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

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

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.

The state misapprehends Durocher's purpose in relying on this court's decision in Klokoc v. State, Case No. 74,146 (Fla. Nov. 27, 1991). It seems to believe that the appellant liked that case because a circuit court appointed special counsel to develop the mitigation in Klokoc's case, thereby creating a constitutional imperative this court must accept. (Appellee's brief at p. 8). What is significant is what this court said when appellate counsel for Klokoc, acting at the request of the defendant, tried to withdraw from his appeal. In order for there to be a "meaningful appeal" there had to be an adversarial proceeding at the Supreme Court level. Appellate

counsel, therefore, was directed "to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests."

The point of Durocher's argument on this issue is that appellate counsel cannot prosecute, "in a genuinely adversary manner," a case, especially one involving sentencing issues, which was not likewise vigorously presented at trial. Of course, there are cases for which there is no mitigation, and in those situations where the trial court made no error, the procedure articulated in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) applies. Durocher is not concerned with that situation but with the one where mitigation is present, just unpresented.

In Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988), this court articulated only half the truth when a defendant seeks death: "[I]n the final analysis, all competent defendants have a right to control their own destinies." Society also has a right to determine the path it wants to take, and in death penalty sentencing only those people whose crimes are the most aggravated and least mitigated deserve to die. The defendant's appellate counsel cannot be an advocate before this court if there was no adversary proceeding below. To protect society's interest, mitigation must be presented (if available), contested (if possible) and discussed by the court. A defendant cannot unilaterally control the sentencing process, and his decision to die need not be acquiesced in by this court, as readily demonstrated by its decision to reduce

Klokoc's death sentence. The extensive procedure implemented and repeatedly approved by this court and the nation's high court is designed to guarantee that society's substantive right to execute only the most deserving is realized. It collapses at the appellate level when the trial court follows only the defendant's wishes and ignores society's equally significant rights.

When the defendant decides he wants to die, he can do all in his power to bring that to pass, but such desire does not mean the state must go along with this wish. Obviously, therefore, there must be a balance struck, and in this case, it is not hard to reach. Let the defendant pursue his course, but also require that all possible mitigation be developed and presented at the sentencing hearing. Whether it takes special counsel to satisfy this requirement is not at issue. What is, is the constitutional mandate imposed by this court and the United States Supreme Court that death be imposed in a rational, consistent manner.

Of course, the defendant may frustrate some efforts to develop the mitigation, by refusing, for example, to be examined by a psychologist. Yet such obstruction should not thwart the legitimacy and moral efficacy of a later imposed death sentence. The state can justify the execution of a death wishing defendant by saying it did all in its power to determine that the defendant truly deserved to die. As the law now stands, this court cannot say that.

The state makes an interesting comment at the close of its argument on Issue II which has relevance to this point:

> Further, the matters[in mitigation] which appellate counsel now identifies are matters which would have been presented, if Durocher had allowed for such presentation. Durocher, of course, did not consent to the presentation of mitigation, and, accordingly, no such presentation was made."

(Appellee's brief at p. 19) (emphasis in brief.)

Sentencing balances the appropriate punishment for the defendant against the state's interests. When the defendant prevents evidence from being presented which would mitigate a death sentence, the confidence society has in the imposed death penalty is severely shaken. Therefore, to prosecute an appeal in an adversarial manner, all the mitigation must be developed and presented in a trial that is adversarial in nature.

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.

In Durocher's initial brief, one of his main points was that the trial court had rejected several items of mitigation for bad reasons (Initial Brief pp. 27-30.) The state makes no response to that argument, noting only that "The judge's conclusion that this evidence did not rise to the level of statutory mitigation should be approved, especially in the absence of any contrary testimony or representation in the record." (Appellee's brief at p. 16)

The State, on page 16 of its brief, argues that since the trial court "was not addressing any specific claim by defense counsel as to the existence of mitigation, it was not inappropriate for him to refer to all the evidence presented in regard to Durocher's mental state, including the experts' findings of competency and sanity." That statement, however, misses the point of Durocher's argument. Assuming the court can mention or refer to issues resolved either in the guilt phase of the trial or before, it cannot use those determinations to justify imposing death or rejecting mitigating factors. That Durocher was competent and sane has no relevance to the penalty phase of the trial because if he had been neither, there would not have been a sentencing. C.f. Burr v. State, 466 So.2d 1051 (Fla. 1985) (Doubt as to guilt cannot mitigate a death sentence.)

Then on page 17 of its brief, the state reiterates without explaining why the trial court rejected Durocher's use of alcohol on the night of the murder. Rather the explanation, that because the defendant could remember what happened the night of the murder, does not justify rejecting this mitigation. Apparently, the court believed that unless the defendant was so drunk that he could not remember what happened, his drinking almost a quart of whiskey on that night had no relevance to the sentencing. At least since this court's opinion in Kampff v. State, 371 So.2d 1007 (Fla. 1979), that has not been the law. Ross v. State, 474 So.2d 1170 (Fla. 1985); Caruthers v. State, 465 So.2d 496 (Fla. 1985).

The state's problem is that the trial court completely rejected the defendant's use of alcohol on the night of the murders, not that he gave its use little weight. In that sense, this case is distinguishable form Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986) where this court did not fault the trial court for giving Kokal's use of alcohol little weight rather than none as in this case.

This case also differs from Cooper v. State, 492 So.2d 1059 (Fla. 1986) in that unlike that case, here the evidence of Durocher's consumption was uncontroverted.

Finally, the state argues that this court's decision in Campbell v. State, 471 So.2d 415 (Fla. 1990) is not retroactive because it was not a fundamental change in the law. It makes this claim because this court's did not issue its opinion on rehearing until after Durocher was sentenced. While that may

be true, the revised opinion did not alter the law relevant to this issue. Additionally, if Campbell was not a fundamental change in the law, then the court should have done what that case requires: explicitly considered all the mitigation.

CONCLUSION

Based upon the arguments presented here and in the defendant's Initial Brief, 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 B. 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 14th day of January, 1992.

DAVID A. DAVIS