IN THE SUPREME COURT OF FLORIDA

VICTOR MARCUS FARR,

Appellant,

v. CASE NO. 77,925

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
OF THE THIRD JUDICIAL CIRCUIT, IN
AND FOR COLUMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

On January 3, 1991, a Columbia County grand jury returned a twelve count indictment charging Victor Marcus Farr with the following offenses: (I) grand theft; (II) attempted armed burglary of a conveyance; (III) attempted armed robbery; (IV) attempted kidnapping while armed; (V) attempted armed kidnapping; (VI) attempted first degree murder; (VII) attempted first degree murder; (VIII) armed burglary; (IX) armed kidnapping; (X) armed kidnapping; (XI) armed robbery; (XII) first degree felony murder during the commission of a kidnapping. (R 124-127) Farr filed a written plea of not guilty on February 5, 1991. (R 142) On February 7, 1991, the circuit court granted a motion for a mental examination and appointed a psychiatrist as a defense expert to determine Farr's competency to stand trial and mental condition at the time of the offense. (R 145-148)

On April 2, 1991, Farr entered a guilty plea to all counts in the indictment. (R 175-183) (TR 1-38) Farr specifically requested in his written plea offer that the state recommend that the court impose a death sentence and that the court sentence to him to death. (R 176) At the plea hearing, the prosecutor provided the factual basis for the plea as follows:

> MR. COLEMAN: Your Honor, we expect to show if this matter went to trial in Columbia County, Florida, that back December 10th and 11th, 1990, that this defendant was staying with an individual, Frank Romine in Lake City, Florida.
>
> He got into an argument with a neighbor of Mr. Romine's on December the 11th, and he was asked to leave Mr. Romine's house, he did so. The day after he left, Mr. Romine noticed that his .25 caliber

handgun was missing. Mr. Romine reported that missing handgun and the serial number and its description to the Columbia County Sheriff's Office, and also that he had given no one permission to take it.

On December the 11th, after being given a ride from Mr. Romine's house to his father's house, Mr. Farr got a ride from there by his father to Tom's Place, a bar in Lake City, Florida. After being in the bar a short time he went outside and tried to kidnap two women, Cindy Thomas and Patsy Lynch. He did that by approaching them in the car, at that point he demanded that the two women slide over and give the control of the car and themselves to him.

He threatened to shoot them if, they didn't comply with his wishes, when they did not, he proceeded to shoot both of them several times. These acts constituted his attempted to unlawfully enter the vehicle while armed with a firearm, he attempted to take the vehicle while armed with a fire-arm, he attempted to kidnap both women and attempted to murder both of the women while armed.

Leaving them wounded, after that, he then walked around the rear of Tom's to a furniture store that was closed. In front of there were two young people, Chris Todd and his girlfriend, Shirley Bryant, they were sitting in Todd's car. He approached the car and forced Mr. Todd into the back, and as he did and began to kidnap them. He put him in the back seat and got in the driver's seat and began demanding the keys to the car. Eventually they were produced and placed in the ignition, the car was cranked and he asked for some assistance to find the light switch to turn it on. Mr. Todd saw this as an opportunity, he told Mr. Farr that he would have to lean forward to reach the switch to turn it on, he did so, and Todd shoved the seat and him and all towards the windshield and bolted out of the door of the car and fled.

Mr. Farr immediately left in that car with Ms. Bryant, Shirley Bryant as a captive at gunpoint.

Mr. Todd jumped in Ms. Bryant's car and attempted to follow them, he stayed up with them as best he could, until the Tuscanooga Road cut off, which veered off

at a 45 degree angle from south 41, there the car that belonged to him being driven by Mr. Farr made that turn, he didn't but ran in the ditch, and when it did he ran into a bar and reported what had happened.

Obviously the people at Tom's had already called in a report, as a consequence, an area wide BOLO was put out for this described vehicle with this individual and Ms. Bryant.

He got to the interstate, headed north and eventually got off the interstate and was up in the edge of Hamilton County, there the car was spotted by a Game and Wildlife Officer and an Agricultural Officer, they began to follow the vehicle and really not getting into a pursuit status but identified themselves with a blue light and suddenly the vehicle accelerated and sped away from them and rounded a curve, when they got there, they found the vehicle crushed against the side of the tree and in the vehicle they found this defendant and Ms. Bryant in critical condition, and also in the vehicle was a handgun, a .25, and that matched the one that was stolen from Mr. Frank Romine and the FDLE laboratory matched the slugs taken from the victims at Tom's Place with that particular gun by scientific analysis.

The death of Shirley Bryant occurred due to the wreck during the course of her kidnapping by Victor Marcus Farr, additionally a FHP homicide investigator that went to the scene advised that he would testify that the markings that he saw on the side of the road after the car left the road, and even proceeding into the tree, were not braking skid marks but acceleration marks.

Finally Mr. Farr wrote a letter that, in which he stated, that he deliberately ran into this tree in an attempt to kill himself and Ms. Bryant at the end.

These are the facts that we would rely on to prove the case and all the charges to which he is pleading.

(TR 26-29). Farr and his counsel agreed that the state could prove those facts. (TR 30)

Circuit Judge Royce Agner accepted Farr's plea and ordered a presentence investigation report. (TR 1-37) At that time, the court left open the question of whether he would convene a jury for an advisory sentence at a penalty phase. (TR 36) Farr filed a memorandum in support of waiver of a penalty phase jury. (R 198-204) The state stipulated to the defendant's waiver of a penalty phase jury. (R 205)

On May 13, 1991, the trial judge conducted a sentencing proceeding without a jury (TR 52-123) The trial judge stated the items he had read in the record to be as follows: presentence investigation report; a letter Mr. Farr wrote to the court dated April 25th; a letter addressed to the state attorney's office in care of the San Angelo Police Department in Texas; and a letter from Farr to his lawyer dated February 20, 1991. Certain other letters the court was aware of but specifically did not read. (TR 53) The court noted there had been a psychiatric evaluation done by the psychiatrist appointed as a defense expert. (TR 54) Defense counsel advised the court, pursuant to Farr's instruction, that Dr. Mahtre would not participate in the sentencing proceedings. (TR 55) The court questioned whether there might be any input regarding Farr's competence to proceed. (TR 55) Defense counsel offered Mahtre's written report to the court. (TR 56) Neither the trial judge nor the prosecutor had access to this report earlier. (TR 56). Farr specifically agreed that the judge could consider Mahtre's report concerning his competency to stand trial or to proceed. (TR 57) The report was received as

exhibit #1. (TR 58) The prosecutor asked for a copy of the report to be made available during the hearing. (TR 58) The court told the prosecutor that, "I don't find any particular interest in seeing Dr. Mahtre's report." (TR 58) The court further said that its only interest was in Farr's competence to proceed. (TR 59) The prosecutor withdrew his request for a copy of the report. (TR 59) The court then asked if Farr had ever been in a mental hospital, and he replied that he had been in Texas. (TR 59) Defense counsel explained that he had not been adjudged incompetent at that time. (TR 59-60)

Farr again reiterated his desire to proceed without an advisory jury. (TR 61-62) Defense counsel provided the court with a letter of instruction signed by Farr which covered this point. (TR 62-63) That letter was received as exhibit #2 in the proceedings. (TR 64) The court noted in paragraph four of the letter, there was some discussion about Mahtre's report as providing possible mitigation. (TR 64) However, the court said it would decide later whether to consider the report. (TR 64-65)

Circuit Judge Royce Agner adjudged Farr guilty of all twelve counts. (R 190-192, 295-296) He proceeded to sentencing on Counts I through XI of the indictment. (TR 66-74) The court sentenced Farr to five years for grand theft; fifteen years for attempted burglary; fifteen years for attempted robbery; fifteen years for attempted kidnapping; fifteen years for attempted kidnapping; thirty years for attempted first degree murder; thirty years for attempted murder; life for armed

burglary; life for armed kidnapping; life for armed kidnapping; and life for armed robbery. (R 297-312, TR 66-74)

Prior to sentencing on the murder, the prosecutor presented one witness, Mike Dunn, a probation officer. (TR 77) Dunn had prepared the presentence investigation report. (TR 78) He said that he spoke to Farr during the preparation of the report and that Farr made a statement to him that he intended to kill the victim when he struck the tree with the automobile, since he had no ammunition for his gun and could not shoot her. (TR 80-81) Dunn also noted in his report that he had information that Farr had been mentally evaluated and declared competent. (TR 82) Based on a statement Farr made to him, he wrote in his report that in 1979 Farr received alcohol treatment on a outpatient basis and voluntarily admitted himself into a mental health center to avoid court proceedings. (TR 82)

Dunn also stated that Farr provided him letters, which he wrote, to be attached to the PSI. (TR 83) The state's exhibits 1 & 2 are the original letters of copies Dunn had presented to the court with the PSI. (TR 83) The prosecutor asked that the letters be made part of the record (state's exhibit #1 is a letter dated February 20, 1991, and exhibit #2 is a letter dated April 12, 1991). (TR 85) In the February 20th letter, Farr wrote to the prosecutor, Mr. Coleman, stating that he had been incorrectly charged with first degree felony murder, that the charge should have been premeditated murder. (TR 84-85) Farr said he told the victim to get out of the automobile on two separate occasions, but she refused. (TR 85) Farr said he

wanted her out of the car because he planned to kill himself. (TR 85) When the police started chasing the car, Farr said he told the victim that the night was going to have a sad ending. (TR 85) He said when he ran the car off road, he felt it would be better if no one could talk. (TR 85) Farr said that is why he was asking for the death sentence. (TR 85)

In the April 12th letter, Farr wrote that he asked for the death sentence because he planned to kill the victim. (TR 86) He said when the police starting chasing him, he had to hit the tree. He was not going to let her live. (TR 86) He told her he was going to kill her and she began to beg. (TR 86) He hit her on the left side of the face to make her shutup. (TR 86) When he first lost control of the car and managed to get it back on the roadway, Farr said he told the victim that this was not the way he planned it. (TR 86) Farr then pressed on the gas and headed straight for the tree. (TR 86) The victim grabbed the wheel to try to turn the car, and Farr hit her again, knocking her against the window. (TR 86) He told her she was going to die. (TR 86)

Farr also presented some letters to the court for consideration. (TR 88) Defense counsel presented them to the court at Farr's expressed direction. (TR 88) They were admitted as defense exhibit #1, which was a letter addressed to the judge and was read into the record. (TR 90) In this letter, Farr explained why he wanted the death penalty and detailed matters about the crime. (TR 90-96)

Dr. Mahtre's report, which the trial judge apparently never read, and the PSI provided information about Farr's background and mental condition. (R 230-232, 261-266) Farr never knew his biological father and his step-father was a chronic alcoholic. (R 261-262) His mother and step-father divorced when Farr was ten-years-old. (R 261) Farr's mother was chronically depressed, made several suicide attempts and was hospitalized several times. (R 262) Farr was raised by his stepfather, an uncle and his grandparents. (R 261-262) He move around a great deal and said he felt rejected by his family -- he said, "I did not feel like I belonged in my family." (R 262) Farr was sexually abuse by a stranger when he was 14, and he ran away from home three times while a teenager. (R 262) He dropped out of school when he was in the seventh grade. (R 262) At 13-years-old, Farr began drinking alcohol his uncle provided to him. (R 263) He stated, "I learned alcohol was good for hiding things like my mother being gone." (R 263) Later, in 1986, his mother was murdered by her boyfriend. (R 261) Farr began drinking a case of beer a day and also used marijuana, speed and cocaine. (R 230, 263) He attended AA meetings for a while, but his longest abstinence from alcohol was four months. (R 263) He never received drug abuse treatment. (R 230) Farr was hospitalized for depression, hallucinations and suicidal tendencies; he attempted suicide four times. (R 263) He reported continued depression due the loss of his mother, several broken marriages and relationships and his not being able to see his children. (R 263)

After the prosecutor concluded his argument to the court encouraging the imposition of the death penalty, defense counsel made no argument in opposition. He told the court that he was making no argument pursuant to Farr's specific instructions. (TR 108-109) The court inquired of Farr if his counsel was carrying out his wishes, and Farr replied affirmatively. (TR 110-111) At a bench conference, the court indicated to counsel that he was inclined to find that the aggravating circumstances outweighed the mitigating and he would need to prepare a written order. He took a recess to write the order. (TR 113-114) The defense counsel at that point offered to participate in drafting the order. (TR 114)

Judge Agner sentenced Farr to death for the murder. (Tr 66-74)(R 309-312) In aggravation, he found: (1) Farr had been previously convicted for a violent felony; (2) the homicide was committed while Farr was fleeing from the commission of a kidnapping, a robbery, two attempted kidnappings and an attempted robbery; (3) the homicide was committed to disrupt the enforcement of laws; and (4) the homicide was especially heinous, atrocious or cruel. In mitigation, the court said it considered, but rejected, the possibility that Farr's capacity to appreciate the criminality of his conduct was substantially impaired due to his intoxication at the time of the offense. (R 309-311)

Notice of appeal to this court was filed on May 13, 1991. (R 313)

SUMMARY OF ARGUMENT

1. In Hamblen v. State, 527 So.2d 87 (Fla. 1991), this Court held that a competent defendant in a capital case can plead guilty and waive the presentation of evidence in mitigation. Although a sentencing judge has the discretion to empanel a jury and require a penalty phase where aggravating and mitigating circumstances are developed for the jury's and judge's consideration, he is not compelled to do so. At the same time, however, this Court has charged a trial judge with the responsibility to examine the record for mitigation to insure the propriety of the death sentence and to protect society's interest in the fair application of the extreme and final penalty. Hamblen. This Court has also adhered to its responsibility to insure the fair and proportional application of the death penalty in such situations. Klokoc v. State, Case. no. 74,146 (Fla. Sept. 5, 1991). The requirements placed on the trial court and this Court to examine the mitigation in the case to insure the fair application of the death sentence is inconsistent with the holding in Hamblen which allows a trial court the discretion to allow a defendant who wants to die to prevent the presentation of mitigation. The trial court and this Court cannot discharge its responsibilities if mitigating evidence is not preserved in the record. This Court should recede from Hamblen.

Alternatively, in this case, the trial court failed to consider the mitigating evidence which did exist in the record when sentencing Farr to death. Farr's sentencing judge had a

written psychiatric report available which he did not read for sentencing. He heard no live testimony in mitigation. Moreover, the trial judge failed to use the information in the psychiatric report and PSI when he imposed the sentence. Moreover, the court improperly found and considered two aggravating circumstances. This record fails to demonstrate that Farr's death sentence was reliably imposed in accordance with constitutional requirements and Hamblen.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING FARR TO WAIVE THE PRESENTATION OF MITIGATING EVIDENCE AND IN FAILING TO INSURE THAT THE DEATH PENALTY WAS NOT IMPROPERLY IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE CONSTITUTION OF FLORIDA.

This Court has held that a competent defendant in a capital case can refuse to contest the imposition of a death sentence and waive the presentation of evidence in mitigation. Pettit v. State, Case no. 75,565 (Fla. Jan. 9, 1992); Hamblen v. State, 527 So.2d 87 (Fla. 1991). Victor Farr, a man with a history of depression and suicide attempts, was allowed to plead guilty expressly asking for a death sentence, waive a penalty phase jury and waive the development of mitigating circumstances. Victor Farr wanted the State to do what he had been unsuccessful in doing in the past -- kill himself. The trial court, the prosecutor and his trial counsel facilitated Farr's wish to place in motion a process to kill him. The adversarial system was thwarted, and the propriety and reliability of the death sentence imposed was not tested. Farr's sentencing judge had a written psychiatric report available, but he heard no live testimony in mitigation. Moreover, the trial judge failed to use the information in the report when he imposed sentence. This record fails to demonstrate that Farr's death sentence was reliably imposed in accordance with constitutional requirements. Amends. VIII, XIV U.S. Const.; Art. I Secs. 9, 16 & 17 Fla. Const.; Eddings v. Oklahoma, 455 U.S.

104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973).

1. This Court Should Recede From Hamblen

This Court has addressed issues surrounding a situation where a capital defendant desires that nothing be presented to mitigate his sentence. In Hamblen v. State, 527 So.2d 800 (Fla. 1988), the defendant waived counsel and pled guilty to first degree murder. He also waived a jury sentencing recommendation; presented no evidence in mitigation and challenged none of the aggravating evidence. On appeal, the question was whether the trial court erred in allowing Hamblen to represent himself at the penalty phase. Appellate counsel argued that the court should have appointed special counsel to present and argue mitigation. This court rejected his argument:

> 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.

Ibid. at 804. This Court also found that the judge in Hamblen had protected society's interest in insuring that the death

sentence was not improperly imposed since he carefully analyzed the propriety of the aggravating circumstances and the possible statutory and nonstatutory mitigating evidence. Ibid. The opinion concluded:

> We hold that there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. The trial judge adequately fulfilled that function on his own, thereby protecting society's interests in seeing that the death penalty was not imposed improperly.

Ibid.

Later, in Anderson v. State, 574 So.2d 87 (Fla. 1991), the defendant directed his lawyer not to present any evidence at the penalty phase of his trial. Counsel told the judge what he would have presented in mitigation had his client not directed him to do otherwise. On appeal, counsel argued that Anderson's orders to his lawyer 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 Anderson's comments on the record were sufficient to waive mitigating evidence and because he had counsel, no Faretta inquiry was required. Ibid. at 95.

Most recently in Pettit v. State, Case no. 75,565 (Fla. Jan. 9, 1992), this Court adhered to the rule announced in Hamblen that a competent defendant could waive the presentation of mitigating evidence. This Court affirmed the trial court's

decision to allow the defendant to waive the presentation of mitigating evidence and the subsequent sentence of death. However, this Court reiterated the responsibility of the trial judge to analyze the possible statutory and nonstatutory mitigating factors. The trial judge satisfied the requirement in Pettit when he had the two neurologist who had examined Pettit to testify at the sentencing hearing. Pettit, slip opinion at 3.

Although Hamblen, Pettit and Anderson said that a capital defendant who wants to die can exercise control over his destiny at the trial phase -- waive counsel, plead guilty, waive the presentation of all mitigating evidence -- this same control does not extend to the appeal stage. This Court's opinion in Klokoc v. State, Case No. 74,146 (Fla. Sept. 5, 1991) establishes this limit on the defendant's ability to control capital sentencing. In that case, the court accepted the defendant's plea of guilty to first degree murder, and as in Anderson, the defendant refused to permit his lawyer to participate in the penalty phase of the trial. Counsel asked to withdraw, but the court denied the request. Then, contrary to this Court's holding in Hamblen, the trial judge 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) Special counsel presented mitigation. This type of procedure would also have been necessary had the trial court chosen to exercise its discretion to obtain a jury recommendation before sentencing.

See, State v. Carr, 336 So.2d 358 (Fla. 1976). Following his client's wishes, appellate counsel asked this Court to allow him to withdraw and to dismiss the appeal. This 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) The result of the appeal was a reversal of Klokoc's death sentence as disproportional.

Hamblen, Pettit and Anderson, which allow a capital defendant to thwart the adversarial system at penalty phase in the trial court, are inconsistent with this Court's requirement in Klokoc that the adversarial system be preserved on appeal. This Court's review of a death sentence, where the facts were not developed below, does not protect against the improper imposition of the penalty. Appellate review in Klokoc was facilitated because the trial judge preserved the adversarial system at penalty phase when he appointed special counsel. Had he not done so, this Court would not have had the record to review the propriety of the death sentence and society would have improperly executed a man and aided a suicide. Procedures must be in place to prevent such a miscarriage of justice. This Court must require the adversarial system to work. Facts pertinent to the sentencing decision must be not be kept hidden

from the jury and judge. A trial judge has the discretion to conduct a penalty phase trial and obtain a jury recommendation even where the defendant has waived his right to have such a procedure. State v. Carr, 336 So.2d 358. Consequently, there should then be no impediment to requiring the presentation of mitigation evidence over a defendant's desire to waive the presentation of mitigation.

The trial judge and this Court have the duty under the Eighth and Fourteenth Amendments to examine the record for mitigating facts and to consider those facts in reaching a decision concerning the proper sentence. Parker v. Dugger, 498 U.S. ___ , 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); Santos v. State, Case No. 74,467, 16 FLW S633 (Fla. Sept. 26, 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987). But, if procedures are not in place to insure those facts are presented in the record, this constitutional mandate fails in its purpose. In the interest of fair application and appellate review of capital sentences, this Court must recede from Hamblen. Farr's case should be reversed for a new penalty phase where mitigation evidence can be fully developed.

2. The Trial Court Failed To Consider Mitigating Evidence

Assuming this Court decides not to recede from Hamblen and reverse Farr's death sentence on that basis, the death sentence must be reversed because the court failed to consider what mitigation evidence did exist in the record. Unlike the judge

in Hamblen, Klokoc and Pettit, the court here did not protect society's interests in proper sentencing by carefully examining the mitigating facts which were present in the record. Victor Farr's death sentence has been imposed in an unreliable and unconstitutional manner. He urges this Court to reverse his sentence.

Although the court allowed Farr to prevent his lawyer from presenting mitigating evidence, the court had the written report of a psychiatrist concerning Farr's mental condition. However, the court never considered it and so advised counsel at the sentencing hearing. (Tr 54-58, 64-64) The court rejected the statutory mitigating circumstances concerning impaired mental capacity, finding that Farr's intoxication at the time of the offense did not qualify for a mitigating circumstance. (R 311) The court never acknowledged Farr's chronic alcoholism; history of depression and suicide attempts; his emotionally deprived family background; and the fact that he had been sexually abused as a child. (R 311) Nothing was weighed in mitigation in the court's sentencing decision. (R 311) This skewed the sentencing weighing process and rendered the death sentence unconstitutional. Amends. V, VI, VIII, XIV U.S. Const.; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978).

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court acknowledged the command of Lockett and Eddings and defined the trial judge's duty to find and consider mitigating evidence:

> ...we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding had been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534.

Later, in Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clarified the trial judge's responsibility to find mitigating circumstances when supported by the evidence. This Court wrote,

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature ....The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, at 419-420. (footnotes omitted) A short time later this Court reiterated this point in Nibert v. State, 574 So.2d 1059 (Fla. 1990):

> A mitigating circumstance must be "reasonably established by the evidence." Campbell v. State, No. 72,622, slip op. at 9 (Fla. June 14, 1990); Fla. Std. Jury Instr. (Crim) at 81; see, also, Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert., denied, 484 U.S. 1020 (1988). "[W]here uncontroverted evidence of a mitigating factor has been presented, a reasonable quantum of competent proof is required before the factor can be said to have been established." Campbell, slip op. at 9 n.5. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved....

Nibert, at 1061-1062.

Finally, this court in Santos v. State, Case No. 74,467, 16 FLW S633 (Fla. Sept. 26, 1991), 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." 16 FLW at S634. More significantly, this court, citing the mandate of the United States Supreme Court, indicated its willingness to examine the record to find mitigation the trial court had ignored:

> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, 111 S.Ct. 731 (1991). There, 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.

16 FLW at S634. "[T]he trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record ...." Wickham v. State, Case No. 73,508 (Fla. Dec. 12, 1991), citing Cheshire v. State, 568 So.2d 908 (Fla. 1990) and Rogers v. State, 511 So.2d 526 (Fla. 1987).

Even without the formal presentation of mitigation, substantial mitigating facts were present in the record. The trial court erred in failing to consider it. Contrary to the one finding the court did make concerning mitigation, Farr's excessive use of alcohol at time of the murder was mitigating. E.g., Nibert v. State, 574 So.2d 1059 (Fla. 1990); Ross v. State, 474 So.2d 1170 (Fla. 1985). His severe alcoholism, present since he was a child, was also a mitigating circumstance. Ross, 474 So.2d at 1174. His emotionally deprived family history, the sexual abuse he suffered and his drug abuse problems which were all, at least mentioned in the psychiatric report and PSI, should have been considered and weighed in mitigation. The court was not justified in rejecting, indeed ignoring, this mitigating evidence. The judge did not properly fulfill his sentencing responsibilities in regard to the finding of mitigating circumstances. His sentencing order is

defective, and the death sentence was imposed without properly weighing the mitigating circumstances present.

3. The Court Improperly Found Aggravating Circumstances

Compounding the court's failures in not considering mitition which was present in the record, the court also improperly found two aggravating circumstances. First, the court should not have found that the homicide was committed to disrupt a governmental function or hinder the enforcement of laws. (R 310) Second, the court improperly found that the homicide was especially heinous atrocious or cruel. (R 310-311)

Initially, the court relied on Farr's statements to provide the evidence used to find both of these circumstances. (R 310-311) Because Farr was actively seeking a death sentence, his statements were not against his penal interest and, therefore, they were not reliable. See Farr's interest was in making the crime sound as aggravated as possible to convince the court to impose death. Consequently, in this atypical situation, Farr's statements were self-serving and lacking reliability. Although the infliction of mental suffering can support the HAC circumstance, e.g., Jackson v. State, 522 So.2d 802 (Fla. 1988), only Farr's unreliable statements provided the court's foundation for this circumstance. (R 311) The same is true for the disruption of governmental function or hindrance of enforcement of laws factor. (R 310) Only Farr's alleged statement that "Dead people don't talk" provide the court's basis for finding this circumstance. (R 311)

Finding the homicide was committed to eliminate a witness was the reason the court found the disruption of governmental function factor. (R 311) This scenario is more typically classed as an aggravating factor under the avoiding arrest circumstance. Sec. 921.141(5)(e) Fla. Stat., see, Bello v. State, 547 So.2d 914 (Fla. 1989). As such, the elimination of a witness must be the dominate or sole reason for the homicide. See, e.g., Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978); Scull v. State, 533 So.2d 1137 (Fla. 1988). This was not the case here. The homicide was the product of the crazed reaction of an emotionally disturbed, intoxicated man. A senseless homicide to be sure, but it was not done solely or predominately to eliminate a witness. Farr said he told the victim to leave the car on two occasions, but she refused for whatever reason. (R 217) He said he wanted the girl out of the car because he wanted to kill himself. (R 217) Furthermore, Farr wrecked the car in an attempt to kill himself. (R 217) Why would he need to eliminate a witness? The killing was really for no reason. It certainly was not predominately to eliminate a witness.

CONCLUSION

For the reasons presented in this initial brief, Victor Farr asks this Court to reduce his death sentence, or alternatively, remand his case for a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. Mark Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Victor Marcus Farr, #541170, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 24 day of January, 1992.

W. C. McLAIN