IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN DUROCHER,

Appellant,

v.

CASE NO. 77,745

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The shortness of this brief reflects the crucial problem in this case: Durocher, during the State's case in chief, pled guilty to three counts of first degree murder and refused to let his lawyer present any evidence to mitigate a death sentence. The record on appeal consists of 13 volumes of record pleadings and transcripts. References to the record will be by the letter "R."

STATEMENT OF THE CASE

An indictment filed in the circuit court for Clay County on February 12, 1991 charged Michael Durocher with three counts of first degree murder (R 987-990). Subsequently, he filed several motions which are relevant to this appeal:

1. Motions to suppress various statements he made to the police (R 133, 139, 146, 152, 724). Denied (R 434, 979).

2. Motion to appoint psychiatrist to assist the defense. Granted (R 507).

3. Motion to preclude death as a possible penalty (R 992). Denied (R 1126).

In addition, the court ordered a competency examination of Durocher (R 1138), and the defendant was found competent to stand trial (R 1222).

Durocher was tried before the honorable Judge William Wilkes, and the trial proceeded in the normal course of such events until the State presented its key witness, Deputy James Redmond. That officer testified about the several confessions Durocher had made admitting that he had killed his girlfriend and her two children. Before defense counsel could cross-examine Redmond, Durocher decided to plead guilty to the three charges (R 2243). In light of Durocher's desire for three death sentences, defense counsel asked to withdraw, but the court refused that request (R 2244, 2251-2252).

The court then explained to the defendant the effect of pleading guilty and determined that he was changing his plea freely and voluntarily (R 2254-2271). After redetermining

Durocher's competency (R 2280-82), it accepted the change of plea (R 2283).

The defendant, in accord with his desire to get three death sentences, also instructed his counsel not to present anything in mitigation or challenge any of the aggravation offered (R 2284-2286). Accordingly, the State presented evidence regarding two murders for which Durocher had been found guilty. The first occurred in 1988, for which he was found guilty of first degree murder and sentenced to life (Durocher I) (R 1251). The second murder occurred in 1986, and he was convicted in 1989 for that crime and sentenced to death (Durocher II) (1252), and that case is currently pending a decision in this court.[1]

After hearing evidence of these murders and the State's argument that Durocher should die, the jury returned unanimous death recommendations on all three murders (R 1223-1227). The court, following that recommendation, sentenced Durocher to death as he wanted. In aggravation, it found that:

> 1. the defendant had previously been convicted of another capital felony.
>
> 2. the murders had been committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

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[1]Durocher v. State, Case No. 74,442.

In mitigation, although the defendant had not presented or argued anything, the court found:

> 1. Or considered and weighed the evidence that Durocher had tried to commit suicide several times during his life and had been depressed over the years, but he had never had any inpatient psychiatric treatment.
>
> 2. That while Grace Reed may have consented to the suicide/murder, her two children did not.
>
> 3. Durocher was 23 at the time of the murders.
>
> 4. Durocher has had an alcohol problem, but this problem did not rise to the level that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.
>
> 5. The defendant has had a life long serious stuttering problem.
>
> 6. The defendant has been diagnosed as having a borderline personality disorder with histrionic and narcissistic features.

(R 1253-1256).

This appeal, such as it is, follows.

STATEMENT OF THE FACTS

To put the facts of this case in perspective, some additional procedural history is necessary. On August 24 1988, Durocher was arrested for the murder of Dwayne Childers. He had surrendered to the police after they had cornered him in a house in Jacksonville and talked him into giving up (R 202). Durocher told them he wanted to die, and he had made an unsuccessful effort to kill himself (R 204, 1397-98).

In January 1989, the defendant was found guilty of first degree murder and the jury recommended life (R 177). Between the time of that recommendation and sentencing, Durocher, without counsel's knowledge, confessed to the police about committing another murder (Durocher II). The court sentenced Durocher to life in Durocher I, and he was arrested for the murder in Durocher II.

He was convicted in June 1989 of this latest murder and sentenced to death on July 7, 1989 (R 178). That case is currently pending in this court. On July 18, 1989, an Assistant State Attorney in Clay county received a letter from the defendant telling him that he had information about five homicides in that county (R 468). Captain Jim Redmond of the Clay County Sheriff's office went to Florida State Prison the next day to talk with Durocher about the letter (R 1764). Surprised that the police had responded so quickly, Durocher discussed the anticipated books and movies which would come from his disclosures (R 1767). When pressed, however, the defendant said he was not ready to talk then, but he would show

them where the bodies of Grace Reed (his girlfriend) and her two children were buried the following Tuesday, July 25 (R 1768).

A week later, Durocher told the police that "the timing wasn't good" and he was not going with them, but they had a court order, so they took him anyway (T 1770-1771). At the sheriff's office, Durocher admitted murdering Reed and the children, but then he laughed and said he had not done it (R 1772). The police, however, had done some investigating, and they discovered that the defendant had admitted committing the three homicides to his brother and co-workers (R 1775-1776). They had also taken a woman Durocher had shown where he had buried the three bodies to the location, but they could never find the graves (R 2180).

Captain Redmond saw Durocher next on January 10, 1990 when he arrested Durocher for the murder of Grace Reed and her two children (R 1557). On October 10, 1990 a hearing was held on a Motion in Limine filed by the State to exclude the testimony of Doctors Legum and Miller regarding Durocher's ability to tell the truth.[2] The next day Durocher contacted Redmond and told him he wanted to "give up the bodies." (R 1559) After talking with the Assistant State Attorney about the propriety of talking to Durocher without his attorney being present

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[2]One mental health expert testified that it was impossible to tell when Durocher was telling the truth (R 698).

(R 1560), the policeman went to the jail and talked with the defendant. Although Redmond wanted to question Durocher about the details of the murder, he told them he only wanted to tell them where the bodies were (R 1562). He did this so the state would have "a stronger case so [he could] get to the chair" (R 1562), a goal he had told Redmond about several times (R 1566).

The police took Durocher to where he thought the bodies were buried on the 11th, but nothing was found (R 1567). Durocher was frustrated and upset over this failure (R 1568).

The next day Durocher again contacted the state and told them he would confess if the prosecution could guarantee that none of his immediate family would be called to testify (R 1574). When the state said no promises could be made (R 1579), he agreed to talk with the police anyway (R 1580). Over the next several days Durocher talked with the police some more, and in one interview, he drew a map of where the bodies were buried (R 1586). Finally on October 16, the bodies of the two children were found (R 1588), and on the 22nd, Grace's body was located (R 1614).

Durocher met Grace Reed in 1981 through a mutual friend and the two began a correspondence. She lived in New Jersey although at the time he met her she was living with his mother in Orange Park (R 2200). She left after two weeks, and over the next two years he visited Reed and her daughter three or four times (R 2200). Reed was pregnant in 1983, and she claimed Durocher was the father. He denied it, but went to

visit her when the baby was about a month old (R 2201). He stayed in New Jersey for about three months, but he decided to return to Florida with Grace and her two children, ostensibly because the welfare people in New Jersey were pressuring him to pay $20-$30 per week in child support for Joshua, the baby Reed claimed was his child (R 2202-2203). At that time, according to Redmond's direct testimony, Durocher planned on killing the three of them (R 2203).

About thanksgiving 1983, Reed and Durocher agreed on a suicide pact in which Durocher would kill Grace and her children then kill himself (R 2203). Things were tough. They did not have any place to stay, and they did not have any money (R 2204). One evening Durocher, Reed, and her two children left home and went to a deserted area of Clay County. On the way, Durocher bought two bottles of whiskey and a shovel (R 2204). At a likely spot, Durocher stopped the car, and he and Reed talked more about their agreement (R 2205)). After a while he shot both children (although the evidence shows he may have stabbed the infant (R 2205-2206). He talked with Grace some more, and she told him that if he did not carry through with his part of the agreement, she would come back and haunt him (R 2207). He then shot her and buried the body in a shallow grave (R 2207).

Afterwards, Durocher checked into a motel, asking for a double room. Redmond said he did this so that if anyone asked about the location of Reed, he could say that she had left while he was asleep (R 2209). To give credence to his story,

he abandoned the car in a swampy area and returned a couple of weeks later and burned it (R 2209-2210). He also threw the gun in the swamp, but claimed he retrieved it a couple of years later (R 2210).

SUMMARY OF THE ARGUMENT

This case presents the troubling issue of what a trial court should do when a defendant charged with first degree murder wants, not only to plead guilty to that charge, but to, in essence, also admit that he should be executed. This court has had three other cases in which the defendants have done this, and in two of them Hamblen v. State, 527 So.2d 800 (Fla. 1988) and Anderson v. State, 574 So.2d 87 (Fla. 1991), this court found no Sixth, Eighth, or Fourteenth Amendment prohibition against this form of State assisted suicide.

Dicta in this court's recent opinion of Klokoc v. State, 589/219
Case No. 74,146 (Fla. Sept. 5, 1991) suggests that appellate counsel must prosecute the defendant's appeal "in a genuinely adversary manner, provide diligent advocacy of appellant's interests." Appellate counsel, however, cannot do on appeal what was not done at the trial level. He can, of course, go through the motions of zealous advocacy, but without similar dedication at the trial level, such effort is illusory and more like trying to create substance from shadow.

What has created this situation does not arise from the absence of any mitigation or the overwhelming strength of the aggravation inherent in the case. If it did, appellate counsel would consider filing a brief in accordance with the dictates of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Instead the problem comes from the defendant's efforts to sabotage any review of his death sentence by this court. He has unilaterally prevented the

development of a record on appeal for this court to review. Yet the clear dictates of Section 921.141(4) Fla. Stat. (1990) require this court to review any death sentence. If the defendant has actively prevented the presentation of any evidence or argument in his favor, he has in effect prevented this court from reviewing the appropriateness of his death sentence. If the defendant wants to die, as did Klokoc, yet there is strong evidence that he should not, as there was in Klokoc, then it should be presented to the trial court so this court can review it. Failure to require all mitigation and instead letting defendants limit what this court can review, violates the statutory and constitutional command that this court review the record on appeal to determine the appropriateness of a death sentence.

The court also made several errors in its sentencing order. First, it lacks the unmistakable clarity this court has traditionally required. Second, the court rejected several mitigating factors because Durocher had either been found competent to stand trial or he had not been involuntarily hospitalized. Rejecting mitigation for those reasons was wrong as this court has repeatedly recognized. Issues resolved in the guilt phase of the trial cannot be used to defeat a finding of mitigation in the penalty phase of the trial.

Third, the court ignored several items of mitigating value presented by trial counsel. This court has said that if the defendant presents any evidence in mitigation, the court must consider it and give it some weight. By completely ignoring

what counsel argued, the trial court in this case erred in sentencing Durocher to death.

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

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN SENTENCING DUROCHER TO DEATH WITHOUT AT LEAST REQUIRING A SPECIALLY APPOINTED COUNSEL TO PRESENT, IN AN ADVERSARIAL FASHION, WHATEVER MITIGATION THAT COULD BE PRESENTED IN DUROCHER'S BEHALF, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Our system of justice rests upon two fundamental, but rarely articulated assumptions. Those who are alive want to remain alive, and those whose interests are threatened will fight the hardest to protect them. Upon those two axioms rests the American adversarial judicial system. That is, standing is usually given or granted to interested parties only when they have some stake in the outcome. E.g. United States v. Scrap, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). Standing not only limits who can bring or participate in a lawsuit, it helps insure that all the relevant evidence is presented and the best arguments based upon the facts and law will be made.

Death penalty litigation obviously exists within this adversarial system, and it presumes that the state and the defendant will present the strongest cases possible for either the imposition of death or life. Such strong interests in reaching mutually exclusive results helps insure not only the overall reliability but the heightened reliability of the correctness of the sentence eventually imposed. Indeed, the Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) said, "there is a corresponding difference in the need for reliability in the

determination that death is the appropriate punishment in a specific case." And in Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) Justice O'Connor, in her concurring opinion, further explained that "this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake."

This court has also recognized the need for "super" due process.

> Review of a sentence of death by this Court, provided by Fla. Stat. § F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1972).

Appellate review of death sentences also supports the Supreme Court's rationale approving the various state's death penalty statutes. In Gregg v. Georgia, 428 U.S. 153, 198, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), the court said that "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences." Such review helps remove any arbitrariness and excessive and disproportionate death sentences.

In approving Florida's death penalty scheme, the court said:

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent it is minimized by Florida's appellate review system, and which the evidence of the aggravating a mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida `to determine independently whether the imposition of the ultimate penalty is warranted.'"

Proffitt v. Florida, 428 U.S. 242, 252-253, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976).

Florida has created a death penalty scheme which has won the approval of every court that has reviewed it. Extraordinary attention to procedural safeguards insure that substantive justice is done in sentencing a defendant to death. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). There is, however, one weakness or blind spot. The legislature and the courts have assumed that the defendant does not want to be sentenced to death. That is, Florida's capital sentencing scheme functions only within an adversarial system in which the State presents its best case for execution and the defendant counters with his strongest arguments why he should live. Out of that clash of incompatible interests, the best solution will emerge. This approach to determining justice does not function when the defendant has abandoned his will to live and fight, and indeed wants to die. C.f. Gilmore v.

Utah, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976) (White, dissenting.)[3]

It does not work because the fundamental presumption that the defendant will fight to live and therefore present his strongest case supporting that desire is missing. As in this case, the aggravation remains unchallenged and the mitigation either unpresented or half-heartedly argued by the court or prosecution. In any event, if the State admits there was mitigation, it will, in the same breath, also explain why it should not outweigh the unchallenged aggravation it had vigorously asserted. The penalty trial, in short, limps along trying to maintain the form of an adversarial hearing but in reality denying substantive justice.

Durocher's case is not the first time this court has considered a defendant who wanted to die for his crimes. That occurred in Hamblen v. State, 527 So.2d 800 (Fla. 1988) in which this court discussed this issue in depth. Hamblen waived counsel and pled guilty to first degree murder. He also waived a jury sentencing recommendation, and he presented no evidence in mitigation and challenged none of the aggravation. On appeal, the question was whether the trial court erred in

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[3]Linda E. Carter, "Maintaining Systemic Integrity in Capital Cases: The Use of Court-appointed Counsel to Present Mitigating Evidence when the Defendant Advocates Death," 55 Tennessee Law Review 95; Richard C. Dieter, "Ethical Choices for Attorneys Whose Clients Elect Execution," 3 Georgetown Journal of Legal Ethics 799.

allowing Hamblen to represent himself at the penalty phase. In essence, appellate counsel contended that the court should have appointed special counsel to argue any mitigation supported by the evidence. This court rejected that claim:

> We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta [v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)]. In the field of criminal law, there is not that `death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies.

Id. at 804.

In Anderson v. State, 574 So.2d 87 (Fla. 1991), Anderson had counsel but he directed him not to present any evidence at the penalty phase portion of his trial. In telling the trial court this, counsel also told the judge what he would have presented in mitigation had the defendant not told him do otherwise. On appeal counsel argued that Anderson's orders to his lawyer effectively denied him his Sixth Amendment right to the effective assistance of counsel. He also argued the court had not determined if Anderson had freely and voluntarily waived his constitutional right to present mitigating evidence. This court rejected both arguments, finding that since Anderson had counsel, no Faretta inquiry was required. Id. at 95.

The situation thus looked bleak for Durocher since this court had essentially said that if the defendant wants to die, society has no compelling reason to determine if he deserved to

live. This court's recent opinion in Klokoc v. State, Case No. 74,146 (Fla. Sept. 5, 1991) has altered that conclusion. In that case, the court accepted the defendant's plea of guilty to first degree murder, and like Anderson, Klokoc refused to permit his attorney to participate in the penalty phase of the trial. Counsel asked to withdraw, but that was denied. The court, contrary to this court's holding in Hamblen, appointed special counsel to "represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." (slip opinion at p. 3) Apparently counsel found a significant amount of mitigation because on appeal this court reduced his death sentence to life in prison.

What is significant for this case, however, is that appellate counsel, following what Klokoc wanted, asked this court to dismiss his appeal so he could be executed. The court denied that request, saying,

> counsel for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence. Accordingly, counsel for appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests.

(slip opinion at p. 7)

Counsel in Klokoc was fortunate that the the trial court had preserved the adversarial nature of the penalty phase by appointing the special counsel. From what he presented, the defendant could receive a "meaningful appeal" because the

sentencing had been adversarial. Not so in this case, where the court denied trial counsel's request to withdraw when Durocher told his lawyer not to proceed with his defense in the penalty phase of the trial (R 2252). Special counsel was also not appointed to develop the mitigation. Trial counsel, however, had read this court's opinion in Anderson, supra, and it presented an outline of the mitigation it would have presented and more fully developed had Durocher let him do so. Specifically, he would have argued, and presented evidence to support, the following:

> 1. He would have presented the facts in Durocher I and Durocher II and the sentences he received in those cases.
>
> 2. He would have presented testimony of his father, mother, and brothers and sister describing his broken home, his school problems, and his drug and alcohol abuse.
>
> 3. Durocher was effectively the head of the family after his father left them. He had an older, retarded brother that he took care of.
>
> 4. Durocher has a severe speech impediment which prevents him from holding jobs for very long.
>
> 5. Mental health experts would have testified about Durocher's very serious personality disorder that borders on psychosis at times, and occasionally he loses contact with reality.
>
> 6. Other mental mitigation would have been developed.
>
> 7. The weight and even the applicability of various aggravating factors, especially that the murder was committed in a cold, calculated, and premeditated manner as well as being especially heinous, atrocious and cruel would have been attacked.

8. On the night of the murders, Durocher had been drinking whiskey.

9. He confessed, and by his actions after being arrested in Durocher I, he has consistently shown a profound amount of remorse (to the point of attempting suicide) for the murders he committed.

(R 2344-2349).

In Anderson, Justice Ehrlich joined in majority's result approving the trial court's treatment of Anderson's waiver of the penalty phase of the trial because defense counsel, much as counsel here did, presented a summary of the mitigation he would have presented. Apparently providing a summary of what the defense intended to offer in mitigation adequately presented the evidence. In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the court said, in regard to Gideon's effectiveness in representing himself: "Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman." But just as that court rejected a result oriented analysis in that case, so this court should not be satisfied that just because the sentencing court was somewhat aware of what mitigation Durocher planned to offer it could therefore allow him not to present any evidence in mitigation nor attack the strength of the aggravation.

This is especially true here where defense counsel was not allowed to attack the damning testimony of Redmond in which he related Durocher's version of the murders and the planning that went into them. He could not develop Durocher's crisis which prompted the murders. He and Grace had no money and he had no

job, and life looked bleak for this couple and their children. For a young man of 23, with a limited education, a terrible childhood and home life, who had drug and alcohol problems on top of his mental problems, perhaps suicide or even murder appeared a reasonable solution.

In Perry v. State, 522 So.2d 817 (Fla. 1988), the defendant tried to rob a woman in her home, and he beat, stabbed, and strangled her. He was convicted of first degree murder, and the court sentenced him to death despite the jury's life recommendation. This court, however, reduced that sentence to life in prison for reasons that have strong similarities with this case.

> Several witnesses who had know Johnny Perry over a long period of time testified that he was kind, good to his family and helpful around the home and that he had never shown any signs of violence. An attorney testified that when he first met him in 1982, Perry was a highly motivated young man. He said that thereafter Perry's life had gone downhill and that by 1985, Perry viewed himself as a total failure. The jury knew that Perry was unemployed, that his wife was pregnant and that the couple was trying to find a place to life. There was testimony that Perry had fully cooperated with authorities in another criminal case in which he was a witness.

Id. at 821.

Of course Durocher had committed other murders, but those occurred after the ones in this case, and defense counsel could have argued that fact to the jury to reduce the weight of that aggravation.

Thus, the problem with Justice Ehrlich's opinion is that counsel does more than simply facilitate the presentation of evidence. Out of the mass of facts presented, he organizes the evidence in the light most favorable to his client. He has spent the long hours talking with his client and witnesses, poring over the medical and psychological reports, examining the physical evidence, and thinking about his case. It is unreasonable to believe the jury or the sentencing judge would want to do the same, and the law does not expect them to do so. The lawyers make sense out of what was presented at trial. In short, this court should not excuse either the trial court or defense counsel from presenting any argument that Durocher should live simply because counsel summarized the evidence he intended to present during the penalty phase of the trial.

When the defendant actively seeks his own execution by strategically allowing the state to present an unchallenged case against him and preventing his lawyer from presenting any mitigation or challenging the state's aggravation, the adversarial system has collapsed at the trial level and also on appeal. Appellate counsel can go through the motions of presenting what this court required in Klokoc: a meaningful appeal. But such efforts are doomed to fail not because trial counsel had nothing to present but that he was prevented from doing so.

In other contexts, courts have said that a defendant cannot dictate the course of his trial. In Singer v. United States, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965), the

Supreme Court held that a defendant cannot unilaterally waive the right to be tried by jury. Likewise in Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), the defendant could not stop his trial by leaving the courtroom. So it is when a defendant joins the state in seeking his own execution. By preventing any evidence or argument to mitigate a death sentence or minimize the weight of the aggravating factors, the defendant is thwarting this court's ability to give his case the meaningful review it promised the United States Supreme Court it would perform and which the legislature expects. The defendant, by his action, has prevented any genuine adversarial appeal, and were it not for Durocher's appellate counsel's fundamental cowardice and an arguable sentencing issue, he would have filed a brief in accord with the dictates of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). As it stands, this court cannot reweigh the aggravating and mitigating factors as the United States Supreme Court in Proffitt said this court would do, nor can it give this case the meaningful appellate review required by Gregg. The heightened scrutiny consistently required by the nation's high court, this court, and the state legislature, cannot be met in this case if this court adheres to its rulings in Hamblen and Anderson. This court should, therefore, reverse the trial court's sentence of death in this case and remand so that either trial counsel or specially appointed counsel can develop and present the mitigation present in this case.

ISSUE II

THE COURT ERRED IN SENTENCING DUROCHER TO DEATH BECAUSE IT DID AN INADEQUATE OR INCOMPLETE ANALYSIS OF THE MITIGATING CIRCUMSTANCES PRESENT IN THIS CASE.

Durocher would not let his counsel present any evidence in favor of a life sentence, but the court in imposing death considered several pieces of evidence as mitigation. Some of this ameliorated such a harsh sentence while it rejected the rest. Specifically, the court discussed each of the statutory mitigating factors and also some nonstatutory mitigation which was evident from the record. As discussed more fully below, the court's sentencing order is deficient in three ways: 1) It lacks the unmistakable clarity this court has required. 2) It failed to include and discuss all the mitigation Durocher's counsel suggested was present. 3) The court used Durocher's lack of incompetency and insanity to reject some of the statutory and nonstatutory mitigation.

This court, in recent years, has placed stringent requirements upon orders sentencing defendants to death. The early case of Mann v. State, 420 So.2d 578 (Fla. 1982) foreshadowed this tough attitude towards the sufficiency of such orders when it said that they must be of "unmistakable clarity." Other cases since then have sought to clarify what this court has demanded, but it became obvious that the message was not getting through to trial courts. A trilogy of cases has sought to clarify what the law requires of trial court in sentencing a defendant to death.

The first case, Rogers v. State, 511 So.2d 526 (Fla. 1987) presented three questions for the trial court to consider:

> 1. Were the facts alleged in mitigation supported by the evidence?
>
> 2. If so, were the facts the kind capable of mitigating a defendant's punishment?
>
> 3. If so, did the mitigation have sufficient weight to offset whatever aggravation was present.

Id. at 534.

Further clarifying what the trial court must do, this court in Campbell v. State, 571 So.2d 415 (Fla. 1990) required:

> 1. The trial court had to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant."
>
> 2. The trial court must find as a mitigating circumstance "each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence.
>
> 3. That in weighing the aggravating factors against the mitigation, the court must give the mitigation some weight, although this court would not say how much consideration the sentencer had to afford each piece of mitigation.

Finally, this court in Santos v. State, Case No. 74,467 (Fla. September 26, 1991) 16 FLW S633 reaffirmed Rogers and Campbell, adding that "Mitigating evidence must at least be weighted in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." (slip opinion at p. 10). More significantly, this court, following the lead of the United States Supreme Court, indicated its willingness to

examine the record to find mitigation the trial court had ignored:

> [In Parker v. Dugger, 111 S.Ct. 731 (1991)] the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.

Id. at p. 11.

To withstand constitutional scrutiny a trial court must give serious consideration to all of the mitigation present in a particular case, and by reducing its evaluation to writing in which it finds, analyzes, and weighs all of the possible evidence supporting a life sentence, the sentencer can satisfy this court's ultimate goal, that death sentences not be the product of judicial discretion but of reasoned judgment. State v. Dixon, 283 So.2d 1 (Fla. 1972). In this case, the court's sentencing order fails the exacting standards this court and the United States Supreme Court have established.

1. The lack of unmistakable clarity.

A relatively minor problem occurs almost immediately in that the sentencing order unclearly reflects what consideration the trial court gave to one of the statutory mitigating circumstances. Under its discussion of whether the capital felony was committed while the the defendant was under the

influence of an extreme mental or emotional disturbance, the court concluded that it "has weighed and considered all the information contained in the report [of Dr. Barnard]. The sentencer never said that what was in the report was mitigating, and it is unclear what it meant when it said that it had "weighed and considered all the information contained in the report."

2. Dismissing the mitigation.

The court's primary mistake was its consistent rejection of all the uncontroverted mitigation for bad reasons. It first did this in its discussion of the previously mentioned mitigating circumstances. The court apparently rejected as mitigation that Durocher was under the influence of an extreme mental or emotional disturbance even though Dr. Barnard's unchallenged report said that he had tried to commit suicide several times during his life, he was chronically depressed, he had started drinking alcohol at 15 and become a regular user by 18. His weekend drinking had resulted in shakes and blackouts. Dr. Barnard, concurring with Dr. Miller's report (R 1154-55) found Durocher to "most likely" have a borderline personality with histrionic and narcissistic characteristic (R 1161-62). The court dismissed this evidence by noting that "he [Durocher] had never had any inpatient psychiatric treatment." (R 1254) Regarding the defendant's mental problems, the court minimized their ameliorative impact on a death sentence by noting that Durocher had been found competent to stand trial and did not meet the criteria for involuntary hospitalization.

Similarly the court rejected the mitigating factor regarding Durocher's ability to conform his conduct to the requirements of the law because the defendant had been found competent to stand trial by Drs. Miller and Barnard (R 1255).

Finally, the court rejected Durocher's use of alcohol on the night of the murder because he was able "to give a detailed account" of them (R 1256). Merely because a defendant can recall, some time later, what he did on the night of the murder does not justify a trial court from totally rejecting the defendant's use of alcohol as mitigating a death sentence. C.f., Ross v. State, 474 So.2d 1170 (Fla. 1985); Caruthers v. State, 465 So.2d 496 (Fla. 1985).

The trial court, however, cannot reject mitigating evidence for reasons which have no relevance to the sentencing portion of the trial. In Burr v. State, 466 So.2d 1051 (Fla. 1985), this court said that doubt as to the defendant's guilt could not mitigate a death sentence. Abstracted, issues decided in the guilt phase generally have no relevance to the penalty determination. Thus, that Durocher had been found competent to stand trial had no relevance in considering the correct sentence to impose because that issue had relevance to the guilt phase of the trial. Said another way, if the defendant was not competent to stand trial he certainly would not have been sentenced. His competence also has no weight in the sentencing since it has no relevance to his mental condition at the time of the murders.

Likewise rejecting Durocher's mental problems because he did not meet the criteria for involuntary hospitalization and was sane at the time of the offense (R 1256) ignores the test of admissibility of mitigating evidence. If the evidence has relevance it is admissible. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). If it admissible, it must be found as mitigation and considered in the balance. It cannot be rejected because the defendant did not meet some statutory criteria. This court has considered as mental mitigation several disorders and problems which probably would not have qualified the defendant for involuntary hospitalization. Ross v. State, 474 So.2d 1170 (Fla. 1985) (Alcoholism); Holdsworth v. State, 522 So.2d 348 (Fla. 1988) (Drug use). Indeed, this court in Campbell, recognized that merely because the defendant had been found sane did not eliminate consideration of Campbell's mental condition as mitigation. Campbell at 418-19. Mines v. State, 390 So.2d 332, 337 (Fla. 1980). Thus, the trial court erred either in rejecting or failing to give any weight to the various mental mitigation present in this case because he was either competent to stand trial or had not been committed to a hospital for mental illnesses.

3. The failure to consider all the mitigation presented.

Durocher did not want his lawyer to present any evidence in mitigation, yet counsel alerted the court to several items he would have presented or argued against sentencing the defendant to death:

a. Durocher came from a broken home in which he was the oldest child. He loves his mother and retarded brother very much. Campbell, supra.

b. The defendant had severe problems in school and dropped out when he was 16.

c. He had drug and alcohol problems. Ross, supra.

d. He has a very serious personality disorder that borders on psychosis, and Durocher at times loses contact with reality.

e. But for his confession in this and other cases, the State would never have established who committed the murders.

f. Durocher has a profound sense of remorse for killing Grace Reed and her children. Campbell, supra. Stewart v. State, 420 So.2d 862 (Fla. 1982).

(R 2343-48).

Contrary to the dictates of Rogers and Campbell, the court made no mention of any of this mitigation. To have failed to do so was error, and when that significant failing is combined with the other sentencing problems presented by the trial court's order condemning Durocher to die, this court should reverse the trial court's sentence and remand for a new sentencing hearing.

CONCLUSION

Based upon the arguments presented here, appellate counsel respectfully asks this honorable court to reverse the trial court's sentence and remand for a new sentencing hearing before a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Richard Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, MICHAEL ALAN DUROCHER, #A-809844, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 31st day of October, 1991.

DAVID A. DAVIS