begun as early as jury selection for the penalty phase. Counsel may have conducted his questioning of prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the required elements, in order for Appellant to avoid a death sentence. Counsel would have provided Appellant with different advice and perhaps changed his mind regarding the presentation of mitigation. During the penalty phase itself, defense counsel's approach may have been different had the jury, rather than the judge, been required to unanimously find that each specific aggravating factor had been proven

beyond a reasonable doubt. Indeed, in a constitutional proceeding, defense counsel may have successfully diminished or eliminated some aggravators.

D. This Court should abandon the idea that an advisory jury's unanimous recommendation is a factor to consider in *Hurst* harmless error analysis because such reliance violates the United States Constitution

Although it is not necessary for resolving the harmless error inquiry in Appellant's favor, there are important reasons, grounded in federal constitutional law, that this Court should abandon the reliance it has previously placed on the advisory jury's recommendation. Under the Sixth Amendment, any reliance on the jury's recommendation is problematic in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), where the Supreme Court emphasized that "[h]armless-error review looks, we have said, to the basis on which the jury actually *rested* its verdict." In Appellant's and other pre-*Hurst* Florida cases, there was no constitutionally valid jury verdict on the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard.

Although *Sullivan* addressed a jury verdict as to guilt, the logic of *Sullivan* applies equally in the capital penalty-phase context:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how

> inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279-80. In Appellant's case too, any reliance on his advisory jury's unanimous recommendation would be a violation of the Sixth Amendment.

Reliance upon an advisory jury's unanimous recommendation also runs afoul of the Fourteenth Amendment. The Due Process Clause requires that, in all criminal prosecutions, the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment, and is clearly incorporated into the *Hurst* line of cases, beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Any reliance on the jury recommendation requires its underpinnings to be made beyond a reasonable doubt. Because Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Appellant's case, did not incorporate the beyond-a-reasonable-doubt standard, reliance on them violates due process.

CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to vacate the circuit court's order and remand for an evidentiary hearing on harmless error or allow a new penalty phase proceeding. Appellant also requests the opportunity for full briefing under its normal rules and for oral argument.

Respectfully submitted,

/s/ Billy H. Nolas
Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Fla. Bar 806821

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Lisa A. Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com, and Harry Brody at barbara.sincerelyyours@gmail.com.

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBITS

EXHIBIT 1

STATE OF FLORIDA)
) ss
COUNTY OF ESCAMBIA)

Declaration of Michael A. Van Cavage

I, Michael A. Van Cavage, declare on this 26th day of Oct. 2016, and pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I was an attorney licensed to practice in the State of Florida. I was defense counsel for Norman Grim in 1983 when Mr. Grim was convicted in Escambia County of robbery, burglary, kidnapping, and weapons offenses.

2. In 2000, Mr. Grim was convicted in Santa Rosa County of murder and sentenced to death. In sentencing Mr. Grim to death, Judge Kenneth Bell found and gave great weight to the aggravating circumstance that Mr. Grim had previous felony convictions, including the 1983 convictions when I served as defense counsel.

3. Mr. Rollo did not contact me before or during Mr. Grim's 2000 penalty phase. Had Mr. Rollo contacted me, I would have gladly provided him with information concerning Mr. Grim's 1983 convictions that would have been relevant to diminishing the weight of the prior-felony aggravating circumstance or other aggravating circumstance alleged by the State.

4. For instance, before trial I moved for the appointment of two psychiatric experts to evaluate Mr. Grim's competency and his mental state at the time of the 1982 offenses. In my motion, I stated that I had reason to believe that

Mr. Grim may have been incompetent at the time of the commission of the offense and may be incompetent to assist counsel with his defense. The court agreed to appoint only the state's expert, Dr. B.R. Ogburn, M.D., to conduct a psychiatric evaluation of Mr. Grim.

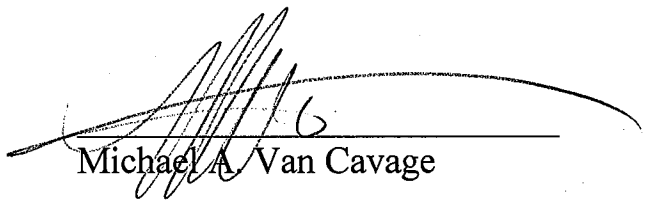
5. Dr. Ogburn examined Mr. Grim on three separate occasions, reviewed court documents, and interviewed Mark Bowden, a friend of Mr. Grim's who was with him on the evening prior to the 1982 offenses. Dr. Ogburn concluded that, on the night of the 1982 offenses, Mr. Grim was intoxicated and succumbed to loss of control stemming from a woman turning him down for another man. Dr. Ogburn further concluded that Mr. Grim's crimes were not planned or premeditated but the result of emotional "triggering" that occurred on the previous night. Dr. Ogburn concluded that Mr. Grim was unable to form specific intent for the 1982 crimes.

6. Prior to Mr. Grim's sentencing for the 1983 convictions, I presented arguments to the court seeking leniency in addition to psychiatric care during incarceration. In a motion to mitigate, in which I argued that Mr. Grim should not spend the majority of his adult years in prison, I referenced Dr. Ogburn's report and stated that Mr. Grim could function and work as a productive member of society if he was provided with adequate psychiatric care. I also noted that, during his pre-trial detention in the Escambia County jail, Mr. Grim had not had any problems with jail officials and had exhibited the ability to function properly within the jail system.

In a separate letter to the court, I expressed my belief that Mr. Grim was not acting maliciously when he committed the 1982 offenses. I noted that Mr. Grim's normal personality is that of a shy young man who at least in personal conversations exhibits no hostility and appears genuinely baffled by his behavior in committing the 1982 offenses. My letter noted that Mr. Grim had been drinking for most of the night of the offenses, which may account for his behavior. I also stated my agreement with Dr. Ogburn that Mr. Grim was unable to form specific intent to commit the 1982 crimes, which were marked by irrationality.

7. The 1983 judgments setting out Mr. Grim's convictions and sentences explicitly imposed a requirement that Mr. Grim receive psychiatric care in prison.

8. Had I been contacted by defense counsel before or during Mr. Grim's 2000 penalty phase, I would have provided the above information, as well as any other information in my files and my recollection that may have been relevant to diminishing the weight of the prior-felony or any other aggravating circumstances. I would have been willing to testify.



Michael A. Van Cavage

EXHIBIT 2

Declaration of John R. Bigham

I, John R. Bigham, declare on this 28 day of OCTOBER 2016, and pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a retired lawyer who formerly practiced criminal defense in the State of Texas. On January 4, 1991, I was appointed by the 27th Judicial District Court of Bell County, Texas to represent Norman Grim on a charge of burglary.

2. The State of Texas agreed to enter into a plea agreement with Mr. Grim. In exchange for Mr. Grim pleading guilty to second-degree burglary of a building, the State agreed to recommend a sentence of 20 years' imprisonment. On January 17, 1991, I, Mr. Grim, and the prosecutor executed a written waiver of jury and agreement to stipulate upon a plea of guilty to burglary with a recommended 20-year sentence. The Court accepted the plea and imposed the recommended sentence.

3. In 2000, Mr. Grim was convicted in Santa Rosa County, Florida of murder and sentenced to death. In sentencing Mr. Grim to death, Judge Kenneth Bell found and gave great weight to the aggravating circumstance that Mr. Grim had previous felony convictions and was under a sentence of imprisonment or parole, including the 1991 Texas conviction when I served as Mr. Grim's defense counsel, and Mr. Grim's parole status on the Texas charge when he committed the Florida capital offenses.

4. Michael Rollo, Mr. Grim's defense counsel for the 2000 murder trial in Florida, did not contact me before or during Mr. Grim's penalty phase. Had Mr. Rollo contacted me, I would have provided him with information concerning Mr. Grim's 1991 Texas conviction that may have been relevant to diminishing the weight of the prior-felony aggravating circumstance or other aggravating circumstance alleged by the State.

5. For instance, Mr. Grim's plea-negotiated sentence of 20 years' imprisonment reflected the fact that he had a prior felony as much or more than the seriousness of the Texas burglary itself. In my experience as a criminal defense attorney in Bell County, Texas, a first-time offender likely would have been charged with second-degree burglary and been permitted to plead to a lesser charge and receive probation. However, because Mr. Grim had a prior felony record, he likely would have been tried for a first-degree felony with a possible sentence of up to 99 years had he decided to plead not guilty. By entering into a plea agreement, Mr. Grim was permitted to plead guilty to a second-degree felony with a recommended sentence of 20 years. In my experience, the State would not have accepted a reduction in the burglary charge if prosecutors felt that the offense itself was too serious to reduce to second-degree burglary.

6. Had I been contacted by defense counsel before or during Mr. Grim's 2000 penalty phase, I would have provided the above information, as well as any

other information in my files and my recollection that may have been relevant to diminishing the weight of the prior-felony or any other aggravating circumstances. I would have been willing to testify.

John R. Bigham

John R. Bigham

State Bar of Texas
02312800

EXHIBIT 3

Declaration of Jethro Toomer, Ph.D.
Pursuant to 28 U.S.C. § 1746

I, Jethro Toomer, Ph.D., declare on this 4th day of November 2016, and pursuant to 28 U.S.C. § 1746, that the following is true and correct.

1. I am a licensed psychologist. My practice includes clinical and forensic psychology. I have been qualified by federal and state courts in several jurisdictions to testify about psychological questions arising in capital cases and other forensic issues. I have been serving as an expert psychological witness in capital cases for over four decades. I have also served as a professor of psychology.

2. Counsel to Norman Grim has asked me to provide a declaration setting forth my opinion regarding the nature, weight, and significance of the prior convictions aggravation in Mr. Grim's case. To that end, counsel provided me with witness declarations and affidavits from the following individuals: Mark Bowden, Ronald Horton, Kathy Smith, Charlotte May, Victoria McKee, Charles Raab, and Nona Young. Counsel also provided me with various records relating to Mr. Grim's prior convictions, as well as records relating to his 2000 trial and death sentencing in Santa Rosa County. I have reviewed those materials, which relate the following relevant information, among other things.

3. Mark Bowden is the witness closest to Mr. Grim. Mr. Bowden says that he and Mr. Grim were best friends, and basically brothers. Mr. Bowden

relates that Mr. Grim has deep-seeded psychological and substance abuse problems. Mr. Grim was self-destructive and used excessive amounts of alcohol and drugs to help cope with his psychological problems.

4. Several of the declarants relate that, when Mr. Grim was drinking, he lost control and engaged in acts that he never would engage in while sober. When he was drunk, Mr. Grim's friends described him as assuming a different personality. One of the victims of his crimes, Nona Young, described him as "a mess, didn't look right and his eyes were strange." The circumstances of Mr. Grim's prior offenses are described by those who knew him and/or were with him around the time of the offenses as driven by alcoholism, drug use, and other psychological issues. Mr. Bowden had been on two-day drinking binge with Mr. Grim immediately preceding Mr. Grim's September 1982 arrest for kidnapping. Charlotte May, Charlie Raab, and Kathy Smith describe the circumstances of their participation with Mr. Grim in a September 1981 robbery in Duval County as being precipitated by heavy, weeks-long alcohol and drug use. Ronald Horton describes committing a 1990 robbery in Texas with Mr. Grim in the midst of an alcohol binge. Two of the victims of Mr. Grim's offenses, Nona Yong and Victoria McKee, relate in their declarations that they do not wish Mr. Grim to be executed.

5. The records provided to me by counsel also shed light on the psychological and substance-abuse issues underlying Mr. Grim's prior convictions. For instance, Mr. Grim's counsel on his 1983 Escambia County convictions, Michael Van Cavage, moved for the appointment of psychiatric experts to evaluate Mr. Grim's mental state at the time of the crimes. Mr. Van Cavage stated that he had reason to believe that Mr. Grim was incompetent at the time of the offense. Dr. B.R. Ogburn, M.D., conducted a psychiatric evaluation of Mr. Grim and reviewed various court documents. Dr. Ogburn concluded that, on the night of the 1982 offenses, Mr. Grim was intoxicated and succumbed to a loss of control as the result of emotional "triggering." Dr. Ogburn concluded that Mr. Grim was unable to form specific intent for the crimes. After Mr. Grim pleaded guilty, Mr. Van Cavage filed a motion to mitigate and wrote a sentencing letter to the judge regarding the circumstances of the offenses. Mr. Van Cavage stated that Mr. Grim's drinking and psychological issues may have been a contributing factor in his commission of the crimes, and recommended that Mr. Grim receive psychiatric counseling.

6. In my opinion, had I been called as a witness in a post-*Hurst v. Florida* proceeding to address the prior convictions aggravation and to assist the jury in understanding the nature, weight, and significance of the aggravation and making a determination whether the prior convictions are sufficient for a death

sentence, I would have explained that they were not substantial or significant in nature. Either I or a similarly qualified mental health expert could have expressed the opinion that the nature, weight, and significance of the priors, under all relevant circumstances, is not substantial or especially weighty in a capital sentencing context, an opinion that I hold. I would have assisted counsel in developing arguments for the jury that the jury should not rely on the priors as sufficiently weighty to justify a death sentence. I would have testified that Mr. Grim's psychological problems as well as his excessive use of alcohol and drugs to cope with his issues, appears, from the accounts of those who know Mr. Grim and from the records provided to me, to have played a contributing role in his prior felony offenses.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Jethro Toomer

Jethro Toomer, Ph.D.

EXHIBIT 4

AFFIDAVIT/ DECLARATION OF MARK S. BOWDEN

PURSUANT TO 28 U.S.C. § 1746

STATE OF FLORIDA)

)

COUNTY OF ESCAMBIA)

I, Mark S. Bowden, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Mark Bowden. I have known Norman "Butch" Grim since tenth grade. We were best friends, basically brothers.

2. Butch had many problems, his relationship with his alcoholic, physically abusive biological father was a constant source of torment for him. His father beat both he and his mother. Even though his father treated him so deplorably he craved nothing more than his acceptance. In high school Butch fantasied about his parents getting back together. Butch dealt with his father's rejection by rebelling against him. His father was a Navy man and straight laced. Because he could never gain his father's approval Butch had very low self-esteem.

3. Relationships were very hard for Butch. Butch never had any girlfriends in high school. He craved loving relationships but was somehow incapable of achieving them. He was a broken person.

4. Butch was his own worst enemy. He was self-destructive. He couldn't control himself. Alcohol and drugs were a way for him to medicate himself. But his excessive use of alcohol and drugs exacerbated his problems.

5. Butch was an alcoholic. He was unable to control or even understand his actions while drinking.

6. Something was going on with Butch deep down. He had psychological problems that he dealt with by drinking. I saw Butch drunk or high on many occasions.

7. I was with Butch the night before and the morning of his September 1982 arrest for kidnapping and other charges. In fact, I had been out drinking with Butch to all hours of the night, and into the morning, on the previous two days. That night Butch and I were drinking at "Franco's" on Bayou Blvd. When the bar closed we continued to drink at an after hour bottle club called "Franco's All Night Affair" on 9th Avenue. We were at the bar until 4:00am or so. We were drinking hard liquor.

8. Butch was really drunk. I could tell based upon our conversation and his bizarre behavior that he was not straight or doing well. Butch was never vocal about his feelings, but he told me, that I was the best friend he ever had – the only friend. Then Butch for some unknown reason became

obsessed with how fat Randy Turner of Bachman Turner Overdrive had become. He wouldn't let it go.

9. That morning at the bottle club Butch attempted to pick-up an African American woman. When she left with another guy, Butch got really upset, strangely upset. I had never seen Butch get so upset over a girl. It just didn't make sense. His behavior was really bizarre, even for Butch. He just wasn't making any sense.

10. I drove Butch to his mother's house where he was staying. Butch asked me if I wanted to hang out and drink more. I was so exhausted from the previous two evenings that I told Butch I needed to get some sleep. I left Butch, who was very drunk, to sleep it off. Later that morning I received call from Butch's sister telling me the police were looking for him.

11. There is no way that Butch would have tried to abduct anyone if not for being so crazy drunk and not in his right mind.

12. As far as I know, every time Butch has been arrested it has been alcohol related. All of Butch's poor decisions seem to be alcohol related. Even just before Butch went to Texas to work, he got drunk and wrapped his Camaro around a telephone poll or tree.

13. I was never contacted by Butch's trial counsel. If so I would have provided this information and testified on his behalf.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Mark S. Bowden

Mark S. Bowden

FURTHER AFFIANT SAYETH NAUGHT.

Sworn and subscribed before me this 19th day of October, 2016, by Mark S. Bowden, who is personally known to me or has produced the following identification: FL: B350-557-60-134-0

Notary Public, State of Florida

DANIEL J. ASHTON
Commission # FF 071854
Expires March 20, 2018
Bonded Thru TroyFain Insurance 800-385-7019

EXHIBIT 5

STATE OF FLORIDA)
) ss
COUNTY OF ESCAMBIA)

Affidavit of Ronald Horton

I, Ronald Horton, declare on this 6th day of October, 2016, and pursuant to 28 U.S.C. Section 1746, that the foregoing is true and correct:

1. My name is Ronald Horton, I live in Pensacola, Florida. I met Butch Grim when he and I worked together on a crew in Pensacola back in the 1990s. We'd worked together about four or five months before our supervisor asked the good workers, like Butch and me, if we wanted to go to Texas on another job. Butch and I were codefendants in the 1990 burglary case in Bell County, Texas. I am now aware that Butch was on probation for this charge when he was arrested for murder in 1998.
2. I remember Butch as a quiet guy at work. He worked alone and kept to himself. But that all changed when he was drinking. Butch drank Busch beer, by the case, and then he'd drink rum and Cokes and smoke pot on top of that. He was an alcoholic, with a serious drinking problem that he could not control. While I was a drinker, too. Butch's drinking was more serious. He seemed to need it.
3. When Butch had a bunch of money, he would drink more and get totally

messed up. He was a bottom of the bottle drunk. He was a red-haired and blue-eyed stocky, little drunk who lost control the more he drank.

4. The night before we left for Texas, Butch got drunk and passed out while he was driving and totaled his Camaro into a lamp post or a tree.
5. After we got down to Texas on Christmas Eve 1990, we went out to a bar. We had been drinking and smoking at the motel. It was a cold night, and it had snowed. It was a serious drinking night. Even when we started playing pool at the bar, Butch was already drunk.
6. After we left, we decided to check out the boat landing to see the icicles from the cold snap. I drove a Mustang Cobra with a bad front tire. On the way back from the boat landing, I needed to take a leak. I also needed new tires for my car. As I told the police, I saw a Pinto which I believed had the right-sized tires that I needed. My plan was to steal them. We pulled into the parking lot of an auto shop and I went in the dark to pee. Butch jumped out of the car like he had to pee too.
7. The next thing I knew, we were stealing tools from the garage. This was totally unplanned. It was just stupid drunken behavior by both of us.
8. The next morning, we were thinking "oh shit, we did this. What have we done?" This never would have happened if we had not been drunk. We both got busted for the burglary. I got 3 years. This was all just a terrible

mistake which hurt my family greatly.

9. I feel sorry for Butch. He was a bad drunk, and couldn't handle it well. He was an alcoholic. He got into a bad situation he never would have gotten into if he had not been drinking so much.

10. I have never been contacted by any attorneys or investigators from Florida representing Butch. I didn't even know that Butch was sentenced to death. If contacted I would have assisted and made myself available.

10-6-16 Ronald L. Horton

Ronald Horton

Sworn or affirmed before me this 6th day of October, 2016. Affiant, Ronald Horton, is personally known to me.

Notary Public

My commission expires:

NOTARY PUBLIC STATE OF FLORIDA
DANIEL J. ASHTON
Commission # FF 071854
Expires March 20, 2018
Bonded Thru Troy Fain Insurance 800-385-7019

EXHIBIT 6

DECLARATION OF KATHY SMITH

PURSUANT TO 28 U.S.C. § 1746

1. My name is Kathy Smith. I currently reside in Georgia. In the fall of 1981, my sister Charlotte May introduced me to Sharon Clough and two Navy sailors named Norman Grim AKA Butch and Charles Raab. In September of 1981, the five of us were involved in robbing a convenience store in Mayport, FL.

2. I only knew Norman and Charles for about a month before the robbery. I thought Norman was very immature for his age. I thought I was older than him and was shocked when I found out he was 20. Norman and Charles may have had motorcycles, but they were not men. They were immature boys and often drunk.

3. I hung out with Sharon, Charlotte, Norman and Charles quite a bit. They were drinking and smoking marijuana daily. On the night of the robbery, Charlotte, Sharon, Norman and Charles were drinking and it was clear they were using other drugs. I could tell they were all intoxicated. The guys would have been using Quaaludes and acid during this time period too. If not for being drunk and high, the robbery would not have happened.

4. The robbery its self was stupid and immature. We were just stupid kids who made a rash decision. We took beer and cigarettes from the store. There were no guns used.

5. Sharon seemed like the mastermind behind everything we did. Shortly after the robbery, we all left to go to Maine. We stayed at Sharon's parents' house. Within two weeks, I hitchhiked back to Florida because Sharon and I had a disagreement. Sharon was very manipulative.

6. I have just now learned that Norman is serving a death sentence. It saddens me to know that the robbery that I was involved in with Norman was used by the prosecution as a factor in requesting the jury and judge sentence him to death. If asked by his trial counsel I would have told them this information. I would have been willing to testify and would have explained that this whole thing was the stupid and immature behavior of young people under the influence.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Kathy Smith

Kathy Smith

10/15/16

Date

EXHIBIT 7

DECLARATION OF CHARLOTTE L. MAY

PURSUANT TO 28 U.S.C. § 1746

- My name is Charlotte L. May, I currently reside in California. In the fall of 1981, my sister Kathy and I became acquainted with Norman Mearle Grim, Jr. and Charles Raab. Norman went by Butch. Charles Raab was dating Sharon Clough. Sharon was friends with my sister and me. In September of 1981 the five of us were involved in robbing a convenience store in Duval County, FL.

- I only knew Butch and Raab for a month or so. During the two to three weeks prior to the robbery Butch was drinking and smoking pot daily. We all were. Butch was drinking as much beer as he could get his hands on. It was during one of these binges that we robbed the convenience store. If not for being drunk the robbery would not have happened.

- The robbery its self was stupid and immature. We were just dumb kids who made a very a poor decision. The robbery took place at a convenience store across the street from the trailer park Sharon lived at. There were no guns. No one was supposed to nor did anyone get hurt. Basically we just walked into the store and took money and beer. It was a drunk prank by stupid kids more than a robbery.

- My sister and I looked up to Sharon. We were both young and Sharon seemed so mature.

She carried herself like a badass biker chick. Sharon always got her way. That was just the way it was. Sharon was the catalyst for everything we did. She was the reason we ended up in Maine. After the robbery and getting to Maine Sharon began to show her true colors. She was very manipulative and only cared about herself. She would do anything to advance her own agenda.

- I have just now learned that Butch has been sentenced to death. I'm sad that the robbery that I was involved in with Butch was used by the prosecution as a factor in requesting the jury and judge sentence him to death. If asked by his trial counsel I would have provided them this information. I would have been willing to testify and would have explained that this whole thing was the stupid and immature behavior of young people who had been drinking too much.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Charlotte May

Charlotte L. May

10/12/10

EXHIBIT 8

DECLARATATION OF CHARLES JOSEPH RAAB

PURSUANT TO 28 U.S.C. § 1746

1. My name is Charlie Raab. In September of 1981 Norman "Butch" Grim and I were in the Navy and stationed together in Mayport, FL. Later in 1981 we were convicted as co-defendants on an unarmed robbery charge in Duval County, FL. Also involved in the robbery were Sharon Clough and Kathy and Charlotte May.

2. Butch and I originally met at A – School at the Navy base in Virginia Beach. We were reunited when we were stationed in Mayport, FL. At Mayport, Butch and I would drink every night during the week. On the weekends we drank even more, and we would get stupid drunk. Butch was immature and he was an alcoholic.

3. In September of 1981, I was dating Sharon Clough. Sharon was friends with Charlotte and Kathy May. Charlotte was a head turner who had a way about her. She had Butch wrapped around her fingers. Butch would have done anything for Charlotte.

4. Butch and I went to see Charlotte and Sharon. The four of us, along with Charlotte's sister Kathy, started binging and just didn't stop binging until we were arrested in Maine. We drank and kept drinking for about four weeks straight.

5. At the start, Butch and I had about five hundred dollars each. It didn't take long to blow through that money. We were drinking hard. Butch was drinking beer by the case and whiskey by the bottle. When he was awake, Butch was drinking until he passed out. When he woke up,

he started drinking again. Butch drank more in that three to four week time span than most drinkers would consume in a year. I'm surprise that he didn't die from alcohol poisoning.

6. When the money ran out, Sharon made it clear that the party was going to continue with or without Butch and me. It was on us to get more money. Sharon was demanding that I get enough money to move her back to Maine or she would find a man that could. She made clear that she was taking Charlotte and Kathy with her and that we would never see them again. I was in love. I didn't want to see her go. I even sold my motorcycle prior to going to Maine so I would have some money left when we got there to start our lives together.

7. Robbing the convenience store was Sharon's idea. She used to work at that store. Her idea, if you could call it that, was to steal from the place right before it closed. We were all drunk. We ran into the store, and stole a lot of beer and cigarettes. No one had guns or knives. No one got hurt. It was just a stupid drunken mistake.

8. After the robbery the five of us headed to Maine. We weren't in Maine for two weeks before we were apprehended. Butch and I were brought to a base in Maine. I recall talking to Butch at the base in Maine after I sobered up. Neither of us could explain nor wrap our minds around what we had done. It defied logic. If not for the crazy amount of drinking this would have never happened.

9. I lost contact with Butch after being discharged from the Navy and leaving Florida. I had no idea that he had been charged in a murder or sentenced to death. If contacted by his attorneys I would have provided them with the above information and testified if requested to

do so. I would have explained what happened with this crime and Butch. I also would have testified, if asked, that Butch should not be sentenced to a death penalty.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Charles Joseph Raab

Charles Joseph Raab

10/18/16

Date

EXHIBIT 9

DECLARATION OF VICTORIA LYNN McKEE

PURSUANT TO 28 U.S.C. § 1746

1. My name is Victoria "Pike" McKee, I now reside in California. In September of 1982, I lived in Escambia County, Florida.

2. Norman Grim was charged with burglary and aggravated battery as a result of him breaking into my residence. I recall that he pled guilty.

3. I became aware at some point that Norman Grim had been charged with murder. At the time I was living in Alaska. I spoke briefly with someone by phone. I don't recall the details of the conversation. I do not recall being asked my opinion on the death penalty.

4. I am against the death penalty. If asked, I would have been against death penalty for Mr. Grim in 1998, especially in light of Mr. Grim's mental health issues. If contacted by defense counsel I would have made these views known.

5. I do not wish to see Norman Grim executed.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Victoria McKee

Victoria Lynn McKee

10-13-16

EXHIBIT 10

DECLARATION OF NONA SIMMONS YOUNG.

PURSUANT TO 28 U.S.C § 1746

1. My name is Nona Young, I currently reside in Dakota County, Minnesota. In September of 1982, I lived in Pensacola, FL. I worked as a radio personality and also for WSRE –Television.

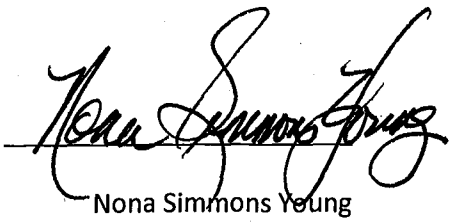
2. Norman Grim was charged with attempting to kidnap me. I recall that he was wearing nothing but shorts and his hair was windblown. He was a mess, didn't look right and his eyes were strange.

3. I was in contact with the police and followed the case through sentencing. I am aware of the bizarre circumstances surrounding other crimes he committed that day. They did not appear to me to be planned. I attended his sentencing. I recall that the judge sentenced him to psychiatric counseling.

4. In 1998, I was working in the news room of the NBC affiliate in Mobile, AL. I was in the news room when the story broke that the police were looking for Norman Grim in connection to a murder. At some point in the following year or so I was contacted by a female lawyer from the Office of the State Attorney. I was told that the State of Florida was seeking the death penalty against Norman Grim. I was asked my opinion on the death penalty and if I was willing to testify for the State. I told the prosecutor that I did not want to be in anyway responsible for assisting in Norman Grim being sentenced to death. I did not hear from the State Attorney's Office again.

5. I did not wish for Mr. Grim to be sentenced to death in 1998 and I do not wish for him to be sentenced to death now. I was never contacted by Mr. Grim's trial counsel. If I had been I would have provided all of this information.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.



Nona Simmons Young

Date: 10/17/16

EXHIBIT 11

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

To File Rec'd 4/25/83

STATE OF FLORIDA,
Plaintiff,
vs. Case Nos. 82-4213 - 82-4216, 82-4201, 82-4200
NORMAN GRIM,
Defendant.

MOTION TO MITIGATE

COMES NOW the Defendant, NORMAN GRIM, by and through his undersigned attorney and hereby moves this Honorable Court to mitigate his sentence pursuant to Fla.R.Crim.P. 9.800, and as grounds, the Defendant would show.

1. That on March 16, 1983 the Defendant was sentenced to 25 years in prison.

2. That the Defendant, Norman Grim, is twenty-two years old and prior to his present sentence of 25 years being imposed he had never been sentenced to any prison time.

3. That he presently possesses a very positive and constructive attitude about what may have caused him to behave in the way he did on September 9, 1982 and also about what he can do to assure society and himself that he will never again violate the law.

4. This attorney has been in contact with Dr. Ogburn who has indicated to me that with psychiatric help and counselling coupled with a period of incarceration as punishment, that Norman Grim could function and work as a productive and honorable member of society in the future.

5. That Norman Grim has been incarcerated since September 9, 1982 in the Escambia County Jail and has not had any problems with the jail officials and has exhibited the ability to function properly within the jail system, which I believe indicates that he can, with the aforementioned counselling and rehabilitative punishment, also function in society.

6. It is my belief, that given his present positive attitude, his young age, and his willingness to accept counselling and whatever treatment is determined necessary to maintain proper behavior patterns, that the 25 year sentence which was imposed upon him should be reduced to a period of time which would have the same effect but not keep him locked up for most of his adult years.

WHEREFORE, the Defendant, through his undersigned attorney respectfully requests this Honorable Court to mitigate his sentence.

* * * * *

NOTICE OF HEARING

TO: Robert Heath
Assistant State Attorney

YOU ARE HEREBY notified that the foregoing motion will be brought on for hearing on May 12, 1983 at 4:30 p.m. before Judge William Anderson.

PLEASE BE GOVERNED ACCORDINGLY.

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was hand delivered to the Office of the State Attorney, 190 Governmental Center, Pensacola, Florida, this the 22nd day of April, 1983.

JACK BEHR
PUBLIC DEFENDER

MICHAEL A. VAN CAVAGE
ASSISTANT PUBLIC DEFENDER
190 GOVERNMENTAL CENTER
PENSACOLA, FLORIDA
ATTORNEY FOR THE DEFENDANT

EXHIBIT 12

Robert Wark

Office of the Public Defender

First Judicial Circuit

Escambia County Judicial Center
P.O. Box 12666
Pensacola, Florida 32574

JACK BEHR
Public Defender

TERRY TERRELL
Chief Assistant

(904) 436-5400

March 15, 1983

RECEIVED
[illegible]
State Attorney's Office

The Honorable William H. Anderson
Circuit Court Judge
190 Governmental Center
Pensacola, Florida 32501

RE: Norman Grim
Case Nos. 82-4200, 82-4201,
82-4213, 82-4214, 82-4215,
82-4216

Dear Judge Anderson:

The defendant pled guilty on February 9, 1983 to all counts contained within all cases pending against him. The State Attorney's Office had offered a plea bargain for Norman to plea to twenty-five years in prison concurrent on all charges.

Norman Grim is 22 years of age and has exhibited to this attorney a very positive attitude about his present situation. His memory of the events on September 9, 1982 is faulty but he does realize that he committed the crimes he is accused of and that he will be punished for these acts. He is at a loss to explain his behavior and desirous of receiving psychiatric counselling and guidance so that he may avoid any further criminal acts. He has come across to this attorney as an intelligent and sensitive young man, who for reasons I do not understand and I do not believe the defendant fully understands, acted in an irrational and dangerous manner on September 9, 1982. I do not believe that Norman was acting maliciously when he committed these acts. Norman's normal personality is that of a shy, diffident young man who at least in personal conversations exhibits no hostility towards no one and as stated appears to be baffled and confused about his behavior on September 9, 1982. While there is no excuse for his behavior, it should be noted that he had been drinking for most of the night and this may have attributed to his initial aberrant behavior.

I feel as Dr. Ogburn feels that Norman probably, while aware of what he was doing and aware that it was wrong, was not at that time capable of forming the specific intent to commit these crimes. His behavior during this period seemed to have no purpose and no direction. After the initial incident with Nona Young his behavior is indicative of his irrationality. While the Presentence Investigation lays out the facts of his behavior after the initial incident with Nona Young, I feel it indicates that Norman Grim was not acting in a purposeful manner at that time.

I would ask this Honorable Court when reviewing the charges and the evidence against Norman Grim to remember that his aberrant behavior of that day is not an indication of the type of person Norman Grim is but merely an anomaly, and, as stated, is not truly characteristic of the defendant. I would ask this Honorable Court to be as lenient as possible when considering all the facts, the defendant's age, his present positive attitude, and Dr. Ogburn's report which indicates that the most important thing is that Norman Grim recieve psychiatric help.

Sincerely,

Michael A. Van Cavage
Assistant Public Defender

Enclosure

cc: Robert Heath
Assistant State Attorney

EXHIBIT 13

EXHIBIT 14

CURTIS A. GOLDEN
STATE ATTORNEY
FIRST JUDICIAL CIRCUIT OF FLORIDA

Please reply to:
Pensacola Office

October 7, 1982

Honorable William H, Anderson
Judge, Circuit Court
190 Governmental Center
Pensacola, Florida 32501

Re: State v. Norman Grim
Case No. 82-4200, 82-4201,
82-4213 - 82-4216

Dear Judge Anderson:

Enclosed please find a motion and order for appointment of expert in the above-styled cases. I have no objection to the motion and order but would like to request that Dr. Benjamin Ogburn be appointed as one of the two experts to examine the defendant.

By copy of this letter I am requesting Mr. Van Cavage to advise the court if he has any objections to Dr. Ogburn.

Very truly yours,

Robert N. Heath, Jr.
Assistant State Attorney

RNHJr/sg

Enclosures

cc: Michael A. Van Cavage, Esquire

ESCAMBIA COUNTY
Post Office Box 12726
190 Governmental Center
Pensacola, Florida 32501
Felony & Intake - 436-5300
Misdemeanor - 436-5300
Child Support - 436-5401

SANTA ROSA COUNTY
Courthouse Second Floor
Post Office Box 845
Milton, Florida 32570
623-7760 & 994-5063

OKALOOSA COUNTY
Cedar Street
Post Office Box 917
Crestview, Florida 32536
682-6161
Courthouse Annex
Shalimar, Florida 32579

WALTON COUNTY
211 East Nelson St
Post Office Box 630
DeFuniak Springs, FL 32433
892-8122

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.
NORMAN GRIM,
Defendant.

CASE NOS. 82-4200, 82-4201, 82-4213 - 82-4216

ORDER APPOINTING EXPERTS

THIS CAUSE coming before the Court, upon the Motion of the Defendant to appoints experts, and the Court having been fully advised in the matter, is is hereby

ORDERED AND ADJUDGED that Dr. Benjamin and Dr. Oglesby ~~are~~ is hereby appointed to examine the Defendant in order to assist the attorney for the Defendant prepare for defense. They shall report only to the attorney for the Defendant in matters related to their consultation with the Defendant and opinions shall be deemed to fall under the lawyer-client privilege.

DONE AND ORDERED this the 8th day of October, 1982, at Pensacola, Escambia County, Florida.

(SIGNED) WILLIAM H. ANDERSON
CIRCUIT COURT JUDGE

cc: Office of the State Attorney
Office of the Public Defender
_____, Appt. Expert
_____, Appt. Expert

RECEIVED
OCT 18 1982
STATE ATTORNEY