

IN THE SUPREME COURT OF FLORIDA

NORMAN MEARLE GRIM, JR.,

Appellant ,

v.

Case No. **SC01-256**

STATE OF FLORIDA,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Norman Grim, wants to die. That makes this an unusual capital case. He was convicted of committing a first degree murder and sexual battery, but he refused to let his attorney present any mitigating evidence or argument at the penalty phase hearing. Hence, that proceeding was severely truncated, and only the State presented its case for aggravation. The Record on Appeal consists of nine volumes, and references to it will be in the form (VV R PPP), where VV is the volume number and PPP is the page in that volume.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Santa Rosa County on August 26, 1998 charged the Appellant, Norman Grim, with one count of first degree murder and one count of sexual battery with a weapon (1 R 9-12). He pled not guilty to those offenses (1 R 13), and the State later filed a notice that it intended to seek the death penalty if he was convicted of the murder (1 R 18). Later, at his request, the court appointed Dr. James Larson, a psychologist, to evaluate his competency and sanity (1 R 48-49, 50-53, 94-96). Grim or the State also filed the following motions or notices relevant to this appeal:

1. Notice on Defendant's Statements and Motion to Determine voluntariness (1 R 100-103). Denied (2 R 202-205)
2. Notice of Intent [by the defendant] to Introduce Victim Hearsay Statements (1 R 132-33). The court refused to let Grim introduce the hearsay (2 R 206-210).
3. Motion to Suppress evidence obtained through a search of Grim's home (1 R 134-35). Denied (1 R 200-201).
4. Notice of Intent to Present Expert Testimony of Mental Mitigation Pursuant to Rule 3.202, Fla. R. Crim. P.

Almost from the beginning of this case, Grim indicated he wanted to waive his right to present any mitigating evidence should his case proceed to the penalty

phase hearing. Shortly before his trial began, the court, following the procedure outlined by this Court in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), found that he had made a valid waiver of the right, and it heard what mitigation Grim's penalty phase lawyer believed he could prove (2 R 211-15). The defendant proceeded to trial before Judge Kenneth Bell, and after the jury had heard the evidence, argument, and law, it found the defendant guilty as charged on both counts (2 R 219).

Accordingly, he proceeded to the penalty phase portion of the trial, and the state presented evidence of, and the court would eventually find it had proven, the following aggravators:

1. At the time of the murder, Grim was on parole.
2. The defendant had several convictions for violent felonies although they had occurred in 1981 or 1982.
3. Grim committed a sexual battery at the time of the murder.

The prosecutor gave a closing argument at the penalty phase, but Grim's lawyer remained silent. Predictably, the jury unanimously recommended he receive the death penalty (2 R 220).

Although Grim had waived presenting mitigation, the court considered a Pre-sentence Investigation Report (PSI), and it appointed Mr. Spiro Kypreos as

special counsel to present any mitigating evidence at the subsequent Spencer¹ hearing (2 R 221-22). He did, arguing specifically that the two statutory mental mitigators applied (4 R 594-615). The court rejected finding he had established them, but it concluded he had proven several other nonstatutory factors that mitigated a death sentence:

1. The defendant had an abusive childhood. Significant weight.
2. The defendant was a “skilled, punctual, dependable, good and hard worker who had some supervisory responsibility.” Significant weight.

3. Mental problems of a smaller degree than the statutory mental mitigators.
Great Weight.

4. Stress due to marital problems. Great weight.
5. Despite his good qualities, Grim “is given to appalling errors of judgment when under stress.” Recognized but given no additional weight.

6. The defendant might be a good inmate in the future. Some weight.
7. The defendant entered the prison system at a young age. Little weight.

Besides rejecting the statutory mental mitigators, the court gave no weight, because they were not established, to his history of alcohol use and his lack of needed long term psychiatric care (2 R 244-45).

¹ Spencer v. State, 615 So. 2d 688 (Fla. 1993).

The court found the aggravating factors outweighed the mitigation, and it sentenced Grim to death for the first degree murder, and it imposed a sentence of 32 years in prison for the sexual battery, to be served consecutively to the death sentence (2 R 250-55).

This required appeal follows.

(2 R 240-46)

STATEMENT OF THE FACTS

Cynthia Campbell was a lawyer, and on July 27, 1998, she was a busy one that had enemies. About five in the morning someone threw a lug nut through one of her windows (6 R 274). She called the police and within a short time they appeared. They found the nut, observed the broken window, and found another window with a torn screen (6 R 274).

Norman Grim lived next to her her, and he had three dogs that began barking when the police showed up (6 R 274). He also got up, and walked to Campbell's house to see what was going on (6 R 273). Nothing much happened, and he invited Campbell over for some coffee (6 R 276). She demurred, and Grim went back home. As the police officer was talking with her, a large tree branch snapped off, sounding like a gun (6 R 280). It hit her car. Alarmed, the officer went outside. Grim also came back, and, after discovering the innocent explanation renewed his invitation for coffee (6 R 281). This time, she accepted (6 R 281), and within minutes the police had left her home (6 R 282).

Now, Campbell had a 7:30 appointment with her bookkeeper (6 R 290). She also had an 8 a.m. meeting with her new secretary or paralegal (6 R 290, 295) . When the lawyer failed to show up for the first meeting the bookkeeper went to her home (6 R 290). The front door was open, the lights were on, and her car was

there (6 R 291). She went inside and called for her, but got no response (6 R 291). Similarly, the new paralegal also went to her home about 9 a.m., and within a few minutes, Grim also came to the house. Concerned, she eventually called the police (6 R 292). When they arrived, they completed a missing persons report (6 R 297). They also asked to search the defendant's house, and after initially balking, he let them walk through it (6 R 304). They noticed he had a pink color² on one shoulder (Grim told one officer that it was paint primer he had used on his car (6 R 348)), saw some black drops on the floor, but otherwise saw nothing suspicious in the house (6 R 305). They saw no blood on the floors or any other signs of a struggle (6 R 330). One officer noticed the defendant had several small reddish brown stains on the shorts he wore, and his left arm had a "tan line from a watch." (6 R 337). After conducting a room by room search, they went outside. They saw a gate that had evidently not been used for a while, and which appeared as if it had been recently pushed open (6 R 321). They peered inside his car, but again found nothing that raised their suspicions. When they asked to look inside the trunk, Grim said he did not have the key to it (6 R 325).

² One officer would describe it as "reddish brown." (6 R 337)

By this time, Grim's dogs had gotten loose, and he asked the police if he go get them (6 R 337). He got in his car and drove away. An officer followed but eventually lost him, and the defendant never returned to his house (6 R 338).

About 1 p.m. a woman who used to work with Grim saw him near his car at a fishing bridge in Pensacola (7 R 461). The trunk was open, as were both doors (7 R 462). Two hours later a man fishing nearby snagged what was later determined to be the body of Cynthia Campbell. It was wrapped in a sheet similar to those owned by Grim (7 R 510), a rug similar to scraps his parents had given him (7 R 508, 540), a rope similar to that found in Grim's house (7 R 543), masking tape that matched that also found in the defendant's house (7 R 547), and plastic garbage bags similar to those he had in his house (7 R 412).

Subsequently, the police got a search warrant to search Grim's house. This time, they found evidence of Campbell's blood in the kitchen and dining room (7 R 409, 416, 419, 8 R 618-19). They also seized a cooler that had bloodied sheets, a claw hammer, a pair of glasses that belonged to the victim (7 R 525), and a watch with a torn band (6 R 400). They also lifted the victim's fingerprints from a coffee cup seen in Grim's kitchen (8 R 667).

Campbell had been hit with a blunt instrument, perhaps a hammer, 18 times about the head, fracturing her skull (7 R 579-81). She had been stabbed at least

eleven times, with seven of those wounds being to the heart (7 R 583), and she had “defensive wounds” on her left hand (7 R 575). She also had a large laceration of “the undersurface and the back of the vagina.” (7 R 585)

Grim was arrested three days later at Watonga, Oklahoma where his father lived (7 R 484-85).

SUMMARY OF THE ARGUMENT

~~ISSUE~~ Grim refused to present any evidence or argument to mitigate a death sentence. Accordingly, the penalty phase hearing amounted only to the State presenting evidence of three aggravating factors. Predictably, the jury unanimously recommended that Grim die. The trial court appointed Mr. Spiro Kypreos to act as special counsel to present any mitigating evidence he could find. It also ordered and considered a Presentence Investigation Report. Despite the abundance of mitigation found, presented, and argued at that final hearing, the trial court, giving great weight to the jury's death recommendation, sentenced Grim to death. This Court, however, has recently said that in a similar situation, where the defendant refused to present any mitigation, the trial court cannot give the jury's death recommendation the normal "great weight" it deserves. In this case, however, Grim never waived his right to a jury recommendation, which meant the court had to consider its verdict. Yet, that decision could achieve legitimacy only if it heard the same evidence as that which was available to the trial court. This means that what Mr. Kypreos presented to the court at the Spencer hearing should have been also given to the jury. That it was not was error.

~~ISSUE~~ Immediately before trial began, the court learned that Grim intended to waive his right to present mitigation during any possible penalty phase proceeding in his case. The

court, following the procedure set out by this Court in Koon v. Dugger, 619 So. 2d 246 (Fla.1993), asked Mr. Michael Rollo, Grim's penalty phase attorney what mitigation he believed he could prove. Among the several factors he subsequently listed, he particularly said that he believed that Dr. James Larson, the psychologist appointed to assist the defense, would testify that both statutory mental mitigators applied.

At the later Spencer hearing, Mr. Spiro Kypreos relied on Dr. Larson's deposition, which made no mention of any of the mental mitigators. Indeed, he never said anything about this expert's ability to establish that at the time of the murder Grim was under the influence of an extreme emotional disturbance and that his ability to appreciate the criminality of his conduct was substantially impaired. The court, however, knew what Dr Larson allegedly would have said, and it therefore should have called him as its witness to establish those two mitigators. That it failed to do so was particularly significant here because it later rejected finding their existence.

The ~~ISSUE III~~ ~~ISSUE III~~ to let Grim present evidence that someone, shortly before Cynthia Campbell was murdered, threatened her life. In response to those threats, she told her secretary, that "If she were ever found floating in the bay look to Henry Homes." Such evidence, which was Grim's only defense, was relevant to show

that someone other than the defendant may have murdered her. Significantly increasing the likelihood of their veracity, other evidence corroborated what Ms. Campbell had said, so the court erred in refusing to let the jury hear Grim's defense.

ARGUMENT

ISSUE I

THE COURT ERRED IN GIVING THE JURY'S DEATH RECOMMENDATION GREAT WEIGHT BECAUSE, IN LIGHT OF THE EXTENSIVE MITIGATION PRESENTED AFTER IT HAD RECEIVED THAT RECOMMENDATION, IT DESERVED LITTLE OR NO CONSIDERATION, A VIOLATION OF THE PROCEDURE SET FORTH IN SECTION 921.141 FLORIDA STATUTES AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Almost from the start of this case, Grim has said, at least to his lawyers, that he wanted no mitigation presented to justify sentencing him to life in prison (2 R 211-12, 4 R 15, 20). He intended to mount an all or nothing defense in the guilt phase of his trial, but if convicted, he wanted to be executed rather than spend the rest of his life in prison (4 R 21-22). This attitude came to the court's attention on October 27, 2000, the first day of trial, when Mr. Michael Rollo, the lawyer appointed to represent Grim for any possible penalty phase hearing, gave the court a written notice of the "defendant's waiver of presentation of mitigation evidence in the penalty phase." (2 R 211-15). Rather than proceeding to voir dire, as would normally have been done, the court held an extensive hearing on what Grim wanted to do and what it should do. Understandably, the trial judge, the prosecution, and

defense counsel were hesitant to rush into solving this unusual problem. They correctly concluded that the court had to consider whatever mitigation apparently existed. Relying on this Court's opinion in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) and Chandler v State, 702 So. 2d 186 (Fla. 1997), the court asked Mr. Rollo what mitigation he had found. He said that Dr. Larson, the court appointed forensic psychologist, would provide testimony that supported finding the two statutory mental mitigators. That is, at the time of the murder Grim acted under the influence of an extreme emotional disturbance, and his ability to appreciate the criminality of conduct was substantially impaired (4 R 12-13). Dr. Larson would also provide testimony to support other, nonstatutory mitigation (4 R 15). Additionally, Mr. Grim had worked for some time at a plant that made metal tool boxes, and he was a good employee (4 R 16-17). Counsel had also talked with the defendant's mother who described her son as having "somewhat of a chaotic childhood." (4 R 17). His father was alcoholic, distant, and never had a close relationship with his son (4 R 17). Finally, at the time of the murder, Grim was going through a divorce, which created its own emotional stress (4 R 18).

The court, extensively questioned the defendant about the voluntariness of what he was doing and whether he was making an intelligent decision (4 R 550-54). Specifically, it told him "You have the absolute right under Florida law and statute

to waive that jury advisory sentencing. Do you understand that?” Grim said he did, but as matters turned out, he never waived it (5 R 27). The court then found that “Mr. Grim has freely, voluntarily and knowingly made the decision to waive the presentment to the jury of mitigation evidence in this case, and his right to a jury’s advice and recommendation of life and death, and he has the absolute right to do that under Florida Statute and applicable case law.” (4 R 33-34).

The court also said that once the jury had returned its sentencing recommendation “I want to go back on the record to discuss in more detail the statutory mitigators and non-statutory mitigators that we weren’t able to discuss as fully here.” (4 R 34)

Accordingly, after the jury had unanimously recommended the court sentence Grim to death, it revisited the absence of any mitigation at the very truncated penalty phase hearing. Specifically, on November 2, 2000, it appointed Mr. Spiro Kypreos as special counsel “to present mitigating evidence at this Spencer hearing. He will represent the public interest in bringing forth appropriate mitigating evidence to be considered by the Court in its sentencing decision.” (2 R 221)³

³ Early in the proceedings of this case the court had also appointed counsel to represent Mr. Grim for the penalty phase portion of the trial, if necessary (1 R 78). Acceding to the wishes of his client, he presented nothing in mitigation (9 R891, 894, 897).

On November 7, 2000, Mr. Kypreos presented the following evidence:

1. Dr. Larson, the psychologist appointed as a confidential expert, and via deposition, said that Grim suffered from and had been treated for “intermittent explosive disorder.” (4 R 569) A 1982 psychological report foreshadowed that diagnosis (4 R 570, 601).

2. Grim worked at a plant that made metal boxes. His shift supervisor said the defendant had worked for him as a “leadman in our fabrication department” for a little over a year (of the four years he had worked at the plant), and during that time he had performed his duties “good to excellent.” (4 R 575, 579) He supervised from six to 12 persons, was never a disciplinary problem, and was productive (4 R 576-77, 581).

3. His sister, who was very hostile to Mr. Kypreos at the hearing, said she was close to her brother, and they went to church regularly (4 R 584). She also said he had served in the Navy, and was proud to have done so (4 R 588).

4. Special counsel also introduced a 1982 psychiatric evaluation done of Grim, and a PSI done in 1983.

5. Mr. Kypreos, besides presenting evidence to mitigate a death sentence, wove together the extensive mitigation and applicable law and argued that this case was not one of the “worst of the worst.” (4 R 592-613).

The court accepted the mitigating evidence Mr. Kypreos presented and most of it found its way into the court's sentencing order as mitigating factors with the notable exception that the court refused to find the two statutory mental mitigators (2 R 243). It did, however, consider Dr. Larson's deposition testimony as nonstatutory mitigation. In brief, it found the following evidence, none of which the jury had heard, as mitigating a death sentence:

1. Grim had a disruptive and abusive childhood. Great weight.
2. He had been a valued, dependable worker for the four years before the murder. Significant weight.
3. Grim suffers from an intermittent explosive disorder, depressive disorder and antisocial personality disorder. Very significant and given great weight.
4. His marriage was dissolving at the time of the murder, he had sought psychiatric help, and was taking medication. Great weight.
5. The evidence suggested that he would be a good inmate. Some weight.
6. Grim was sent to prison in 1983 when he was young-22. Little weight.

(2 R 240-46)

When we look at what the court did with the individual sentencing problems that arose in this case, it is hard to make any good faith argument that it erred in sentencing Grim to death. When we look at the "totality of the circumstances,"

however, the inescapable conclusion emerges that the trial court fundamentally erred in finding he deserved to die. This in no way castigates the trial court's sincere desire to impose a just punishment. Grim, or rather his appellate counsel, argues that the trial court, applying two procedures this Court has fashioned to remedy specific problems, inadvertently created a situation in which the jury's recommendation of death deserves far less than the great weight this Court has said such verdicts deserve. Then, without any valid guidance from this voice of the community, the court sentenced Grim to death. In doing this, the trial judge violated Florida's death penalty statute, Section 921.141, Florida Statutes, and the proscriptions developed under the Eighth Amendment to the United States Constitution. As such, its error amounts to a misapplication of a rule of law, and it is subject to a de novo review by this Court.

This novel argument arises directly and by implication from opinions of this Court and the United States Supreme Court. First, the overarching consideration in this area of the law focuses on the reliability or justness of imposing a capital sentence on a defendant found guilty of committing a first degree murder. See, e.g., Simmons v. South Carolina, 512 U.S. 154, 172 (1994)(Souter, concurring.) To enhance the reliability of a finding of death this Court has created an additional procedure the trial court must follow after it has received the jury's

recommendation but before it actually imposes sentence. Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993). In Grossman v. State, 525 So. 2d 833 (Fla. 1988), this Court required the trial court to prepare a written order before it orally pronounced punishment. In Spencer, the prosecution and the trial court had an ex parte discussion regarding how to comply with that case. The trial court had also drafted a sentencing order before the final hearing in which counsel would present arguments about why his client should be spared a death sentence. It thus appeared that the trial court had made up its mind about what punishment to impose without regard to any last arguments the defendant might make. “[W]e did not perceive that our decision [in Grossman] would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard.” Spencer, at 690. Hence, to give the defendant the utmost due process, in this case the right to be heard, the Court created the Spencer hearing.

Second, unlike most states that have capital punishment, in Florida we have split capital sentencing between the jury and judge. Espinosa v. Florida, 505 U.S. 1079 (1992). The former, after hearing the relevant evidence and law, recommends whether the defendant should live or die. The latter, giving that vote “great weight,” then imposes the appropriate sentence. Tedder v. State, 322 So. 2d 908 (Fla. 1975). There is, therefore, an interdependence between the judge and jury. In

Espinosa, the United States Supreme Court recognized that symbiotic existence by holding that the jury, as a co-sentencer, had to have correct statements of the law in order for its recommendation to receive great weight. Without that the jury's recommendation was suspect, and the judges sentence unconstitutional.

Third, this Court has created a procedure to use whenever defendants like Grim have decided they would rather die than spend the rest of their lives in prison. While acknowledging their right to control their destiny, Hamblen v. State, 527 So. 2d 800 (Fla. 1988), it has imposed on defense counsel the obligation to present whatever mitigation he believes exists. Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). In most instances the defendants have refused to cooperate with their lawyers in meeting the demands of the Koon hearing, so it is not a particularly satisfying solution to a difficult problem. It is, however, the best that can be done under the unusual circumstance of a defendant wishing to die and doing all he can do to have the State kill him.

Fourth, when a sentencing jury makes a recommendation without considering or being given the mitigation the sentencing judge considered, the latter can give its verdict no weight. In Muhammad v. State, 26 Fla. L. Weekly S244 (April 5, 2001), this Court again faced the "volunteer" situation. That is, the defendant wanted to die, and he prohibited his trial counsel from presenting any evidence or

argument to mitigate a death sentence. There, as in this case, the jury recommended death (though by a vote of 10-2), and as here, the trial court acknowledged that it had to give “great weight” to that verdict. On appeal, this Court affirmed Muhammad’s conviction but reversed the subsequent sentence of death because the trial court, apparently following the dictates of Tedder v. State, 322 So. 2d 908 (Fla. 1975), had given too much weight to the jury’s death recommendation.

[I]n light of Muhammed’s requested waiver of both mitigation and an advisory jury and the State’s lack of objection that that waiver, we find that reversible error occurred when the trial court gave great weight to the jury’s recommendation in imposing the death penalty despite the fact that no mitigating evidence was present for the jury’s consideration.

* * *

[T]he trial court erred when it gave great weight to the jury’s recommendations in light of Muhammed’s refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence.

Muhammad, cited above. (Emphasis supplied.)

Thus, if defendants have not waived their right to a jury recommendation, they have the accompanying right to the community’s input into whether they should live or die. This, by implication, means the jury must have more than accurate

statements of the law. Espinosa. They must also have heard the relevant mitigating evidence.

In this case, and despite special counsel's warning (4 R 568),⁴ the trial court gave unwarranted consideration to the jury's death recommendation. In its sentencing order the court recognized that it had, as a matter of general law, to give it great weight.

In reaching its sentencing decision and in analyzing the aggravating and mitigating circumstances, this Court has remained cognizant of several significant points. First, as a matter of law, a jury's recommendation of life or death must be given great weight. The jury in this case unanimously recommended death, but it did not have the benefit of receiving mitigating evidence from the defendant or the benefit of his counsel arguing the evidence and applicable law. Thus, in reaching its sentencing decision, this Court has assiduously followed the two separate paths recognized by law. It has duly considered the jury recommendation. But it has also independently weighed the aggravating and mitigating circumstances.

(2 R 236-27)

⁴ Mr. Kypreos told the court at the Spencer hearing "you're going to be hearing of things that the jury never heard. . . .In any event, I think it's clear that the jury's verdict, given the unusual circumstances of this case where they didn't hear mitigation, isn't as deserving as a full weight and consideration as it might otherwise be." (4 R 568)

This case, at least to this point, thus becomes indistinguishable from Muhammed. Because Grim refused to present any evidence or argument in mitigation, his jury, like the one in Muhammed, never fulfilled its statutory sentencing role. Id. at. The trial court, therefore, should have ignored its recommendation when it determined if Grim should live or die. But it could not. Because Grim never waived his right to have the voice of the community fairly pass on whether he should live or die, the court could not ignore what they recommended. Yet, according to Muhammed, it had to do so. To resolve this problem this Court can only conclude that the trial court erred in keeping the mitigation from the jury. That distorted their recommendation and allowed the court to either give it great weight or ignore it. Obviously, it could do neither. Instead, it should have, as this Court said in Muhammed, “provide[d] for an alternative means for the jury to be advised of available mitigating evidence.”

So, what should the court have done? In Muhammed, this Court provided a solution. Realizing that at his resentencing hearing, Muhammed might continue to insist on refusing to present any mitigation, this Court said “[W]e have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuse to present mitigation evidence.” If the PSI raises the possibility that

significant mitigation, the court can call witnesses to establish it, or appoint special counsel to present the case for mitigation. Id.

In this case, the court did both: it ordered and considered a PSI, and it appointed special counsel, Mr. Spiro Kypreos, to present the case for mitigation, over the defendant's objections and without his cooperation. Obviously, Mr. Kypreos found a significant amount of evidence to support a life sentence, and indeed, based solely on what he presented to the court, it found several items in mitigation and gave them either great, significant, some, or little weight (2 R 243-46). Special counsel also argued that the statutory mental mitigators applied, but the court refused to find them.

So, where did the court in this case err? The court arguably anticipated the Muhammed procedure, so even though the judge may have given the jury's recommendation more weight than it deserved, in the end it reached the correct result because it did all this Court said needed to be done. Taking a deep breath, appellate counsel now argues that the Muhammed proceeding fails to adequately protect or realize the defendant's right to have the jury, one of the co-sentencers, recommend whether he should live or die. Specifically, even though Grim waived his right to present mitigation, he never gave up his right to have a jury recommendation (5 R 27). Of course, as this Court recognized in Muhammed, that

verdict would have little weight because no mitigation had been offered. Yet, in this case, there obviously not only was evidence of ameliorating value, but a lot of it. The trial court had the benefit of special counsel's efforts, but the jury did not. The absolutely critical point is that it should have, and under the facts of this case, it could have had the benefit of Mr. Kypreos' efforts. The trial court erred, therefore, in considering the mitigating evidence as part of the Spencer hearing. It should have required special counsel to present his evidence before the jury as well. Had he done so, the jury's recommendation would have had greater legitimacy.

Moreover, the jury, when presented with the mitigation, may have found the two statutory mitigators the court rejected, and have given the case for life more weight than that for aggravation. After all, two of the three aggravators involved crimes committed sixteen years earlier or a burglary, which, without more, is inherently nonviolent. See, Mann v. State, 420 So. 2d 578, 580 (Fla. 1982). Hence, that body may have recommended the court impose a life sentence, and had it done so, the trial court's independent analysis would have been far different than the evaluation it made (2 R 237). Instead of following the jury's death recommendation it would have had to have examined the record to discover if no reasonable person would have voted for life. That is a very difficult level of proof to satisfy, and as

this Court's recent history has shown, it has become a burden almost impossible to carry on appeal.

Thus, the court improperly used the Spencer hearing to consider Mr. Kypreos' case for mitigation. That proceeding was never intended to be the major vehicle for a defendant or, in this case, special counsel, to present mitigation. It was, instead, created to provide the defendant a final opportunity to be heard in his defense. The court here should have appointed Mr. Kypreos before trial when it first learned of Grim's determination to keep all mitigation from the jury. Had it done so then, it could have also had him to present that evidence to the jury for them to consider, as Section 921.141 plainly requires. Here, the court knew before the penalty phase, indeed before the trial began, that Grim intended to waive any mitigation. It could and should have appointed counsel then to develop the case for mitigation, and have him or her present it to the jury. That the court in this case had Mr. Kypreos discover and develop the mitigating evidence was commendable. That it denied the jury the information it considered was error.

Instead of splitting the sentencing decision between the judge and jury, as Section 921.141 contemplates, this Court has recognized, Tedder, and the United States Supreme Court has acknowledged, Espinosa, the trial court assumed sole responsibility for determining that Grim should die. That law, however, allows the

judge sentencing in a capital case only if the defendant has waived his right to a jury recommendation. Grim never did that. The court, therefore, had no right to impose a death sentence without considering their vote and giving it great weight. But, to give it such respect required that body to have had the mitigation available to the trial court.

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

ISSUE II

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

Immediately before trial started, Grim's lawyers told the court that if found guilty, the defendant would present nothing to mitigate a death sentence. The court, following the procedure outlined in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), had defense counsel tell it what mitigation he believed could be established.

Specifically, Mr. Rollo, the penalty phase lawyer for Grim, said:

Well, Your Honor, in this case were it to go to a Phase II or penalty, we would have presented the testimony of James Larson, PhD, from Pensacola, Florida, 600 East Government Street, and as you may be aware, Dr. Larson has been practicing in the area of forensic psychology and psychological evaluations for a number of years, and he was appointed by this court to be a consulting expert with respect to the evaluation of Mr. Grim.

Dr. Larson did, in fact, visit with Mr. Grim and made some evaluations of Norman, and it depends on each case whether or not I have the consulting expert to reduce his findings to either a report or letter, and in this case, I had Dr. Larson, because we discussed just the other day how we were going to proceed in this case, I did have him reduce to writing the substance of our conversations with respect to Mr. Grim and his evaluations of Mr. Grim.

Specifically, I asked Dr. Larson to make a finding of whether or not there were any statutory mitigating circumstances that if we went to phase II he would present on behalf of Mr. Grim.

Dr. Larson did, in fact, find two statutory mitigators that we would present were there a Phase II, and that is – the first is the statutory mitigator that Dr. Larson found the offense was committed while the defendant was under the influence of extreme emotional disturbance.

Dr. Larson would also testify that should he have been called, that the second statutory mitigator would have been that the defendant's capacity to confirm, excuse me, conform his conduct to the requirements of the law was substantially impaired at the time of the alleged offense.

THE COURT: Could you elaborate on those two a little bit or are you hesitant on doing this at this juncture?

MR. ROLLO: Well, I am because, you know, Judge, in any case, there's a coalescence of the defense theories that intertwine with the presentation of mitigation that's intertwined with the guilt presentation, and it puts me in a little bit of a difficult position to get into the underlying facts or the basis of Dr. Larson's evaluations insofar as they may reveal things that may affect Mr. Hill's presentation during the guilty phase.

THE COURT: Well, I think what we can do –

MR. ROLLO: I'll be happy to do it later.

THE COURT: We'll go ahead and go through this process now, and if, in the worse case for yourself, the jury were to come back guilty as charged, we are facing a penalty phase and the death penalty, we'll elaborate a little bit more.

* * * *

MR. ROLLO:

... At the time of the incident, again, there are factors

that Dr. Larson and I talked about and that I discovered on my interview from Mr. Grim that, again, I would not like to detail too much here, but I would like to say that there were stressful factors occurring in Mr. Grim's life with respect to just generically his marriage and things of that nature that may have coalesced into the statutory mitigators that Dr. Larson has already identified, and we'll go over those later, Your Honor. So at the time of the incident, there are certain things that I think should be presented to the jury in mitigation to help to understand what the defendant was or wasn't thinking. Those are the types of things I would have presented to the jury in mitigation.

(5 R 12- 14, 18)

Mr. Spiro Kypreos, the special counsel appointed by the court after Grim had been found guilty, apparently had no knowledge of or appreciated what Mr. Rollo had said at the Koon hearing regarding Dr. Larson's unequivocal opinion that both statutory mitigators applied in this case. Indeed, at the Spencer hearing the State introduced the psychologist's deposition, but it made no mention of either mitigating factor. See, State exhibit 6 (Spencer hearing, pp. 117-35). Mr. Kypreos, therefore, was reduced to argument, relying almost exclusively on a 1982 psychological evaluation, the deposition, and some skimpy other evidence that either of those factors applied to this case (4 R 598-614). From the Koon hearing, however, the trial court, if not Mr. Kypreos, knew that Dr. Larson possibly had more evidence or a stronger opinion regarding the statutory mitigators. It never

called this expert to present his evidence, which, according to this Court's opinion in Muhammad v. State, 26 Fla L. Weekly S224 (Fla. April 5, 2001), was error.⁵ Instead, in its sentencing order, it dismissed the need for additional testimony by Dr. Larson because Grim had chosen "to waive mitigation and not waive confidentiality [which had] impeded the full expiration (sic) of both of these significant mental mitigators." (4 R 628).

First, as to the problem of confidentiality, that is easily resolved. At the deposition, Mr. Rollo clearly waived it.

MR. ROLLO: For the record, Mr. Molchan [the prosecutor] and I have spoken about this, and I think we're in agreement that the actual interview that Dr. Larson may have conducted with Mr. Grim, when he may or may not have asked him about the specifics of the incident, that my discussion with you, John, was that I felt that would be privileged, whether or not any of the rest of the communications were waived. Ans so we certainly waive the attorney –excuse me, the psychotherapist/client privilege and any attorney/client privilege that may also attach to Dr. Larson's divulging what he did, in fact, discuss with Mr. Grim, with the exception of the details of the event.

(Spencer hearing, State Exhibit 6, p. 121)

⁵ In Muhammed, this Court said the trial judge had some discretion in whether to call the expert or not; hence Grim argues here that this Court should find it abused that discretion in failing to do so.

Accordingly, as the court itself noted in its sentencing order, Dr. Larson found that Grim “suffers from an impulse control disorder known as intermittent explosive disorder, along with a depressive disorder not otherwise specified.” He also diagnosed the defendant as suffering from an antisocial personality disorder. At the time of the murder Grim was taking Prozac and Depakote for the explosive disorder. (4 R 628). It minimized the weight this and the other mitigation relevant to the statutory mitigators might have by repeatedly noting that Grim had refused to waive confidentiality (4 R 628). Clearly, at least as to the mental evaluation he, through his lawyer, had not done that. If not, Dr. Larson would have remained silent at the deposition. Moreover, if Dr. Larson’s testimony was privileged information, Grim, either personally or through counsel, never objected to the state introducing it at the Spencer hearing. Failing to do so, waived any claim of privilege on appeal. See, Muhammad v. State, 494 So. 2d 973 (Fla. 1986) (Defendant or his lawyer waived any claim of privilege when they failed to object to admission of mental health expert’s report at competency hearing, and it was admitted as a joint exhibit.)

Second, that Dr. Larson gave a significant amount of testimony about the defendant’s mental condition should have prompted the court to have called him as its witness at the sentencing hearing to give more, specific evidence about whether

he had an expert opinion about whether Grim qualified for the two statutory mental mitigators. At the Koon hearing, Mr. Rollo firmly said the psychologist believed they existed. The court should have called the psychologist to verify that hearsay. In the more recent Muhammed, this Court encouraged trial court's to do that. Although said in the context of discovery information in a PSI, the procedure this Court created applies to this situation:

Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses.

Id.

Here, Mr. Rollo alerted the court to the probability that Dr. Larson would have found both statutory mental mitigating factors. It should have, according to Muhammed, called him to testify. That the trial judge failed to do so, especially when no evidence shows the doctor was unable to factually or legally testify, was error, and this Court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE III

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

Grim had only one defense to the State’s charge that he had murdered Cynthia Campbell. As mentioned in the Statement of the facts, Cynthia Campbell was a lawyer who had enemies. Actually, she had one: Henry Homes. In the weeks and months before her death, she represented several persons in litigation against Henry Homes, a building contractor (3 R 477). About a week or so before her death she had a meeting with an inspector and a representative of the company at one of the homes the latter apparently had built. One of them failed to show up, so Ms. Campbell had to crawl into the attic to see a crack. While there, the person told her “if she didn’t stop doing what she was doing that she was going to—she was putting her nose where it didn’t belong, and she was going to find herself dead in the Bay if she continued to put her nose where it didn’t belong.” (3 R 468-69). When Ms. Campbell returned to her office, she told her secretary about the words and added, “If that happens to me, ... If I ever end up dead in the Bay, point your finger at

Henry Company Homes.” (3 R 469) Additionally, she represented a Mr. Charles Worrell in litigation against Homes, one of many people who had come to her to sue Henry Homes (8 R 686). At some point during the year that she prosecuted Worrell’s claim against Homes, she told Worrell “that threats against her life were made by Henry Homes.’ (8 R686). Indeed, at the time of her death she was proceeding against Homes, but called Mr. Worrell sounding scared and wanting to “back out of” his case (8 R 688). As a result of her many statements about these repeated threats Grimm wanted to point his finger at “Henry Company Homes” as the one who had murdered Campbell.

He did so claiming that this hearsay was allowed, either as a spontaneous statement or as an excited utterance. (1 R 144). The court refused to let him present that evidence, ruling that neither exception to the hearsay rule applied to those statements (2 R 206-10). More significantly, Grim also argued that the court’s order excluding the threats against Ms. Campbell “basically den[ied] Mr. Grim a defense and is denying his Constitutional rights, Your Honor.” (3 R 479). Despite that claim, the court decided “to stick by my ruling at this time.” (3 R 481) That was error. Since the facts relevant to this issue are uncontested, and only the court’s legal analysis is challenged, this Court should review this issue using a de novo standard of review.

The oft cited and as often distinguished and ignored case of Chambers v. Mississippi, 410 U.S. 284 (1973), provides the introduction to this issue. In that case, the Mississippi voucher rule prevented Chambers from calling a person who had made several verbal and written confessions to the murder the State had charged the defendant with committing. The United States Supreme Court found that rule unfairly prevented Chambers from presenting a defense. Subsequently, this Court limited the implications of that broad ruling by noting “In Gudinas v. State, 693 So. 2d 953, 956 (Fla. 1977), ... we recently characterized Chambers as ‘limited to its facts due to the peculiarities of Mississippi evidence law which did not recognize a hearsay exception for declarations against penal interest.’” Jones v. State, 709 So. 2d 512, 524 (Fla. 1998). The specific holding of Chambers, therefore, had no pertinence to Florida because we, of course, now allow hearsay statements against the declarant’s penal interest if corroborating circumstances show their trustworthiness. Section 90.804(2)(c), Florida Statutes (Supp. 2000).

Chambers, however, has broader implications than simply rejecting the unthinking application of a parochial state evidentiary rule. Fundamentally, it recognizes the due process right of the defendant to present a defense. Of course, the states have the power to control the course of trials within their boundaries, but those must, in certain instances give way to the overarching federal and state

concerns that those charged with a crime should be able, to the fullest extent possible, present evidence to support their defenses. Notably, otherwise legitimate state evidentiary rules must give way to a defendant's due process right to present a defense if the proffered evidence bears "persuasive assurances of trustworthiness." Chambers, at 303; Jones, cited above at 525.

So, the question here focuses on the facts that will give us confidence in the reliability of what Ms. Campbell's secretary said. First, and unlike the situation where the declarant may have something to gain by what he or she says, Ms. Campbell had no reason to lie about the threat from Henry Homes. She told her secretary, a person of no particular importance and with no interest in this case, about the threat, and by the time of trial this latter woman brought what her boss had said to light, Ms. Campbell was dead. Moreover, litigants frequently have animosity towards, not only the opposing side, but the lawyers that represent them. Thus, that someone made threats was predictable. Additionally, although Ms. Campbell had a strange sense of humor (3 R 470) and tended to blow off such remarks, she took these threats seriously and was upset by them (3 R 474). Indeed, when she called Mr. Worrell she was obviously so scared that she wanted to "back out" of his case (8 R 688).

With such reliable assurances of the reliability of the statements, the court should have allowed Grim to use them to present his defense. Excluding this evidence totally emasculated his case, and it amounted to nitpicking and trying to create a reasonable doubt. While a legitimate strategy, it was, in comparison to the Henry Homes defense, anemic. The court, therefore, erred in excluding the corroborated hearsay evidence because it denied Grim his constitutional right to present a viable defense. This Court should reverse the trial court's judgment and sentence and remand for new trial.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to **CURTIS M. FRENCH**, Assistant Attorney General, at The Capital, Tallahassee, FL 32399-1050, and by U.S. Mail to appellant, **NORMAN M. GRIM**, #282008, Florida State Prison, Post Office Box 181, Starke, FL 32091-0181, on this _____ day of July, 20001.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Times New Roman 14 point.

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