IN THE SUPREME COURT OF FLORIDA

MARTIN GROSSMAN,

Appellant,

v. Case No. SC10-118
Lower Tribunal No. CRC84-11698
STATE OF FLORIDA, ACTIVE DEATH WARRANT

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

BILL MCCOLLUM
ATTORNEY GENERAL

CAROL M. DITTMAR
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0503843
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
carol.dittmar@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

## STATEMENT OF THE CASE AND FACTS

On January 12, 2010, Governor Charlie Crist signed a death warrant in this case, and execution has been scheduled for 6:00 p.m. on Tuesday, February 16, 2010. Grossman is on death row for the December 13, 1984 murder of Florida Fish and Game Officer Peggy Park. This appeal seeks review of the denial of his third successive motion to vacate his convictions and sentences, which was filed in the circuit court on Monday, January 18, 2010 (V1/18-40).

Following his October, 1985 trial, Grossman was convicted as charged of first-degree murder, burglary, and robbery. Following a penalty phase, a unanimous jury recommended the death penalty, which was imposed by the Honorable Crockett Farnell, Circuit Court Judge. Grossman's death sentence is supported by three aggravating circumstances: (1) the murder was committed while engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit, the crime of robbery or burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest and to disrupt or hinder the lawful exercise of a government function or the enforcement of laws; and (3) the murder was especially wicked, evil, atrocious, or cruel. In mitigation, Grossman asserted that he had no history of violence, that he was only

nineteen, that he had a deprived and difficult adolescence, that he expressed remorse for the crime, and that he had been a well-behaved and cooperative prisoner.

This Court affirmed the convictions and sentence on February 18, 1988. Grossman v. State, 525 So. 2d 833, 846 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). A full clemency hearing was held in October, 1988. Grossman was represented by James A. Martin, Esquire, of Clearwater, for that proceeding.

Governor Bob Martinez signed a death warrant in March, 1990, which was stayed by this Court in April, 1990. On August 13, 1990, Grossman filed a motion for postconviction relief, and an evidentiary hearing was conducted on the motion May 31 - June 2, 1994. This Court affirmed Judge Farnell's denial of relief and denied a state petition for writ of habeas corpus in the same opinion. Grossman v. State, 708 So. 2d 249 (1997).

Federal habeas corpus proceedings confirmed the validity of the convictions and sentences. Grossman v. McDonough, 466 F.3d 1325 (11th Cir. 2006), cert. denied, 550 U.S. 958 (2007); Grossman v. Crosby, 359 F.Supp.2d 1233 (M.D. Fla. 2005). Successive challenges to Grossman's convictions and sentences have also been repeatedly rejected. Grossman v. State, 5 So. 3d 668 (Fla. 2009) [lethal injection claims]; Grossman v. State, 932 So. 2d 192 (Fla. 2006) (table) [claim based on Roper v.

Simmons, 543 U.S. 551 (2005)]; Grossman v. Crosby, 880 So. 2d 1211 (Fla. 2004) (table) [claims based on Ring v. Arizona, 536 U.S. 584 (2002), and Wiggins v. Smith, 539 U.S. 510 (2003)].

On January 20, 2010, the circuit court held a case management conference on Grossman's most recent motion to vacate (V1/128-174). The court thereafter summarily denied all relief (V2/175-183). This appeal follows.

## SUMMARY OF THE ARGUMENT

The court below properly denied Grossman's successive motion for postconviction relief. The court's finding that the motion was untimely is well supported by the record; the motion does not rely on any newly discovered facts or any major change in the law. In addition, the individual claims are procedurally barred, refuted by the record, and meritless. No evidentiary hearing or stay of execution is warranted on Grossman's allegations.

## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING GROSSMAN'S CLAIM OF INEFFECTIVE ASSISTANCE AT PENALTY PHASE

Grossman's first issue asserts that the court below should have permitted him to develop factual support for his claim that trial counsel rendered ineffective assistance in the penalty phase of his capital trial. According to Grossman, he was improperly denied the opportunity to present evidence on this claim in his initial postconviction proceeding, so another evidentiary hearing is now warranted. In denying this claim, Judge Bulone expressly found it to be successive, untimely, and without merit (V2/178-80). Because Grossman's claim was summarily denied, review is *de novo*. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009); State v. Coney, 845 So. 2d 120, 137 (Fla. 2003).

As in Walton, Grossman's motion raised a claim that he has previously presented in postconviction. His prior allegation that counsel were ineffective in failing to investigate and present mental mitigation was denied on the merits following an evidentiary hearing, and this ruling was upheld on appeal (PC ROA V16/2831-37); Grossman, 708 So. 2d 250-51. No new facts or change in law has been identified to justify reconsideration of

this issue. The court's finding of a procedural bar was compelled under these circumstances. Marek v. State, 8 So. 3d 1123, 1129 (Fla. 2009) (rejecting reconsideration of previously litigated claim of ineffective assistance of counsel after signing of death warrant).

A review of the record in this case fully supports both the procedural bar applied below and the original rejection of this claim in Grossman's initial postconviction challenge to his convictions and sentences. Grossman's first postconviction motion included two claims regarding his mental state at the time of the crime. In Claim 5A, Grossman asserted that his trial attorneys provided ineffective assistance of counsel by failing to investigate and present an adequate penalty phase defense. Grossman specifically alleged that counsel should have presented evidence supporting the "mental mitigation factors" in Sections 921.141(6)(b) and (f), Florida Statutes (PC. ROA V1/192). In Claim 6, Grossman claimed that he had been denied a competent mental health examination. Grossman specifically asserted that counsel had retained Dr. Sidney Merin prior to trial, but that counsel had failed to provide Dr. Merin with the necessary background information and, consequently, Merin had failed to adequately assess Grossman's mental state (PC. ROA V2/329-337).

In support of these claims, Grossman attached the same report from Dr. Brad Fisher attached to his third successive motion filed below on January 18, 2010 (PC. ROA V5/846). Dr. Fisher, a cum laude graduate of Harvard University who specialized in forensic evaluations, examined Grossman on March 28, 1990. His testing did not reveal any signs of "a current psychotic condition or of any major affective disorder" (PC. ROA V5/851). However, Dr. Fisher noted that his testing revealed "soft signs of organic impairment," supported by Grossman's history of "chronic and extensive drug and alcohol dependence," and that "[f]urther testing would be required to determine the nature and extent of this probable mental disability" (PC. ROA V5/850-51).

On October 18, 1991, the circuit court granted an evidentiary hearing on Grossman's Claim 5, and denied Claim 6 as procedurally barred, insufficiently pled, and meritless (PC. ROA V10/1802-04). The court specifically found that, even if the substance of Grossman's allegations had been introduced into evidence, his allegations in Claim 6 were insufficient to show prejudice under Strickland v. Washington, 466 U.S. 668 (1984) (PC. ROA V10/1804). This finding was expressly upheld on appeal. Grossman, 708 So. 2d at 252.

Prior to the 1994 evidentiary hearing, the State filed a motion requesting permission to speak with Dr. Merin, asserting Grossman had waived any privileged information by challenging his counsels' performance with regard to the failure to develop mental health mitigation and noting that Dr. Fisher had specifically reviewed and relied on Dr. Merin's report (PC. ROA V11/1959-60). Grossman's attorneys responded that they would not present any witness that relied on Dr. Merin's information (PC. ROA V11/1970-71). The court denied the motion and offered to revisit the issue if any such testimony was offered (PC. ROA V11/1972).

Despite securing a hearing on his claim of ineffective assistance for failing to present evidence of mental mitigation, Grossman did not present Dr. Fisher as a witness at the evidentiary hearing in 1994. The only expert offered by the defense was Kevin Sullivan, a licensed clinical social worker (PC. ROA V11/2070-2122). Sullivan testified that Grossman was raised in a dysfunctional environment, and his development had been negatively impacted by a number of factors, including that Grossman had been given inappropriate caretaking responsibilities from a young age; that his family had relocated at a critical time in his development; and that he experienced

grief at the loss of his father and grandfather (PC. ROA V11/2083-98).

Given this history, the lower court was compelled to find a procedural bar when Grossman reasserted this same claim of ineffective assistance of counsel in his fourth postconviction motion filed in 2010. The court noted that Grossman's successive motion "does not state why claims which have been previously presented to this court should be relitigated or why the claims were not raised in the previous three rule 3.851 motions" (V2/177). This failure to comply with Rule 3.851(e)(2) establishes that the entire motion was untimely and subject to summary denial on that basis alone. Marek, 8 So. 3d at 1127.

In addition, there are several other independent grounds supporting the procedural bar as to this issue. Because this exact claim was previously litigated, the prior ruling constitutes law of the case and cannot be revisited. Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits). Beyond the law of the case doctrine, it is well established that Rule 3.851 prohibits reconsideration of prior postconviction claims. Marek, 8 So. 3d at 1129; Wright v. State, 857 So. 2d 861, 868 (Fla. 2003); Downs v. State, 740 So. 2d 506, 518 n. 10 (Fla. 1999); Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995);

Christopher v. State, 489 So. 2d 22, 24 (Fla. 1986). All pertinent case law fully supports the lower court's denial of this claim as untimely and successive.

Disregarding the fact that he was granted an evidentiary hearing on his Claim 5 in 1994, Grossman now focuses exclusively on the fact that his Claim 6 was summarily denied in 1991. Grossman's argument to this Court is three-fold; he asserts (1) Claim 6 in his initial motion was improperly denied under the standard set forth in Gaskin v. State, 737 So. 2d 509 (Fla. 1999); (2) his successor motion filed below was improperly summarily denied under the standard set forth in Lemon v. State, 498 So. 2d 923 (Fla. 1986); and (3) he can now offer evidence of nonstatutory mental mitigation, which he claims must be considered newly discovered evidence because, allegedly, until Porter v. McCollum, 130 S. Ct. 447 (2009) was decided, "Florida courts did not consider non-statutory mental mitigation as mitigation" (Appellant's Initial Brief, p. 19). His argument offers no basis for finding error in the summary resolution of this claim below.

As to the assertion that Claim 6 in his initial motion should not have been summarily denied under Gaskin, the instant proceeding cannot serve as an appeal from the 1995 denial of postconviction relief. Grossman was provided an opportunity to

fully litigate his claim of ineffective assistance of counsel in his initial postconviction challenge, and he claimed on appeal at that time that his Claim 6 (alleging incompetent mental health assistance) should not have been summarily denied. This Court rejected that claim, specifically quoting the trial court's finding that Grossman's conclusory allegations were insufficient to demonstrate the necessary prejudice. Grossman, 708 So. 2d at 252.

Although Grossman now cites Gaskin, Massaro v. United States, 538 U.S. 500 (2003), and Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000), none of those cases suggest that the 1995 denial of relief in this case must be revisited, or even that this Court's previous rejection of this claim was improper. Gaskin and Allen discuss the standards to determine the need for an evidentiary hearing on an initial motion; they are not inconsistent with this Court's previous findings in this case. In Massaro, a federal prosecution which relied on federal statutory law, the United States Supreme Court rejected a procedural default that had been applied to a claim of ineffective assistance of counsel which could have been, but was not, asserted on direct appeal. As Grossman's claim of ineffective assistance of counsel was fully explored in his

initial postconviction proceeding, Massaro, to the extent it could be relevant at all, was clearly satisfied.

Grossman's assertion that application of the standard identified in Lemon should compel an evidentiary hearing is also without merit. The court below applied the proper standard in considering Grossman's current successive claim, pursuant to Florida Rule of Criminal Procedure 3.851(f)(5)(B). Grossman's motion, files and records "conclusively show that the movant is entitled to no relief" since the claims he raises are procedurally barred and affirmatively refuted by the record. This is sufficient under Lemon. In Lemon, although the defendant was under an active death warrant, he had not previously sought postconviction relief and, unlike in Grossman's case, there was no procedural bar to preclude postconviction consideration of Lemon's case.

Finally, Grossman's reliance on Porter v. McCollum, 130 S. Ct. 447 (2009), to suggest that any evidence of nonstatutory mental mitigation should be considered newly discovered evidence in this case is easily refuted. Numerous cases clearly recognize that mental mitigation which does not rise to the level of the statutory mitigators can be considered as nonstatutory mitigation, and this principle was well established at the time of Grossman's trial and certainly at the time of his

initial postconviction proceedings. See Card v. State, 453 So. 2d 17, 24 (Fla. 1984) (noting claim that mental mitigation that did not rise to the level of statutory mitigation should be considered as nonstatutory mitigation); Adams v. State, 543 So. 2d 1244, 1248 (Fla. 1989) (noting witness had concluded "there were many nonstatutory mental health factors available"); Stewart v. State, 558 So. 2d 416 (Fla. 1990); Walls v. State, 641 So. 2d 381, 389 (Fla. 1994); Jones v. State, 652 So. 2d 346, 351 (Fla. 1995) (finding jury instructions sufficient to inform jury it could consider "nonstatutory mental mitigation" and noting that Cheshire v. State, 568 So. 2d 908 (Fla. 1990), stands for the proposition that any mental or emotional disturbance must be considered as a nonstatutory mitigating circumstance); Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995); see also Amendments to Florida Rule of Criminal Procedure 3.220 Discovery, 674 So. 2d 83, 84 (Fla. 1995) (adopting Rule 3.202 on Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial, including 3.202(c), which requires a statement "listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish"). As these and many other cases demonstrate, Grossman's suggestion that the

concept of nonstatutory mental mitigation should be considered newly discovered evidence in light of Porter is without merit.

Grossman's argument offers no real analysis to contrast his allegations with those at issue in Gaskin, Lemon, Allen, Massaro or Porter, and he does not specifically identify any potential evidence that he would present if granted an evidentiary hearing in this case. He has clearly failed to demonstrate any error in the summary rejection of this claim entered below.

This Court routinely applies a procedural bar to mental health mitigation claims raised on the eve of execution. Marek, 8 So. 3d at 1129 (rejecting reconsideration of previously litigated claim of ineffective assistance of counsel after signing of death warrant); Henyard v. State, 992 So. 2d 120, 130-131 (Fla. 2008); Schwab v. State, 969 So. 2d 318, 325-26 (Fla. 2007); Hill v. State, 921 So. 2d 579 (Fla. 2006). Grossman's case provides a strong basis for the procedural bar, since his claim was specifically raised and rejected previously. He offers no new facts and no legal reason for reconsideration of this issue.

The egregious facts of Peggy Park's murder provide substantial aggravation to support Grossman's death sentence. The jury that unanimously recommended the sentence and the judge that imposed it heard the outrageous details in Grossman's own

words, from a number of different sources, since Grossman was so quick to boast about what he had done. A new discussion of any possible mental mitigation which was known but strategically not presented in prior postconviction proceedings cannot, as a matter of law, make any difference. Since Grossman's successive motion was procedurally barred and refuted by the record, the court below properly summarily denied this claim.

## ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING GROSSMAN'S CLAIM THAT FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Grossman also challenges the denial of his claim that Florida's death penalty is unconstitutional as applied in this case because it is arbitrary and capricious in violation of Furman v. Georgia, 408 U.S. 238 (1972). The court below denied this claim as procedurally barred and without merit (V2/181-82). As this claim was summarily denied, review is *de novo*. Walton, 3 So. 3d at 1005, State v. Coney, 845 So. 2d 120, 137 (Fla. 2003).

Grossman alleges that his death sentence is unconstitutional because (1) he was denied the opportunity to present mitigating evidence to the jury; (2) the State withheld material and exculpatory evidence in violation of Giglio v. United States, 405 U.S. 150 (1972); and (3) he was denied clemency. As these claims were procedurally barred and without merit, the court below properly denied this issue.

Grossman first claims that he was denied the right to present mitigating evidence to the penalty phase jury and asserts that he should be granted an evidentiary hearing in order to present the "newly discovered" evidence outlined in Claim One, supra. As previously discussed, Grossman's claim of

ineffective assistance of counsel regarding trial counsels' decision to forego presenting mental health mitigating evidence is procedurally barred. Grossman has offered no additional argument in Claim Two, but merely alleges, without any record citations, that he was prevented from presenting such evidence to the jury.

At the penalty phase proceedings, Grossman presented mitigating evidence from four witnesses: Myra Grossman (mother); Thomas Campbell (correctional officer); Steven Martakas (best friend); and Carolyn Middleton (correctional social worker). (DA. ROA V15/2607-51). Grossman has not cited to any ruling by the trial court prohibiting him from presenting any other mitigating evidence. In fact, the record clearly demonstrates that Grossman's trial counsel was aware that, pursuant to Lockett v. Ohio, 438 U.S. 586 (1978), he could present "any other aspect of the defendant's character or record and any other circumstances of the offense" as mitigating evidence. (DA. ROA V2/239-40; V15/2602-03). The trial court ultimately instructed the jury on the statutory mitigating factor of the defendant's age and also utilized the standard jury instruction informing the jury that they could consider "any other aspect of the defendant's character or record and any other circumstances of the offense" as a mitigating factor. Thus, Grossman's

current allegation that he was prevented from presenting this type of mitigating evidence is without merit and conclusively refuted by the record.

In his next sub-claim, Grossman alleges that the State violated Giglio v. United States, 405 U.S. 150 (1972), regarding witness Charles Brewer, and further alleges that he is being treated differently than Paul Beasley Johnson. See Johnson v. State, 2010 WL 121248 (Fla. Jan. 14, 2010) (reversing death sentence based on newly discovered evidence of prosecutor's notes indicating that jailhouse snitch was acting at the direction of law enforcement officers).[1] Grossman's claim was procedurally barred, without merit, and properly summarily denied.

In his original postconviction proceedings, Grossman raised the identical claim regarding witness Charles Brewer, and relied on the same 1990 affidavit attached to his current motion. The circuit court rejected the claim after conducting an evidentiary hearing, and this Court affirmed:

> Grossman claims that inmate Charles Brewer, who testified for the State, was acting as a State agent when he procured incriminating information from Grossman. The trial court addressed this claim:
>
> > Defendant states that Charles Brewer, a trusty at the Pinellas County jail while

[1] Notably, the Johnson case is not final and rehearing is being sought by the State.

> Defendant was being held there awaiting trial, was a state agent, and the State withheld this fact along with an agreement that Mr. Brewer had reached with prosecutors regarding charges that were pending against Mr. Brewer. Mr. Brewer testified that he had his brother contact law enforcement after he heard Defendant discussing the case. Mr. Brewer said that he talked to the homicide detectives only one time and that was when they took his taped statement.
>
> Detective Robert Rhodes testified that he taped Mr. Brewer's statement on July 25, 1985, and that was the only time he ever met with Mr. Brewer. The State did not make any deals with Mr. Brewer in exchange for the statement, and Detective Rhodes did not suggest questions for Mr. Brewer to ask the Defendant or ask Mr. Brewer to be an agent for the State.
>
> The State Attorney, Bernie McCabe, testified that he interviewed Mr. Brewer at the State Attorney's Office prior to the trial and that he emphasized to Mr. Brewer that there were no deals in exchange for Mr. Brewer's testimony. Defendant's claim that Mr. Brewer was a state agent at the time that he discussed the Peggy Park murder with Defendant and that the State struck a deal with Mr. Brewer in exchange for his testimony is without merit.
>
> Competent substantial evidence in the record supports the trial court's finding that Brewer was not a State agent. We find no error.

Grossman, 708 So. 2d at 251-52. Obviously, Grossman's attempt to relitigate the same claim in his 2010 successive motion was procedurally barred. See Marek, 8 So. 3d at 1129 n.3 (noting that recent United States Supreme Court opinion has "no impact on the Florida courts' policy of not allowing defendants to

relitigate claims in state court that have been adjudicated previously on their merits").

Furthermore, Grossman's attempt to compare his case to Paul Beasley Johnson's case is without merit as the two cases are clearly distinguishable. In Johnson, this Court reversed the defendant's death sentence based on newly discovered evidence of the prosecutor's notes which the court found indicated that a jailhouse snitch was acting as an agent at the direction of law enforcement officers. This Court found that the prosecutor presented false testimony and argument at the motion to suppress in violation of Giglio, but found the error harmless in regards to the guilt phase. However, this Court reversed Johnson's death sentence because the inadmissible testimony of the jailhouse snitch was material to the jury's 7 to 5 death recommendation.

Unlike Johnson, Grossman's claim is not based on newly discovered evidence, but rather, is based on a 1990 affidavit from Charles Brewer which was made available to Grossman's original postconviction counsel and previously utilized in his 1994 evidentiary hearing. While Grossman's appellate brief provides additional historical facts to support his current claim, they are still facts that were fully developed at the 1994 evidentiary hearing. Grossman neglects to outline the

contrary testimony presented at the hearing which fully refuted Brewer's claim of being a state agent and which was specifically credited in the rejection of this claim years ago.

As previously noted when analyzing this claim, Grossman's claim that Brewer "was a state agent at the time that he discussed the Peggy Park murder with Defendant and that the State struck a deal with Mr. Brewer in exchange for his testimony is without merit." Grossman, 708 So. 2d at 252. Because this Court has previously rejected this claim and Grossman has failed to establish any legal basis for relitigating this issue, this Court should summarily deny the instant sub-claim.

In his final sub-claim, Grossman alleges that his death sentence is arbitrary and capricious because he has not had the opportunity to have a recent clemency proceeding. Grossman acknowledges that he had a full clemency proceeding in 1988, and alludes to a renewed clemency proceeding in February, 2009 which was allegedly abandoned, and argues that he should be granted postconviction relief because the Governor was not aware of the newly discovered evidence discussed in his successive motion.

Grossman's clemency claim should be summarily denied as procedurally barred and meritless. See Johnston v. State, 2010 WL 183984 (Fla. Jan. 21, 2010); Marek, 8 So. 3d at 1129-30);

Bundy v. State, 497 So. 2d 1209, 1211 (Fla. 1986) ("It is not our prerogative to second-guess the application of this exclusive executive function"). This Court has uniformly rejected eleventh-hour "clemency" claims in death warrant proceedings and has repeatedly reaffirmed Bundy. Rutherford v. State, 940 So. 2d 1112, 1121-1123 (Fla. 2006) (rejecting argument that "the ABA Report requires us to reconsider our prior decisions rejecting constitutional challenges to Florida's clemency process"); King v. State, 808 So. 2d 1237, 1241 n. 5, 1246 (Fla. 2002); Glock v. Moore, 776 So. 2d 243, 252 (Fla. 2001); Provenzano v. State, 739 So. 2d 1150, 1155 (Fla. 1999).

Grossman was provided with a full clemency hearing while represented by attorney James Martin in October, 1988. The denial of clemency was revisited in February, 2009, prior to the signing of the current death warrant. Grossman has cited no irregularities in his clemency review or any other basis to reject the well-settled precedent rejecting this claim. Grossman was neither abandoned by counsel nor left alone to navigate the clemency process from his jail cell. See Harbison v. Bell, 129 S. Ct. 1481 (2009). The warrant issued by Governor Crist on January 12, 2010, attests that "it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate."

This claim is untimely, procedurally barred, and without merit; it was properly summarily denied, and no relief is warranted on this issue.

## ISSUE III

WHETHER THE TRIAL COURT ERRED IN DISMISSING GROSSMAN'S CLAIM THAT HE MAY BE INCOMPETENT TO BE EXECUTED

Grossman's last issue challenges the dismissal of his claim that he may be incompetent to be executed. The court below found the claim was not properly raised because (1) it is premature and (2) judicial review is only available in the Eighth Judicial Circuit pursuant to Rule 3.811(d)(1) (V2/182-83). Review of this issue is *de novo*. Walton, 3 So. 3d at 1005 Coney, 845 So. 2d at 137.

This Court has repeatedly upheld the summary rejection of this issue. As Grossman acknowledged at the hearing below (V1/147), this claim was not properly subject to consideration; judicial review of competency to be executed may only be provided after the Governor has explored the issue and rejected a claim of incompetency. Rule 3.811(c) expressly provides that "No motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, shall be entertained by any court until such time as the Governor of Florida shall have held appropriate proceedings for determining the issue pursuant to the appropriate Florida Statutes." This Court has repeatedly rejected claims of incompetency which are offered prior to the Governor's determination under Section

922.07, Florida Statues . Reaves v. State, 826 So. 2d 932, 936, n. 5 (Fla. 2002); Brown v. State, 800 So. 2d 223, 224 (Fla. 2001). This Court must affirm the circuit court's findings that this claim was premature and filed in the wrong circuit, and affirm the dismissal of this issue.

## CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the Order filed below denying Grossman's third successive motion for postconviction relief.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

/s/ Carol M. Dittmar
CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843
carol.dittmar@myfloridalegal.com

/s/ Stephen D. Ake
STEPHEN D. AKE
Assistant Attorney General
Fla. Bar No. 14087
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
stephen.ake@myfloridalegal.com

CO-COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to Ali A. Shakoor, Assistant Capital Collateral Counsel, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, shakoor@ccmr.state.fl.us this 28th day of January, 2010.

/s/ Carol M. Dittmar
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Carol M. Dittmar
COUNSEL FOR APPELLEE