

IN THE SUPREME COURT OF FLORIDA

NORMAN MEARLE GRIM, JR.,

Appellant,

vs.

CASE NO. SC01-256

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT, IN AND
FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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ALTHOUGH RECOGNIZING THE USUAL OBLIGATION TO GIVE THE JURY'S SENTENCING RECOMMENDATION GREAT WEIGHT, THE TRIAL COURT INDEPENDENTLY WEIGHED AGGRAVATING AND MITIGATING CIRCUMSTANCES, THEREFORE AVOIDING THE ERROR COMMITTED BY THE TRIAL COURT IN MUHAMMAD v. STATE, AS GRIM CONCEDES. THIS COURT SHOULD REJECT GRIM'S ARGUMENT THAT MUHAMMAD DOES NOT GO FAR ENOUGH, AND THAT TRIAL COURTS SHOULD BE REQUIRED NOT ONLY TO APPOINT SPECIAL COUNSEL, BUT TO DO SO PRIOR TO THE JURY PENALTY HEARING 28-33

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PRELIMINARY STATEMENT

The record on appeal consists of: (1) four volumes (I-IV), paginated 1-638, denominated "Transcript of Record" (including pleadings, transcripts of pre-trial hearings, and transcripts of the "Spencer" and sentencing hearings); (2) another five volumes (I-V), paginated 1-919, consisting of transcripts of the trial and penalty-phase proceedings before the jury; (3) a supplemental record containing the presentence report; and (4) another supplemental record containing a floppy diskette of the trial transcripts.

In addition, this Court has in its custody copies of various exhibits, including six depositions presented to the trial court for its consideration at the Spencer hearing. These depositions are from: Grim's stepfather, Charles David Flamand; Grim's mother, Isabel Flamand; Grim's sister, Elaine Guy; James D. Larson, a psychologist; William Lee Daws, plant manager where Grim worked; and Robert Lowell Schenke, shift supervisor where Grim worked. These depositions are paginated separately in typewritten numbers in the upper right hand corner of each page, but also cumulatively in handwritten pages numbers at the lower right hand corner. Cumulatively, they are paginated 24-135.

The State will cite to the volumes denominated as "Transcript of Record" by "R" and the volume number (in arabic

numerals), i.e., (2R 223). The trial transcript will be cited as "T" accompanied by the volume number, i.e. (2T 223). The PSI will be referred to as "SR," i.e., (SR 5). The State will cite to the depositions by "depo" and the handwritten page number, i.e., (depo 84).

Because Grim's appellate counsel¹ has made statements about the "truncated" nature of the penalty phase in his preliminary statement, the State would observe that one of the issues in this case is whether the trial court dealt properly with Grim's refusal to present evidence in mitigation. As will be discussed in much more detail below, it is the State's position that the trial court adhered to (and to some extent anticipated) the procedures established in this Court's opinions on the subject, as even Grim's appellate counsel appears eventually to concede. Thus, the trial court had considerably more to consider than just the State's "case for aggravation" (Initial Brief of Appellant at 1) when it imposed sentence.

STATEMENT OF THE CASE

¹ Undersigned counsel ordinarily characterizes the legal positions taken on appeal as the appellant's own, using his real name instead of the overly stuffy word "appellant." In this case, however, it seems clear that appellate counsel is advancing positions contrary to those taken by Grim himself. The State therefore will attempt to differentiate between Grim and his appellate counsel acting, in some sense, on his behalf.

Cynthia Campbell was murdered the morning of July 27, 1998. Her body was recovered from Pensacola bay that afternoon. The appellant, Norman Mearle Grim, Jr., was arrested four days later in Garber, Oklahoma. He waived extradition (1R 8), and was returned to Milton, making a "first appearance" on August 3, 1998 (1R 6). A two-count indictment was returned on August 26, 1998, charging Grim with first-degree murder and sexual battery upon a person 12 years of age or older (1R 9-10). On October 5, 1998, the State filed its notice of intent to seek a death penalty (1R 18).

Jury selection proceedings were conducted Friday, October 27, 2000, and the trial began the next Monday. The jury returned a verdict of guilty on both counts at 4:08 p.m. on November 1, 2000 (2R 219, 5T 806).

Because Grim insisted on waiving his right to present evidence in mitigation (and, in fact, ordered his attorneys not to present mitigation), the trial court conducted a hearing pursuant to the dictates of Koon v. Dugger, 619 So.2d 246 (Fla. 1993) (5T 812-64). The trial court determined that Grim was freely, voluntarily and knowingly entered into his decision to waive mitigation (5T 862). The court announced that it would conduct a penalty phase before the jury at which Grim could, if he wished, present mitigating evidence (5T 863). Afterwards,

the court would conduct a pre-sentencing hearing. The court would order a presentence investigation and, if necessary, based upon the jury's recommendation, would appoint an independent or special counsel to present mitigating evidence to the court (5T 863).

A penalty hearing was conducted before the jury on November 2, 2000 (5T 866-918).² Grim presented no mitigating evidence. The jury recommended death by a 12-0 vote (5T 911, 2R 220). The trial court announced that it had appointed attorney Spiro Kypreos as independent or special counsel in this case (5T 916, 2R 221). On November 16, 2000, the trial court issued a written order directing the Department of Probation and Parole to prepare a pre-sentence investigation and to provide copies to the court and all counsel (2R 225).

The pre-sentencing hearing before the trial court took place on December 7, 2000 (4R 549-620). Independent counsel presented testimony and made argument for a life sentence. The court adjourned to consider what had been presented, then convened for sentencing on December 21, 2000 (4R 621). The trial court imposed a death sentence, after considering the jury recommendation but "independently" weighing the aggravation and mitigation because the jury "did not have the benefit of

² This proceeding is also reproduced verbatim at 3R 495-547.

receiving mitigating evidence from the Defendant or the benefit of his counsel arguing the evidence and applicable law" (2R 237).

The court found three statutory aggravating circumstances: (1) the murder was committed by a person previously convicted of a felony and on parole; (2) Grim had numerous prior violent felony convictions; (3) the murder was committed while Grim was engaged in the commission of a sexual battery (2R 237-240).

The trial court rejected the two proposed statutory mental mitigators, but found and gave weight to a number of other mitigators, including: poor family background (significant weight); good employment history (significant weight); mental problems not rising to the level of being "extreme" and "substantial" (great weight); stress due to marital problems (great weight); Grim has been and likely will continue to be a good inmate (some weight); Grim first entered prison at the young age of 22 (little weight) (2R 240-46).

The court concluded that the three aggravating factors established by the State "significantly outweigh all of the mitigation in this case," and that "death is unquestionably the appropriate penalty in this case" (2R 247).³

³ On Count 2 (the sexual battery), the Court sentenced Grim to 390.5 months in prison, to run consecutive to the death sentence imposed on Count 1 (the murder).

Notice of Appeal was filed January 2, 2001. Grim filed his brief on July 2, 2001.

STATEMENT OF THE FACTS

A. Guilt Phase

At 5:08 a.m. on Monday, July 27, 1998, a police officer responded to a call from 5232 Nimitz Road in Santa Rosa County, where he met Cynthia Campbell and her next door neighbor Norman Grim (2T 270-71). Grim was wearing a pair of cut-off jean shorts (2R 273). Campbell was wearing a long-sleeved sweatshirt and a pair of slacks; she was not wearing shoes (2T 284). The three of them examined a broken window pane that apparently had been struck by a chrome lug nut found in the bushes immediately below the window (2R 274). Grim told the officer he had been awakened by his dog, shone his flashlight out, and had seen the broken window (2R 274-75). After questioning Campbell briefly, the officer asked her to step inside so he could see to fill out his paperwork (2R 275). Grim told Campbell to come over for a cup of coffee when she was finished (2R 276).

Inside the Campbell house, while the officer was writing his report, Campbell told him about a second noise (2T 276-77). He went into her kitchen and discovered another cracked pane on her back door (2T 277). It was on the uppermost level of nine panes (2T 277). Upon opening the door, he observed numerous,

apparently undisturbed, cobwebs between the two columns on the back porch from about four feet off the floor on up (2R 278-79).

The two went outside to see if any other windows were broken. None were, but, while they were on one side of the house, they heard a loud noise that sounded like a gunshot (2R 279-80). Turned out just to be a branch that fell on the hood of her car (2T 280). Grim ran over to see what the noise was; before he left, he repeated his offer of coffee (2T 280-81). Campbell accepted (2T 281). The officer left at 5:51 a.m. (2T 283).

Connie Kelley was a bookkeeper for a law firm in Milton; she met Campbell when Campbell had worked there (2T 289). When Campbell opened her own law firm, Kelley worked for her on the side (2T 289). On July 27, 1998, Kelley had been working for Campbell for five months (2T 289). She was supposed to stop by Campbell's house that morning before 7:30 with papers for Campbell to sign; Campbell had to be at her office at 8:00 a.m. because she had a new employee starting that day (2T 290). Kelley arrived at Campbell's house at 7:20 (2T 290-91). Campbell's car was there, her front door was open, and the lights were on, but Campbell was not there (2T 291). After waiting several minutes on the front porch, knocking and calling

Campbell's name to no avail, Kelley stepped inside and placed a file folder by the bookcase (2T 291). She left at 7:26 and drove to her office a couple of miles away (2T 292).

Campbell's new employee was Cynthia Magee (2T 295). She got to Campbell's office on Old Palafox Street in Pensacola at 8:20 a.m. (2T 295-96). Campbell was not there and Magee did not have a key (2T 295-96). As she waited for Campbell to show up, she got a call on her cell phone from her daughter, who worked as a receptionist at the same law firm in Milton where Kelley worked; her daughter told Magee that Campbell had not been at home earlier (2T 296). Magee decided to drive to her house, arriving there some time after 9 (2T 296). Campbell's car was there, and her car keys and her dog were inside the house, but Campbell was missing (2T 296-97).

Police patrol officers Rutherford and McCauley arrived shortly thereafter. McCauley went to Grim's house to ask him if he had seen Campbell. Grim replied that Campbell had come over earlier that morning and had three or four cups of coffee (2T 323).⁴ Officer Rutherford asked Grim if they could come inside to look for Campbell (2T 301-04). At first, Grim refused, telling the Rutherford that he was "rude" (2T 304). Shortly

⁴ In a written statement he gave later that morning (after being advised of his rights, Grim stated that Campbell had stayed 30-40 minutes and had left "about 5:30 or 6" (2T 310).

thereafter, however, he gave police permission to come inside.⁵

Grim was not wearing a shirt (2T 305). Rutherford and McCauley both noticed something red or pink on one of his shoulders (2T 305, 322). The officers saw no signs of struggle or bloodshed in the house (2T 305).⁶ Neither patrol officer could remember if there was a cooler on the back porch at this time (2T 315, 330).

Grim's car was in the back yard, inside a gate that apparently had been opened for the first time in a while, as a 6-8 inch pile of fresh dirt was wedged up where it had been forced open (2T 307, 322).⁷ Rutherford looked inside the car, but saw nothing out of the ordinary (2T 308). He asked Grim if

⁵ Officer McCauley testified that, after refusing them entry, Grim went inside his house and then outside to a shed in his back yard; a few minutes after returning to his house, Grim came out the front and told police they could come in (2T 323-24). Officer Rutherford could not recall if Grim went back inside his house after his initial refusal, but said that if he did, he was not gone long (2T 304).

⁶ Officer Rutherford testified that McCauley pointed out some black drops on the kitchen floor, but McCauley did not remember seeing them or pointing them out to Rutherford (2T 305. 324-25).

⁷ Kenneth Bailey, who lived across the street from Grim, testified that he had never seen Grim park his car in his back yard in the two years they had been neighbors (3T 452-54).

he could look in the trunk, but Grim said that his wife, who had recently divorced him, had the key (2T 308).

Rutherford contacted his superiors; based on his report, detectives were sent to the scene (2T 311). Detective Blevin Davis arrived at 11:00 a.m. (2T 335). After looking through the victim's residence and seeing no signs of struggle, Davis talked briefly to Grim, who was standing next to a car in the street in front of his house (2T 335-36). Grim complained that he was not feeling well; Davis let him sit in the back seat of one of the patrol cars, leaving the door open (2T 337). Davis observed that Grim was wearing a pair of cut-off blue jean shorts with several small reddish brown stains on them; in addition, there was another reddish-brown stain on his shoulder (2T 337). He also noted that, although Grim was not wearing a watch, there was a "tan line" from a watch on his arm (2T 337).

After a bit, Grim composed himself, and asked for permission to get his dogs that were now loose in the neighborhood (2T 337). Davis gave him permission to leave, but ordered detective Wigger to watch him (2T 338).

Detective Wigger testified that Grim went into his house, got a cigarette, went into the back yard, opened the gate, and left the scene in his white Chevrolet Cavalier (2T 355-56). Grim went to a nearby park and retrieved two of his dogs, but

then drove to a convenience store (2T 356). He told Wigger he was not trying to leave, but just wanted to get cigarettes and something to drink (2T 357). Upon leaving the store, Grim drove south; instead of turning back toward his home, he kept driving south until he got to Interstate 10 (2T 357). He got off at Scenic Highway, thereafter making several turns, right one time, left another, for several miles, always obeying the speed limit and using his turn signals (2T 357-58). Wiggers, who was in an unmarked car, flashed his lights several times to see if he could get Grim to stop and talk to him; Grim continued driving (2T 358-59). Wiggers eventually lost sight of him on Davis Highway (2T 359).

Thomas Rodgers is the manager of the north end of the Pensacola Bay fishing bridge, running what is basically a convenience store and bait/tackle shop at the foot of the fishing bridge (3T 473).⁸ Sometime early in the afternoon of July 27, 1998, Grim came into the store; Rodgers remembered that his arms were covered with tattoos (3T 477-78).

Cynthia Wells had worked with Grim for several months at Daws manufacturing in late 1996 and/or early 1997(3T 458-59).

⁸ The fishing bridge is actually the old two-lane US 98 bridge with its drawbridge removed, making two separate mile and a half long fishing piers, one on the Pensacola side, and one on the Gulf Breeze side (2T 472-73). It is adjacent to the present-day four-lane, three-mile long Pensacola Bay Bridge.

On July 27, 1998, she worked in Gulf Breeze (3T 459). She got off work "around" 1:00 p.m. that day and headed north across the Pensacola Bay bridge towards her home in west Pensacola (3T 460-61). On the Pensacola side of the fishing bridge, she saw Grim, walking beside his car parked on the fishing bridge (3T 460-61). The trunk of his car was open and both doors were open (3T 462). He was wearing a light colored shirt, and cut-off blue jean shorts (3T 462).

At 3-3:30 p.m. that afternoon, a man fishing on the Pensacola side of the fishing bridge hooked a human body, wrapped in a sheet, plastic garbage bags and masking tape (3T 437). He told his son to call 911 (3T 438).

The Florida Marine Patrol was called to retrieve the body, which the parties stipulated was that of Cynthia Campbell (3T 441-42, 469).

Detective Wigger, who had earlier tried to tail Grim, went to the convenience store next to the fishing bridge, where he talked to Mr. Rodgers and retrieved a surveillance videotape (State's exhibit 61) showing that Grim had entered the store just after 2:00 p.m. (2T 362-63).

Police had left Grim's home at 4:00 p.m. (2T 339). At 4:15, Detective Davis got word that Campbell's body had been found (2T 339). He immediately sent a detective back to Grim's house to

secure it, and himself drove to the Pensacola Bay fishing bridge (2T 339-40). He was present when Campbell's body was brought to shore (2T 340). Davis testified that her body was wrapped in sheets and black garbage bags (2T 340). When the bags and sheets were removed at the autopsy, he observed that a piece of green carpet was "wrapped up with everything else." Davis recalled having seen a similar piece of green carpet hanging over the rail of Grim's back porch (2T 340). After Grim's ex-wife identified the sheet, police obtained a search warrant for Grim's home and an arrest warrant (2T 341). Police also learned that Grim had relatives in Oklahoma, and alerted authorities there (2T 343).

FDLE crime scene analyst Jan Johnson attended Campbell's autopsy, which was conducted by Dr. Michael Berkland. Johnson testified that under the black garbage bags, the body was wrapped in carpet and sheets (2T 372, 377). They had to remove "layers of material," including the garbage bags, a floral sheet, a striped flat sheet, a striped fitted sheet, a piece of green carpet, masking tape and rope (2T 372-78).

Dr. Berkland testified that Campbell's face was covered with "very deep" abrasions and contusions around both eyes, her forehead, both sides of her chin and her lips, all of which Dr. Berkland described as blunt force trauma (3T 573).

There was additional blunt force trauma to both shoulders (3T 576-77) and to the head. Besides the previously mentioned injuries to the face, Dr. Berkland identified at least eighteen blunt force, separate traumatic injuries to Campbell's head (3T 578-79). At one place on Campbell's right temple, a piece of her skull was missing (3T 581-82). These injuries were all consistent with having been inflicted by a hammer, and they were all antemortem (i.e., before death)(3T 580-81).

Campbell had also been stabbed numerous times in the chest; Dr. Berkland counted at least eleven separate stab wounds to the front of her chest, at least seven of which penetrated her heart (3T 583).⁹ These wounds were consistent with having been caused by a single-edged weapon like a knife (3T 586-87). Campbell was still alive when these wounds were inflicted (3T 584).

Dr Berkland observed additional blunt force trauma on her right forearm and wrist, with bruises, contusions, and (as shown by X-ray) broken bones (3T 573-74). Her left hand was also broken and showed other signs of blunt force trauma, as well as a "perforated injury" to the back of the hand (3T 574). Dr. Berkland described the injuries to Campbell's arms and hands as

⁹ There may have been more than eleven total, but some of the apparent additional ones might "represent complex stab wounds where the blade was never actually removed out of the wound but was simply [pushed] back in" (3T 584).

typical of defensive injuries, and said he would categorize them as such (3T 574-75). Finally, Dr. Berkland observed a large laceration extending deeply into the internal portion of Campbell's vagina, caused by something either "roughly inserted or roughly pulled back out at an angle to cause that kind of tearing" (3T 585-86, 591). This wound also was antemortem (3T 586).

Dr. Berkland was of the opinion that the blows to the head preceded the stabbing of the chest (3T 588). Death was caused by blunt force trauma to the head and multiple stab wounds to the chest (3T 587-88).

After attending the autopsy, Jan Johnson went first to the victim's home, where she found no signs of any struggle, and then to Grim's home (2T 384-85). Johnson found two mops in the kitchen that were still damp and had areas of suspected blood on them (3T 416). Although the area appeared largely to have been cleaned up, Johnson discovered small areas of blood on floor of the kitchen and on the cabinets near the floor (3T 408-09). Johnson collected a coffee mug from the kitchen counter (3T 413). On top of the microwave was a Good Sense trash bag box with two bloody fingerprints on it (3T 411). Inside the kitchen trash can was a striped pillow case that appeared to have blood on it (3T 412). The pattern on the pillow case was the same as

one of the sheets on Campbell's body (3T 412). In the dining room, Johnson collected additional samples of suspected blood from the window frame and from the floor (3T 418-20). In the living room, Johnson seized a pair of athletic shoes, one of which had what appeared to be blood on its shoelace (3T 423). She also recovered rope from the top of a bookcase and from a desk (3T 423). On the sofa were a pair of blue-jean shorts with bloodstains on them (3T 423-24).

On the back porch, Johnson found a piece of green carpet draped over the rail and, partially hidden, a cooler (2T 392). Inside the cooler, Johnson found a steak knife, a bloody terry cloth, a pair of Haynes underwear, a tampon with reddish-brown stains on it, a pair of prescription eye glasses, a wrist watch with a broken band, masking tape, a blue and white striped pillowcase and (inside the pillowcase) a hammer, some cloth tissue, and a Bud Lite beer carton (2T 395-400, 3T 400-05).

Grim was arrested in Oklahoma on July 31 (2T 343). Detective Davis flew to Oklahoma to pick him up, to retrieve the clothes he had been wearing, and to arrange for the return of Grim's car to Florida (2T 344, 3T 499). He tried the keys and determined that they opened the trunk (3T 514-15). Jan Johnson found a stain in the trunk that appeared to be blood (3T 427-28).

The prescription glasses found in the cooler were compared to Campbell's prescription records and they matched (3T 518-19, 524-25). The roll of masking tape in the cooler was fracture matched to the tape found on Campbell's body (3T 547). The rope and the green carpet found on Campbell's body were compared to the rope and green carpet found at Grim's home; although the examiner was unable to fracture match these pieces, he was able to determine that they were identical in appearance, construction, fiber type, etc., and could have originated from the same source (3T 540, 543, 545).

Fingerprints on the coffee cup found on Grim's kitchen counter were identified as Cynthia Campbell's (4T 667). Bloody fingerprints on the trash bag box on top of Grim's microwave were identified as his own (4T 668-70).

FDLE analyst Magda Clanton conducted a DNA analysis of a variety of items recovered from Grim and from his home. Analysis of stains on the cutoff jean shorts Grim was wearing when arrested revealed 12 genetic markers consistent with the DNA of Cynthia Campbell (4T 629-30).¹⁰ The bloody steak knife found in Grim's cooler yielded seven genetic markers consistent

¹⁰ Clanton testified that FDLE's policy was to compare markers and to determine whether or not they were consistent, but not to attempt to "state a uniqueness of a certain DNA profile" (4T 609).

with the victim (4T 616-17). The hammer found in the same cooler also yielded genetic markers consistent with the victim, as did swabbings from the mops found in Grim's kitchen, from the kitchen floor, and from the box of trash bags found on top of his microwave (3T 417, 420; 4T 617-19, 626-27). Likewise, stains on the shorts found in Grim's sofa and on of the shoes found in the living room bore genetic markers consistent with those of the victim (4T 618-20, 626-27).

B. Jury Penalty Phase

The State introduced certified copies of prior Florida convictions, including: (1) unarmed robbery, (2) kidnapping and robbery, (3) armed burglary and aggravated battery, and (4) armed burglary and armed theft (5T 874-75).

Nancy Newland, the Pensacola police officer who had arrested Grim on September 9, 1982, testified about the circumstances leading to some of these convictions (5T 877, 880). A woman reported that, as she was walking to work, a man got out of his car and grabbed her (5T 880). She fought with him as he tried to choke her; she broke loose and ran, but he chased her down and began choking her again (5T 880-81). The man pulled her into the car, telling her that if she did not stop screaming, he would kill her (5T 881). However, when she told him that her purse was still lying on the ground and that if he killed her it

would be evidence, the man got out of the car to retrieve the purse. When he did, she drove off (5T 881). The man was later identified as Grim (5T 881). In another incident occurring in the same area, a man standing in his own bathroom looked in his bathroom mirror and saw a white male standing behind him (5T 885). He chased the man out of the house and called the police. Then he heard a scream from the house next door (5T 885). A woman living next door was awakened by her lights flickering on and off, when she saw a white male with a knife walking towards her (5T 886). She fought him off, getting cut in the chin in the process, but broke free and ran out of the room screaming (5T 886). Her brother, who had been sleeping on the couch, awakened and chased the intruder out of the house (5T 886).

In yet another incident, a fourteen year old female student was accosted as she walked to class, by a white man in jogging shorts who dragged her into a wooded area near the school (5T 887). She screamed, attracting the attention of a security guard, who chased the man away (5T 887). The victim's earrings had been torn from her ears, and she was cut on her hands and elbows during the attack (5T 887).

Finally, when Grim was arrested for these offenses, he was in possession of two firearms and 35 rounds of ammunition stolen in a residential burglary (5T 887).

Probation officer Melody Pierce testified that she began supervising Grim in September of 1997 on a Texas conviction (5T 889-90). He was still on parole when he murdered Cynthia Campbell (5T 891).

The State's last witness was Dorothea Campbell, the victim's mother (5T 895). She read a short victim impact statement (5T 896-97).

Grim chose not to present evidence in mitigation.

C. The Sentencing Hearing

Grim's two attorneys were present at the sentencing hearing before the court, along with the special counsel appointed by the court to investigate and present mitigation to the court. The court determined that Grim still insisted on presenting nothing in mitigation and had so instructed his attorneys (4R 551-52). Defense counsel confirmed that such remained Grim's intent, and objected to the presentation of any mitigation on Grim's behalf (4R 552-53).

The State presented no testimony at the hearing, but presented its sentencing memorandum to the court, along with six depositions from Grim's mother, stepfather, sister, two co-worker/supervisors, and psychologist Dr. James Larson (4R 555-56, 573). The State noted that its apparent responsibility in this case was to provide that potentially mitigating information

as well as to inform the court of potential mitigating circumstances in its sentencing memorandum (4R 557).

Special counsel Kypreos pointed out to the court that because Grim had presented no mitigation to the jury, the court was going to be "hearing of things that the jury never heard," and that the jury's recommendation therefore was not deserving of the weight it might otherwise be (4R 567-68). He noted that he was disadvantaged by not having a client to talk to; it was difficult to get necessary background information or subpoena records without knowing where such records are and without having the defendant's consent to obtain them (4R 568-69). However, he had reviewed the depositions presented by the State and the presentence report ordered by the court. He offered for the court's additional consideration the presentence report and a psychological report from the 1982 court proceedings, a 1983 letter from his public defender in those cases, and a written description of intermittent explosive disorder taken from the DSM IV (4R 570, 590-91). Kypreos also presented the testimony of three witnesses. Following the presentation of this evidence, Kypreos made a lengthy argument to the court (4R 595-616).

(1) The Deposition Testimony

In a deposition dated May 16, 2000, Dr. Larson testified that he had evaluated Grim (depo 120). He had reviewed prior mental health records whose authorship was unclear and which he deemed incomplete because they did not include counseling sessions that Grim told him about (depo 122-23). In addition, Dr. Larson had not completed his review of the trial discovery material in this case (depo 123). However, the records Dr. Larson reviewed did show that Grim had been treated by a psychiatrist (Dr. Guschwa) and had been taking psychotropic medications during the "time frame" of the offense (depo 123, 125). Psychological test results were also in the records (depo 123). Dr. Larson also interviewed Grim and administered his own tests, including an IQ test, an achievement test, and MMPI-2 and incomplete-sentences personality tests. (depo 124).

Dr. Larson concurred with the earlier diagnosis of intermittent explosive disorder and antisocial personality disorder (depo 125-26). He would add a diagnosis of depressive disorder, not otherwise specified (depo 125).

Dr. Larson testified that Grim's treating psychiatrist had prescribed Prozac and Depakote for the intermittent explosive disorder (depo 127). This diagnosis, Dr. Larson testified, was a "way of accounting" for the problems that some people have "with control of anger and control of temper, and it is usually

applied to people who have a history of temper outburst where the expression of anger is far in excess of what you would expect" (depo 127). Grim apparently was having explosive episodes around his wife and sought treatment beginning in February of 1998 (depo 128). Dr. Larson did not know if Grim's treatment had been helpful or not (depo 130). He was comfortable stating that Grim was not delusional or hallucinating during the murder of Cynthia Campbell, but could not rule out some kind of drug interaction without more information and consultation with other experts; although he did not "see a sanity issue," he could not yet rule it out at this point in his ongoing evaluation (depo 130-31).

In a deposition dated May 2, 2000, Grim's stepfather Charles Flamand testified that he married Grim's mother in 1980, while Grim was in the Navy (depo 61). Grim got into trouble in the Navy, but Flamand was unfamiliar with the circumstances (depo 62). When Grim got out, he moved in with his mother and stepfather and attended Pensacola Junior College, studying communications (depo 63). He stayed with them for less than a year before getting into "trouble with the law" (depo 63). Although disapproving of Grim's conduct, his mother was very supportive (depo 64). When he got out of prison, Grim moved back in with them and stayed until he went to Texas (depo 64).

Flamand was unaware of any drugs, but Grim did have a problem with alcohol (depo 64-65). He always got to work, however; he was a good worker (depo 65). He went to Texas to work, but got into trouble there when he and another robbed a store (depo 65-66, 70). He spent more time in prison and then was paroled. His parole was transferred to Florida and he came home again (depo 66). He met his wife in 1997, after Grim had left home and moved into his own apartment (depo 66). She had three children, but soon lost custody of them (depo 66, 69). After that, the marriage went downhill (depo 70).

Grim's mother Isabel Flamand testified in a deposition dated May 2, 2000 (depo 34). She divorced Grim's father in 1970 or 71 when Grim, who was born in 1960, was 11 or 12 (depo 38). Grim's father was in the Navy at the time and had little contact with Grim after the divorce, except for one point when his mother and father tried to get back together for a few months (depo 40, 42). The father drank and once beat Grim over a car he wanted to buy (depo 42). During this same incident, the father struck Mrs. Flamand. The father left soon afterwards (depo 42). Grim graduated from high school and joined the navy (depo 41, 43). He got in trouble in the Navy, but Mrs. Flamand was unsure what happened (depo 43). He was home for a while, but got in trouble again and went to prison (depo 44). Mrs. Flamand remained

supportive; he was her son (depo 44). She got him into counseling (twice, if she was not mistaken) and he was on medication "at one time" (depo 44).

Mrs. Flamand testified that Grim was "really happy" when he got married, until "they moved out to that house they got in Milton" (depo 46). His wife expected to get her three younger children back, and when she did not, that was the "turning point" in their lives (depo 46). Grim's wife told him that she didn't have her children because he was not "man enough" (depo 48). The children's grandparents would bring them to the Flamands, saying "The mother can come here, but they are not to go with her" (depo 50).

Mrs. Flamand testified that Grim was never able to please his father (depo 51). The father always drank some, but his drinking problem developed only after he became a Chief petty officer in the Navy (depo 51).

Grim's sister Elaine Guy also testified by way of deposition dated May 2, 2000 (depo 75). She is three years older than Grim (depo 79). They were close (depo 80). Grim did not get along well with his father, but the divorce upset him (depo 81). He did "pretty good" in high school (depo 81). He enjoyed serving in the navy; he would probably still be in if he had not gotten into trouble (depo 82). She never knew what the trouble

actually was, or why he got "kicked out of the Navy" (depo 82-3). She did not have a lot of contact with Grim after he got out of the Navy, as she had left home (depo 83). Then Grim was gone again, then back, then gone, and then back again (depo 83). She did visit him in prison a couple of times (depo 84). They did not really discuss his crimes, as she did not "like to mess with that kind of stuff" and did not "want to know about it" (depo 84).

Guy testified that Grim's wife was "nothing but trouble" (depo 85). Guy did not want her in her house or around her family; Grim's wife is a thief who drinks and does drugs (depo 86). One of her children was dead; Guy was not sure of the circumstances (depo 94). She had stolen Grim's mother's credit card and ran up a bill of several hundred dollars, and had forged Grim's signature to one or more of their checks (depo 86, 92, 95). Guy reduced her contact with her brother as a result of her disapproval of his wife (depo 87). She thought Grim had a "poor way of looking at things," but she could not force him to do things differently (depo 88). When his wife left him, she told Grim "good riddance" and "leave her alone," but his response was that he loved her (depo 91). She was not sure if Grim's wife had moved out a few days before the murder or if she simply had not come home for a few days (depo 93).

Guy testified that her brother was never physically abused by his father (depo 95). However, their father was tough, very old fashioned and very military, and he favored her over Grim (depo 95-96). Anything she did was wonderful; nothing her brother did was good enough (depo 103).

Their father drank a lot, but she never saw him falling-down drunk; most of the time you could not tell he was drunk (depo 97). Their father now has serious medical problems which Guy is sure are alcohol related (depo 97). Guy never saw her father get into any altercations with anyone; he was a peacemaker who did not like to fight—he would break up fights, but he would not fight (depo 98). Guy did not think that her parents' marriage was either physically or mentally abusive; they were just two "totally different people" who "couldn't mesh" (depo 100). They were both religious, but he was Pentecostal, while she was Catholic (depo 100-01).

William Daws and Robert Schenke also testified by way of depositions dated May 2, 2000 (depo 24 et seq; depo 107 et seq). Their deposition testimony essentially is the same as their testimony at the Spencer hearing.

(2) The Spencer Hearing Testimony

Robert Schenke testified first. Schenke is a shift superintendent at Daws Manufacturing, where Grim worked (4R

575). He described Grim's work performance as "good to excellent" (4R 575). Grim was a lead person in his department, supervising from 5-6 to 10-12 people (4R 576-77). He was punctual, seemed to like his work, and fulfilled his leadership responsibilities appropriately (4R 576-77).

William Daws is plant manager at Daws Manufacturing (4R 578). Grim worked at Daws four years and four months (4R 579). Grim was lead person in the fabrication department on the second shift, overseeing what was going on (4R 579). Grim was a good, productive worker (4R 580-81). Daws would like to have more employees like him (4R 581).

Grim's sister Elaine Guy testified that Grim was raised as a Catholic and went to church regularly as a child (4R 583). He was an altar boy (4R 583). He was a good brother and they are still close (4R 584).

SUMMARY OF ARGUMENT

Grim's appellate counsel raises three issues on appeal:

1. The trial court in this case followed all procedures necessary in cases where the defendant decides to waive mitigation. In fact, the trial court did more than what is minimally required. Although not required to do so at the time, the trial court did as this Court later suggested in Muhammad and ordered a PSI. In addition, the trial court appointed

special counsel to investigate and present evidence in mitigation. Although Grim's appellate counsel suggests in the caption to his argument that the trial court in this case committed the same error as the trial court in the Muhammad case by giving great weight to the jury's recommendation even though the jury heard no mitigation, in fact, the trial court weighed the evidence in aggravation independently. This Court should reject the suggestion of Grim's appellate counsel that appointment of special counsel should be required when the defendant waives mitigation, and should reject his contention that the trial court erred by not appointing special counsel before the jury sentencing hearing.

2. Although Grim's trial counsel made a limited waiver of privilege when they allowed the State to depose psychologist Dr. Larson several months prior to trial, Grim never waived his privilege and strenuously objected to any use of Dr. Larson at the penalty phase. The trial court did not abuse its discretion by failing to call Dr. Larson *sua sponte*, especially where it is clear that Grim would have refused to cooperate with any evaluation by an expert of the State's choosing.

3. Especially absent identification of the person who supposedly had threatened the victim, or any other evidence tying Henry Homes in any way whatsoever to this murder, or any

sufficient foundation for admitting hearsay statements as spontaneous or excited utterances of the victim, the trial court did not err in excluding hearsay testimony that some unidentified person possibly connected to Henry Homes had threatened the victim. Moreover, in light of overwhelming evidence that Grim is guilty of Campbell's murder, any error in excluding this hearsay testimony was harmless.

ARGUMENT

Issue I

ALTHOUGH RECOGNIZING THE USUAL OBLIGATION TO GIVE THE JURY'S SENTENCING RECOMMENDATION GREAT WEIGHT, THE TRIAL COURT INDEPENDENTLY WEIGHED AGGRAVATING AND MITIGATING CIRCUMSTANCES, THEREFORE AVOIDING THE ERROR COMMITTED BY THE TRIAL COURT IN MUHAMMAD V. STATE, AS GRIM CONCEDES. THIS COURT SHOULD REJECT GRIM'S ARGUMENT THAT MUHAMMAD DOES NOT GO FAR ENOUGH, AND THAT TRIAL COURTS SHOULD BE REQUIRED NOT ONLY TO APPOINT SPECIAL COUNSEL, BUT TO DO SO PRIOR TO THE JURY PENALTY HEARING.

The caption to appellate counsel's argument is misleading; he appears to be arguing that the trial court committed the same error as the trial judge in Muhammad v. State, 782 So.2d 343 (Fla. 2001), by giving the jury's death recommendation great weight even though the jury heard no mitigation because of Grim's waiver. However, that is not what the trial court in this case did, as Grim's appellate counsel eventually concedes, ten pages into his argument. Initial Brief of Appellant at 24-

25 (trial court "reached the correct result because it did all this Court said needed to be done" in Muhammad). Appellate counsel acknowledges that the trial court not only ordered a PSI, but appointed special counsel to investigate and present mitigation to the trial court at the sentencing hearing. His complaint is that Muhammad inadequately addresses the issue; he asks this Court to further extend the trial court's obligation and not only *require* the appointment of special counsel to present mitigation (which Muhammad does not do), but require special counsel to present evidence *to the jury*.

"This Court has repeatedly recognized the right of a competent defendant to waive presentation of mitigating evidence." Robinson v. State, 684 So.2d 175, 177 n. 2 (Fla. 1996). In cases where a defendant waives the presentation of mitigating evidence, this Court has required defense counsel to comply with the procedure set out in Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993). Grim's appellate counsel does not dispute that these procedures were followed in this case, and they clearly were (1T 3-34, 5T 812-64).

In addition, the trial court must consider and evaluate mitigating evidence contained in the record, even when the defendant waives the presentation of mitigation, and even if the defendant objects to the presentation of mitigating evidence.

Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993). Grim's appellate counsel does not complain about any noncompliance with Farr, and it is obvious from a review of the trial court's sentencing order that the trial court fully considered and carefully evaluated all mitigation reasonably shown by the record.

Moreover, although not required to do so, the trial court ordered a pre-sentence investigation. Thus, the trial court's actions satisfy even the prospective procedure announced in Muhammad that, henceforth, "the preparation of a PSI [will be required] in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence." 782 So.2d at 363.¹¹

Moreover, the trial court in this case did not make the mistake that the court in Muhammad did. There, the trial court gave "great weight" to the jury's death recommendation notwithstanding that the jury had heard none of the mitigation later presented to the court by way of the PSI which the trial court had ordered. Here, the trial court considered the jury's recommendation, but independently weighed the evidence. The Court stated:

¹¹ Because this requirement was established prospectively, it does not apply in this case, which was tried but not decided on appeal at the time Muhammad was entered.

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 general 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 is has also independently weighed the aggravating and mitigating circumstances. Both paths have led to the same point.

(2R 237).

Grim's appellate counsel appears to concede that the trial court satisfied all concerns expressed in Muhammad.¹² He certainly concedes that the trial court ultimately "reached the correct result" under Muhammad. Initial Brief of Appellant at 24-25. The issue he presents and argues on this appeal is whether Muhammad goes far enough. Grim's appellate counsel takes issue with this Court's continuing rejection of any

¹² He does, however, state that the trial court "may have given the jury's recommendation more weight than it deserved." Initial Brief of Appellant at 24. The State disagrees. It seems obvious that the trial court evaluated the evidence giving some deference to the jury's recommendation *and also* evaluated the evidence giving no deference to the jury's recommendation. The court reached the same conclusion both ways. Which path the trial court might ultimately have chosen if the two evaluations had resulted in two different conclusions is a moot point.

requirement that the trial court *must* appoint special counsel to investigate and present mitigation and asks this Court not only to require such appointment, but to require the presentation of mitigation by the special counsel *to the jury*. Although acknowledging that the trial court did in this case appoint special counsel to present mitigation, Grim's appellate counsel asserts that presentation of that mitigation only to the judge was insufficient, inasmuch as Grim never waived his right to a jury recommendation. Initial Brief at 27.

The State would first note that Grim told his trial counsel that he did not care if there was any presentation to the jury and that he "would waive that altogether" (5T 815). He also stated to the court that he was ready to waive a penalty phase before the jury (5T 819). The penalty hearing before the jury went forward only because the court insisted, not because Grim was unwilling to waive it (5T 822-23).¹³

Secondly, this Court has consistently rejected suggestions that trial courts should be required to appoint special counsel for a defendant who waives mitigation. Hamblen v. State, 527 So.2d 800 (Fla. 1988); Farr v. State, 621 So.2d 1368 (Fla. 1993); Hauser v. State, 701 So.2d 329 (Fla. 1997); Muhammad v.

¹³ This Court has held that the trial court may require an advisory jury recommendation even where the defendant waives such. Muhammed, supra at 361, and cases cited therein.

State, supra. This Court has left such appointment to the discretion of the trial court. The trial court in this case went beyond what was required by exercising its discretion to appoint special counsel to investigate and present mitigation to the court, over the defendant's objection. The court committed no error under this Court's precedents by failing to go even further beyond what was required and to order special counsel to present mitigation to the jury.

The record in this case is more than adequate to satisfy any concerns this Court expressed in Muhammad about having a sufficient record to conduct a proportionality review by comparing "the aggravating and mitigating circumstances in this case to those present in other death penalty cases." Id. at 365. See, also, Allen v. State, 662 So.2d 323, 331 (Fla. 1995)(defendant's waiver of mitigation does not preclude this Court's required proportionality review).¹⁴ The trial court

¹⁴ That is not to say that the record would not have been different if Grim had not waived mitigation. For example, because Grim refused to waive his privilege, some mental health evidence was unavailable to special counsel. Moreover, an uncooperative defendant can always curtail to some extent any investigation of his background simply by refusing to cooperate or provide necessary information from which additional mitigation might be adduced. However, a defendant cannot be forced into an adversarial position, or to cooperate with his attorneys or the court. The answer to any suggestion that this Court's "independent review" of a defendant's death sentence is "thwarted" when a defendant refuses to cooperate, Muhammad, supra at 369 (Pariente, J., specially concurring), is: (a) the

satisfied the concerns expressed in Muhammad, and Grim's appellate counsel has not shown any sufficient reason to impose additional requirements on trial courts.

Issue II

THE TRIAL COURT DID NOT ERR IN FAILING TO CALL DR. LARSON AS ITS OWN WITNESS OVER GRIM'S OBJECTION AND REFUSAL TO WAIVE HIS PRIVILEGE

As noted earlier, in Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993), this Court established the rule to be applied when a defendant, against his counsel's advice, decides to waive mitigation:

When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.

defendant may not simply volunteer for death because he is ineligible for a death sentence unless the State first proves his guilt of first degree murder and establishes at least one statutory aggravating circumstance beyond a reasonable doubt and (b) in any event, a valid capital punishment scheme need not achieve perfect consistency. Pulley v. Harris, 465 U.S. 37, 54 (1984) (proportionality review not constitutionally required; while risk of wholly arbitrary and capricious action must be suitably limited, any "capital sentencing scheme may occasionally produce aberrational outcomes;" such inconsistencies "are a far cry from the major systemic defects identified in Furman"). See also Conner v. State, 303 S.E.2d 266, 273-74 (Ga. 1983)(arbitrariness cannot be wholly eliminated).

The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

The purpose of this procedure is simply to ensure that the record adequately reflects that the defendant is making an informed waiver of his right to present mitigation, in that counsel has investigated mitigation, evaluated that mitigation, and properly advised his client. Counsel's statements to the trial court in compliance with the Koon rule are not themselves evidence in mitigation, but merely a proffer to the court for its determination of whether the defendant is making a knowing, voluntary and intelligent decision, as the trial court recognized (5T 826-27).¹⁵

In this case, trial counsel informed the court that Grim had been evaluated by Dr. Larson, who was of the view that the two statutory mental mitigators would be applicable to this murder (1T 13). Grim's appellate counsel contends that Dr. Larson should have been called as a court witness to testify about this alleged mitigation. He dismisses "the problem of confidentiality" as "easily resolved," because trial counsel

¹⁵ If such a proffer were evidence in mitigation, counsel would be presenting mitigation in direct contradiction to his client's wishes. Cf. Nixon v. State, 758 So.2d 618 (Fla. 2000) ("the defendant, not the attorney, is the captain of the ship").

waived Grim's privilege at the outset of Dr. Larson's deposition, and neither trial counsel nor Grim objected to the State's proffer of this deposition at the Spencer hearing. Initial Brief of appellant at 31-32.

Although this Court did suggest in Muhammad that the trial court "has the discretion to call persons with mitigating evidence as its own witnesses," 782 So.2d at 364, this Court did not say that the trial court was required to do so. This Court especially did not hold that the trial court could call a witness in violation of the defendant's privileges or confidences.¹⁶ And the fact is that under Florida law, communications between a psychologist and his client are privileged and confidential. Sections 490.0147 and 90.503, Fla. Stat. (2001).

Grim's appellate counsel argues, however, that any privilege was waived when Dr. Larson was deposed on May 16, 2000 - some seven months before the Spencer hearing. Grim himself apparently was not present at this deposition. However, his counsel did waive any privilege that may "attach to Dr. Larson's divulging what he did, in fact, discuss with Mr. Grim, with the exception of the details of the event" (depo 121). When special

¹⁶ If the court could ignore the defendant's confidentiality rights, it would not need to appoint special counsel; the court could simply call trial counsel as a witness.

counsel Kypreos mentioned the depositions, Grim objected, claiming that when he had spoken with Dr. Larson, "it was with the understanding that the attorney-client privilege and the doctor-patient privilege applied" (4R 559). He insisted that he had not waived the privilege and objected to the court considering Dr. Larson's information (4R 559). The court noted the objection, but allowed special counsel to rely on matters contained in the deposition, in light of trial counsel's limited waiver as expressed at the deposition (4R 559).

Grim refused to waive any privileged communications not already divulged, announcing that he did not want any privileged communications between himself, his attorneys, and his "several doctors" to be part of any record, and that he "would not cooperate with any independent counsel [the court] appointed as far as privileged communication" (5T 830-31). Trial counsel confirmed that Grim did not want Dr. Larson's final conclusions to be divulged (5T 834-36, 837-38). Therefore, trial counsel could not "recite to the court [the] specifics of the testimony that Dr. Larson would have presented by virtue of their protection under the attorney/client or psychotherapist privilege" (5T 838).

In view of all this, it simply cannot be said that Grim waived his privilege with respect to Dr. Larson except to the

limited extent that matters had been divulged in Dr. Larson's pre-trial deposition. See Courville v. Promedco, 743 So.2d 41 (Fla. 2d DCA 1999) ("When the attorney-client privilege is waived regarding a certain matter, the waiver is limited to communications on the same matter."); Sagar v. State, 727 So.2d 1118 (Fla. 5th DCA 1999) (in context of Fla.R.Crim.P. 3.216(a), disclosure of expert's reports in compliance with rule was insufficient to waive privilege, which would be waived only if expert were called *by defense* to testify); First Union Nat'l Bank v. Whitener, 715 So.2d 979 (Fla. 5th DCA 1998) (absent intentional waiver as to all communications, limited waiver by implication exists where client voluntarily produces certain privilege documents; however, any intent to waive privilege as to all communications must be clear); Sanders v. State, 707 So.2d 664 (Fla. 1998) ("Unless otherwise waived, only when the defense calls the expert as a witness is the privilege relinquished.").

Moreover, aside from any question of the scope of the limited waiver at the deposition, the court was not required to call Dr. Larson even if doing so would not violate any defense privilege; the issue remains whether or not the trial court abused its discretion in failing to call Dr. Larson as a court witness. It is the State's position that the court did not.

First, the court went well beyond what was required by law at the time of this sentencing in eliciting potential mitigation, by ordering a PSI and by appointing special counsel.

Second, the court disregarded the defendant's wishes by going as far as it did. Caution, and respect for the defendant's own rights, would seem to counsel against cavalierly ignoring the defendant's assertion of psychologist-patient privilege.

Third, calling Dr. Larson as the court's witness would raise a question about the State's right then to have its own expert evaluate the defendant. Ordinarily the State would have the right to do so, and the State does not think that a defendant ought to be able to avoid having to submit to an evaluation by a State mental health expert, or to render his own expert's testimony un rebuttable, merely by purporting to "waive" mitigation. Nor does the State think that a defendant who "waives" mitigation should be able to refuse to cooperate with a State expert and still be able to present his own expert testimony, when a defendant who does wish to present mitigation cannot refuse to cooperate with the State's mental health expert. Fla.R.Crim.P. 3.202; Kearse v. State, 770 So.2d 1119 (Fla. 2000); Elledge v. State, 706 So.2d 1340 (Fla. 1997); Davis

v. State, 698 So.2d 1192 (Fla. 1997); Dillbeck v. State, 643 So.2d 1047 (Fla. 1994).

The trial court had the benefit of the PSI; of the efforts of special counsel Kypreos; of Dr. Larson's deposition testimony; the deposition testimony of Grim's stepfather, mother and sister; and of previous psychological evaluations. This information was a more than adequate basis for the court's sentencing decision. The court did not abuse its discretion by failing to call a witness *sua sponte* that special counsel did not ask for and whose testimony Grim strongly objected to.

Issue III

THE TRIAL COURT DID NOT ERR IN EXCLUDING HEARSAY

Before trial, defense counsel filed a "Notice of Intent to Introduce Victim Hearsay Statements" (1R 132). Defense counsel proposed to call Jan Wallace (the victim's former secretary) to testify that the victim had litigated cases against Henry Homes and that the victim had told her "If she were ever found floating in the bay look to Henry Homes," and also to call Charles Worrell to testify that the victim had represented him in a case against Henry Homes and had reported being threatened concerning her life as the result of her litigation against Henry Homes (1R 132).

On October 23, 2000, the trial court denied the motion by written order (2R 206-10). Basically, the court found the proffer insufficient to establish that the statement of Wallace qualified as an excited utterance, and the court found no other hearsay exception applicable. The court also noted that under case law in other jurisdictions, threats to the victim by a third person were inadmissible in the absence of other evidence tending to connect such person to the crime (2R 209-10).

Trial counsel thereafter proffered Wallace's testimony. She was employed by the victim in the early summer of 1998, as her paralegal, for a week and a half (3R 466). Sometime during that week, the victim was supposed to have a meeting with representatives from Henry Homes (3R 467). Upon her return from this meeting, she appeared to be upset; she told Wallace that one of the people she was supposed to meet had not shown up, and that she had been forced to crawl up into the attic to inspect a crack and had gotten sweaty and hot and dirty shortly before she had to be at a hearing (3R 467-68, 470). She also reported to Campbell that whoever was in the attic with her told her she was "putting her nose where it didn't belong, and she was going to find herself dead in the bay if she continued" (3R 468-69). The victim told Wallace, "If I ever end up dead in the bay, point your finger at Henry Company Homes" (3R 469). This

conversation occurred a "few weeks" before the victim was murdered (3R 469). The victim did not appear to be upset by the threat; she laughed it off (3R 470). Wallace was not sure where the meeting had taken place, or how much time had elapsed between the threat and the victim's report of it to her, although it apparently was around two hours (3R 472-73). Wallace was not sure who had shown up for the meeting, or whether that person was an employee or representative of Henry Homes (3R 473-74).

The court adhered to its previous ruling (3R 481-83).¹⁷

After the State rested, defense counsel proffered the testimony of Charles Worrell (4T 685). Worrell testified that the victim represented her in litigation against Henry Homes (4T 686). She reported to him that threats had been made against her life as the result of her litigation against Henry Homes (4T 686). Worrell had not heard any threats himself, and the victim did not "give any names" (4T 687).

While the trial court did not allow this testimony (4T 699-700), the court did allow defense counsel to cross examine detective Davis about his investigation of information that

¹⁷ The State supplemented its witness list to include two rebuttal witnesses on this issue if it subsequently became necessary (3R 481).

Henry Homes had threatened the victim (4T 695).¹⁸ Thus, defense counsel asked Davis if he recalled a report indicating that Henry Homes might have been responsible for Cynthia Campbell's death (4T 702). Davis answered yes, and testified that he had assigned another detective to look into it (4T 702). Davis had not himself investigated, but the detective he assigned to investigate had talked to the complainant and to a representative of Henry Homes, and had concluded that the report was baseless (4T 702-03).

Defense counsel did not attempt to call the detective who had investigated this matter, or anyone from Henry Homes.

The trial court did not err in its handling of this matter. Defense counsel's proffer was simply insufficient to establish the prerequisites for admitting the victim's statements as excited utterances, see Damren v. State, 696 So.2d 709, 713-14 (Fla. 1997). Nor are there any facts suggesting that the victim's state of mind is relevant to the identity of the murderer, and no other justification appears for admitting this hearsay testimony. In particular, the State would note that trial counsel presented nothing other than hearsay reports that the victim had been threatened; we do not have even hearsay

¹⁸ Defense counsel's justification for its cross-examination of detective Davis was that it was relevant to the quality of his investigation. The court agreed.

identification of the person or persons who made these threats, and no other evidence implicates Henry Homes or otherwise connects Henry Homes in any way to this homicide.

In any event, any error would have to be harmless in light of the overwhelming evidence that Grim murdered Campbell, including not only the circumstances in their entirety, including Grim's flight to Oklahoma, but also the fingerprint and DNA evidence.¹⁹ Thus, no reversible error appears.

¹⁹ Appellate counsel does not even contend the evidence is insufficient to support the conviction. In fact, the evidence is overwhelming.

CONCLUSION

Grim was convicted and sentenced to death in a proceeding that is free from reversible error. Although he raises no issue of proportionality, the State would note that Grim's death sentence is amply warranted by the evidence. He has had some problems, but he enjoyed a largely normal childhood (albeit one that was marred by divorce), was able to work, and is of normal intelligence. He also has been repeatedly in trouble with the law, having numerous prior violent felony convictions. In fact, he was on parole at the time of this murder. The murder itself was brutal and merciless. Grim sexually assaulted and beat and stabbed his next-door neighbor to death with a claw hammer and a knife. This Court has affirmed death sentences in similar cases. E.g., Bates v. State, 750 So.2d 6 (Fla. 1999) (death sentence proportionate where victim stabbed; three aggravators, including HAC and murder committed during kidnapping and sexual battery, versus two statutory and some nonstatutory mitigators); Robinson v. State, 761 So.2d 269 (Fla. 1999) (death penalty proportionate where victim beaten and stabbed; three aggravators versus two statutory mental mitigators and evidence of abusive childhood, brain damage and heavy drug usage); Guzman v. State, 721 So.2d 1155 (Fla. 1998) (death penalty proportionate for stabbing murder; four aggravators, including prior violent

felony and HAC, versus mitigation of alcohol and drug dependency).

The State respectfully asks this Court to affirm the judgment in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David Davis, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida 32301, this 5th day of October, 2001.

CURTIS M. FRENCH
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND FONT

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

CURTIS M. FRENCH
Assistant Attorney General