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IN THE SUPREME COURT OF FLORIDA

VICTOR MARCUS FARR,

Appellant,

v. CASE NO. 82,894

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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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This case is on appeal from a resentencing. The orginal appeal record (case no. 77,925) is relied on in this brief and page references are preceded with "R." The record on appeal from the resentencing (case no. 82,894) consists of two volumes. The page numbers in these volumes commence where the numbering stopped in the original record on appeal. References to the pages in the resentencing record will have the prefix "SR."

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) (R 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 cap-tive 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.

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

Circuit Judge Royce Agner accepted Farr's plea and ordered a presentence investigation report. (R 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. (R 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 (R 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. (R 53) The court noted there had been a psychiatric evaluation done by the psychiatrist appointed as a defense expert. (R 54) Defense counsel advised the court, pursuant to Farr's instruction, that Dr. Mahtre would not participate in the sentencing proceedings. (R 55) The court questioned whether there might be any input regarding Farr's competence to proceed. (R 55) Defense counsel offered Mahtre's written report to the court. (R 56) Neither the trial judge nor the prosecutor had access to this report earlier. (R 56). Farr specifically agreed that the judge could consider Mahtre's report concerning his competency to stand trial or to proceed. (R 57) The report was received as exhibit #1. (R 58) The

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

Farr again reiterated his desire to proceed without an advisory jury. (R 61-62) Defense counsel provided the court with a letter of instruction signed by Farr which covered this point. (R 62-63) That letter was received as exhibit #2 in the proceedings. (R 64) The court noted in paragraph four of the letter, there was some discussion about Mahtre's report as providing possible mitigation. (R 64) However, the judge said he would decide later whether to consider the report. (R 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. (R 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, R 66-74)

Prior to sentencing on the murder, the prosecutor presented one witness, Mike Dunn, a probation officer. (R 77) Dunn had prepared the presentence investigation report. (R 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. (R 80-81) Dunn also noted in his report that he had information that Farr had been mentally evaluated and declared competent. (R 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. (R 82)

Dunn also stated that Farr provided him letters, which he wrote, to be attached to the PSI. (R 83) The state's exhibits 1 & 2 are the original letters of copies Dunn had presented to the court with the PSI. (R 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). (R 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. (R 84-85) Farr said he told the victim to get out of the automobile on two separate occasions, but she refused. (R 85) Farr said he

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

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

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

Dr. Mahtre's report 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 stepfather was a chronic alcoholic. (R 261-262) His mother and stepfather 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. (R 108-109) The court inquired of Farr if his counsel was carrying out his wishes, and Farr replied affirmatively. (R 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. (R 113-114) The defense counsel at that point offered to participate in drafting the order. (R 114)

Judge Agner sentenced Farr to death for the murder. (R 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)

Farr appealed to this Court.(R 313) On June 24, 1993, this Court affirmed Farr's convictions and sentences for the noncapital felonies. However, this Court vacated the death

sentence and remanded for a new sentencing hearing because the trial judge did not consider all available mitigating evidence. Farr v. State, 621 So.2d 1368 (Fla. 1993). The Court's opinion approved the four aggravating circumstances the trial judge found. Ibid. at 1370. On remand, the directive was to "...conduct a new penalty phase hearing in which [the trial court] weighs all available mitigating evidence against the aggravating factors." Ibid.

On December 8, 1993, Circuit Judge Royce Agner conducted a new sentencing hearing. (SR 447-516) The only witness at the hearing was Victor Farr, himself. (SR 447-516) Farr again advised the court, through his letters, that he wanted the death penalty imposed, did not want an advisory jury and did not want any mitigation presented in his behalf. (SR 454-461) (Defense Exhibits Nos. 1, 2 & 3) (SR 402-411) Farr's trial counsel summarized his advise to Farr and Farr's directives to him concerning the resentencing in a letter which Farr signed and later confirmed in court. (SR 455-461) (Defense Exhibit No. 2) (SR 404-405) On cross-examination, the prosecutor had Farr identify five letters he wrote to the State Attorney's Office and one letter he wrote the the parents of the victim. (SR 461-470) These were introduced as State's Exhibits Numbers 1 through 6. (SR 461-470) (SR 385-401)

The prosecutor also questioned Farr about some of the factual matters contained in the letters, in Dr. Mhatre's psychiatric report and in the presentence investigation report. (SR 470-488) First, the prosecutor asked about a troubled

childhood as a possible mitigating factor. (SR 471) Farr confirmed a statement in one of his letters that he was raised with love and understanding by a father who worked hard to take care of him. (SR 471) Farr said his childhood played no part in the homicide. (SR 472) Second, Farr said the statements in Mhatre's reports that he had attempted suicide four times was based on a lie he told Mhatre. (SR 472-473) He stated that he had never attempted suicide. (SR 473) Third, regarding prior hospitalizations, Farr said he was placed in a psychiatric hospital one time and in a clinic one time. (SR 473) Regarding the impact of the death of his mother, Farr testified that his mother was murdered by her boyfriend, but he denied that he suffered unusual emotional trauma as a result. (SR 474-475) Although he told Mhatre that he was hospitalized and had visual hallucination of his mother coming alive to visit him, Farr said this was a lie. (SR 475-476) Farr said he reported hallucinations and suicide attempts in the past in order to evade criminal prosecution. (SR 477-480) 472) Fourth, Farr said his statement to Mhatre about being sexually abused was a lie and that he was never abused sexually as a child. (SR 480) Fifth, the prosecutor asked Farr about his drug and alcohol consumption. (SR 481-486) Farr said the statement in the reports about his drinking beginning at age 13 was true. (SR 481) He also confirmed that he had never had a blackout or delirium tremors. (SR 481) The presentence investigation report stated that Farr was drinking three cases of beer and a fifth of liquor a week in December of 1990. (SR 482) Farr corrected

that amount to a case of beer a week and no liquor. (SR 482-483) He further said his consumption of speed was about three doses a week until November 1990 rather the reported 25 pills a week. (SR 483-484) Farr testified that he used only a small amount of marijuana in October and November of 1990. (SR 484-485) Finally, Farr said he used cocaine only once in August 1990. (SR 485) He stated that he lied when he told Mhatre that he could not remember the events of the night of the homicide. (SR 486)

At the conclusion of Farr's testimony, his trial counsel advised the court that he reviewed the court files and his files and did not discover any additional information he deemed potentially mitigating. (SR 488) Further, defense counsel stated that he was unaware of anything in the presentence investigation report which needed to be amplified. (SR 489) The prosecutor relied on the evidence presented in the original sentencing hearing and said he would not present any additional evidence in aggravation. (SR 490-491) Additionally, the State argued that Farr's letters and his testimony in the resentencing negated the existence of mitigating factors. (SR 490-491) The trial judge took a recess, and upon returning, read a written order reimposing a death sentence. (SR 493-512)

Circuit Judge Agner, in sentencing Farr to death, again found four aggravating circumstances: (1) Farr had a previous conviction for a crime involving violence; (2) at the time of the homicide, Farr was fleeing from the commission of a robbery, attempted kidnappings, an attempted robbery and a

kidnapping; (3) the homicide was committed to corrupt or hinder lawful governmental functions; and (4) the homicide was especially heinous, atrocious or cruel. (SR 415-416) The trial court again found no mitigating circumstances. (SR 416-421) In his order, Judge Agner specifically addressed and rejected the following factors as mitigating circumstances: (1) Farr's blood alcohol level on the night of the homicide of .20 percent (SR 416); (2) Farr's troubled childhood (SR 418); (3) Farr's suicide attempts (SR 418-419); (4) the murder of Farr's mother (SR 419); (5) Farr's psychological disorders resulting in hospitalization (SR 419-420); (6) the sexual abuse Farr suffered as a child (SR 420); (7) Farr's chronic alcohol and drug abuse (SR 420).

Notice of Appeal to this Court was filed on December 13, 1993. (SR 422)

SUMMARY OF ARGUMENT

The trial court improperly sentenced Farr to death. On the first appeal of this case, this Court vacated the death sentence and remanded to the trial court to insure that all available mitigation was properly considered and weighed in the sentencing decision. Farr v. State, 621 So.2d 1368 (Fla. 1993). This directive required the trial judge to "carefully analyze the possible statutory and nonstatutory mitigating factors against the aggravators to assure that death is appropriate." Pettit v. State, 591 So.2d 618, 620 (Fla. 1992). The trial judge wrote extensively about the mitigation he rejected. But, the basis for rejecting the mitigation was largely based on Farr's testimony. Because Farr was seeking a death sentence, he was motivated to minimize or negate any mitigation present. In rejecting mitigating circumstances on the basis of such testimony from Farr, the court did not reliably evaluate the mitigation. A new sentencing proceeding is required.

Farr was allowed to waive the presentation of mitigating evidence. In Hamblen v. State, 527 So.2d 87 (Fla. 1991), this Court held that a competent defendant in a capital case can waive the presentation of such mitigating evidence. 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 allowing the trial court discretion to allow the defendant to prevent the presentation of mitigation. If mitigating evidence is not presented, the trial court and this Court cannot

discharge its duties to review the propriety of the death sentence. This Court should recede from Hamblen.

Two aggravating circumstances were improperly found. The trial judge relied on Farr's statements to provide the evidence that the homicide was especially heinous, atrocious or cruel and was committed to disrupt a governmental function or hinder law enforcement. Farr was seeking a death sentence. His statements were not against his penal interest. He was attempting to make the homicide appear as aggravated as possible. Consequently, his statements were not sufficiently reliable to support the aggravating circumstances.

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.

A. The Trial Court Failed To Properly Evaluate And Weigh The Mitigating Evidence

On the first appeal of this case, this Court vacated the death sentence and remanded to the trial court to insure that all available mitigation was properly considered and weighed in the sentencing decision. Farr v. State, 621 So.2d 1368 (Fla. 1993). The opinion stated,

> ...We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. E.g., Santos v. State, 591 So.2d. 160 (Fla. 1991); Campbell v. State, 571 So.2d. 415 (Fla. 1990); Rogers v. State, 511 So.2d. 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

621 So.2d at 1369. This directive required the trial judge to "carefully analyze the possible statutory and nonstatutory mitigating factors against the aggravators to assure that death is appropriate." Pettit v. State, 591 So.2d 618, 620 (Fla. 1992). However, this careful analysis and consideration of the mitigating evidence did not occur.

The trial judge wrote extensively about the mitigation he rejected. (SR 418-421) However, the basis for rejecting the mitigation was largely based on Farr's testimony. (SR 418-421) Because Farr was seeking a death sentence, he was motivated to minimize or negate any mitigation present. Farr began before the resentencing hearing by writing letters to the court and the state attorney. (SR 385-401, 462-488) In rejecting mitigating circumstances on the basis of such testimony from Farr, the court did not reliably evaluate the mitigation. The court failed to "carefully analyze the possible statutory and nonstatutory mitigating factors." Pettit, at 620. The procedure employed of allowing Farr's testimony to be taken at face value in order to rebut mitigation did nothing to insure that the State is not participating in assisting a suicide. In several instances, the court rejected the conclusions of Dr. Mhatre solely because Farr now says he lied about certain facts during the psychiatric interview. (SR 418-421) Farr may or may not have lied to Dr. Mhatre. Even if he did, however, Mhatre may or may not have changed his conclusions. Mhatre never testified and was never asked if opinions on Farr's mental condition would have been affected. (SR 447-515)

In the sentencing order, the trial judge listed six possible mitigating factors and wrote his finding on each. (SR 418-421) First, regarding the statement about Farr's childhood difficulties contained in Mhatre's report, the court wrote:

1) Farr's troubled childhood.

> FINDING: Farr told Dr. Mhatre that he ran away from home on three different occasions as a teenager because, "I did not feel like I belonged in my family". From that Dr. Mhatre concluded that Farr felt rejected both emotionally and every other way by his family. Later, however, in a letter that Farr acknowledged writing and requested be reason to the Court at his original sentencing, Farr stated: "I could say many things to cover up. But the truth is I was rased (sic) good. With lots of love. And understanding. I was blessed with a farther (sic) who tryed (sic) to give his all. And worked hard to take care of me. But I always turned wrong." Farr further states in his letter of August 21, 1991, to Jerry Blair, State Attorney, "As for my childhood . . . it would only be a cop out to say that played any part in that night. For it did not." The Defendant testified at resentencing that his statement to Dr. Mhatre was not true, but that his statement in his letter of August 21, 1991, was, in fact, true.

(SR 418) The court rejected this mitigating factor solely on the basis of Farr's testimony that his childhood experiences were fine and did not affect him. Nothing refuted the fact that Farr never knew his biological father and his stepfather was a chronic alcoholic. (R 261-262) His mother and stepfather 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 alcoholic stepfather, an uncle and his grandparents. (R 261-262) He move around extensively and felt rejected by his family. (R 262) Farr ran away from home three times while a teenager and 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) A person who has suffered severe childhood trauma often does not realize the impact of such trauma on their lives. Repression and denial of bad childhood experiences are common. Herman, Judith, Trauma and Recovery, Basic Books, New York, 1992, p. 101-102. Consequently, a person's dismissal of the impact of his own childhood trauma is not necessarily true, even if he, himself, believes it to be true. Ibid.

As a second possible mitigating factor, the court listed Farr's suicide attempts. Again, this factor was completely rejected on Farr's testimony at the sentencing hearing that he had never attempted suicide:

> 2) Farr's numerous suicide attempts.
>
> FINDING: As part of his report Dr. Mhatre reports that, "Victor has made 4 suicide attempts so far by cutting his writs and taking an overdose of medication". No further mention is made of these events or any effect they had on Farr on the night of the crime. Dr. Mhatre does note later in his report that Farr denied any present suicidal or homicidal thoughts. The Defendant testified at resentencing that he had made no suicide attempts and that he had lied to Dr. Mhatre.

(SR 418-419) The court never addressed the fact that Farr's earlier statement that he drove the car into the tree in attempt to kill himself as well as the girl, contradicted his testimony at resentencing. (R 85, 217) In a letter Farr wrote, which the prosecutor read into the record in the original sentencing, Farr said, "...I told her to get out twice, but she

would not. Maybe thinking I would shoot her or maybe thinking I would run her down. I wanted her out of the car because I planned to end my life." (R 85, 217) The State stipulated that this fact could be proven when submitting a factual basis for the guilty plea. (R 26-30)

The third mitigating factor mentioned in the order was the impact of the murder of Farr's mother. As to this factor, the court wrote:

> 3) The murder of Farr's mother.
>
> FINDING: According to Dr. Mhatre's report, Farr told him that his mother was murdered in January of 1986 by her live-in boyfriend who is now in prison. Later in his report Dr. Mahatre quotes Farr as telling him that, "I learned that alcohol was good for hiding things like my mother being gone". Later Dr. Mhatre refers to Farr's psychiatric hospitalization and stated that Farr reported visual hallucinations at that time; claiming that he actually used to see his mother come alive and talk to him. Given the fact that the same report states that the psychiatric hospitalization occurred in March, April, and May of 1985, which is prior to Farr's mother's death, this statement of Farr is suspect in its veracity. Farr further states in his letter of August 2, 1991, to Jerry Blair, State Attorney, "As for . . . Mother being killed . . . it would only be a cop out to say that played any part in that night. For it did not." The Defendant testified at resentencing that his mother was in fact murdered and that he experienced normal grief, but denied any visual hallucinations regarding his mother and denied that her death had any impact on his decisions on the night that he committed the murder for which he now faces sentencing.

(SR 419) Dismissing the impact the murder of his mother had on him, Farr, again, was attempting to minimize the mitigation

or was in denial about the impact her death may have had on him. The trial court's analysis of the factor should not have relied so heavily on Farr's testimony.

Regarding the fourth factor, Farr's previous hospitalization for psychological and emotional disorders, the court again dismissed it largely on Farr's testimony. The court's order stated:

> 4) Farr's psychological disorders resulting in hospitalization.
>
> FINDING: Dr. Mhatre reports one psychiatric hospitalization of Farr and apparently relies on Farr's report of the incident. This period of hospitalization occurred in March, April, and May of 1985, and Farr apparently told Dr. Mhatre that he was diagnosed as suffering from depression and suicidal thoughts with visual hallucinations. Dr. Mhatre state that Farr was mildly depressed a the time that he examined him, but the depression was due to his legal status at that time. Dr. Mhatre went on to state that Farr's affect was appropriate and found no evidence of psychosis. Dr. Mhatre found that Farr was oriented as to time, place and person, and that his memory for immediate, recent, and remote even was fairly intact. Farr indicated in the Pre-Sentence Investigation Report that he voluntarily admitted himself to the mental health center in San Antonio, Texas to avoid court proceedings; stating that he remained in the program for thirty days and was released. Farr further states in his letter of August 21, 1991, to Jerry Blair, State Attorney
>
> > ". . . the State Hospital, I was in I said I seen things that I plained (sic) to kill myself, that I heard things. The reason it was a way for me to keep out of jail. For I was wanted for stilling (sic) a truck. So I put or had myself put in the mental hospital to help have the charges droped (sic). I used the mental hospital twice to bet (sic) charges as that and charges was

droped (sic) each time".
The Defendant testified at resentencing that he had been psychiatrically hospitalized on two occasions, but claimed that both were at his instigation in efforts to avoid the consequences of criminal conduct. The Defendant further testified that he told the staff where he was hospitalized that he was depressed, suicidal, and having visual hallucinations of his mother, but that these statements were not true.

(SR 419)

The trial judge's treatment of the fifth factor, Farr's being sexually abused as a child, was also based on Farr's testimony denying the truth of his previous report of being abused:

> 5) The sexual abuse Farr suffered as a child.
>
> FINDING: Dr. Mhatre reports that Farr "claims that he was sexually abused by a stranger when he was 14 years old, this abuse considered mostly of fondling". This claim of abuse is not mentioned again by Dr. Mhatre and appears to have had no clinical significance in the conclusions reached by Dr. Mhatre that Farr was sane at the time of the alleged offense and competent to proceed at the time of the examination. At resentencing the Defendant denied a history of abuse and specifically denied that he had ever been sexually abused. He further testified that he lied to Dr. Mhatre about this.

(SR 420)

The sixth factor, Farr's chronic alcohol and drug abuse was also dismissed on the basis of Farr's testimony at the resentencing hearing:

> 6) Farr's chronic alcohol and drug abuse.

FINDING: In the Psychiatric Evaluation Report, Farr stated that he had begun drinking alcohol at the age of 13. Farr claimed at times in his life he drank as much as a case of beer in a day. Farr stated that his longest period of abstinence was 4 months, but denied ever having any black out spells or any delirium tremens. This murder occurred on December 11, 1990. In the Pre-Sentence Investigation Report, Farr stated that he was consuming about 3 cases of beer and a fifth of liquor per week in December of 1990. Until November of 1990, he used "speed" at the rate of about 25 pills per day. Farr stated that he used marijuana sparingly, usually 1 cigarette at a time, and last smoked marijuana in December of 1990. Farr further stated that he had used cocaine in the past and last used cocaine in August of 1990. Dr. Mhatre, upon examining Farr pursuant to order of this Court, found no evidence of psychosis, induced by prolonged alcohol or drug abuse or otherwise. Dr. Mhatre goes on to discuss the amount of beer consumed by Farr on the night of this murder and to conclude that Farr was "heavily intoxicated" at the time of the murder which, in Dr. Mhatre's opinion, did not constitute insanity, but was ". . . strong mitigating circumstances . . .". The Court finds it noteworthy that Farr detailed his ingestion of alcohol to Dr. Mhatre and then claimed not to remember anything after arriving at the bar when this murder and the associated crimes to which Farr has pled guilty began. It is reasonable to conclude that Dr. Mhatre based his opinion that Farr was "heavily intoxicated", at least in part, on Farr's apparent lack of memory of the crimes. Later, Farr recounted the circumstances of his crimes on the night in question in great detail in letters which he has admitted authoring. Farr further states in his letter of August 21, 1991, to Jerry Blair, State Attorney, " . . . I was not so drunk I don't remember, for I knew what I was doing. At first I said, I did not know what happen (sic) it was away (sic) to lie my way out of trouble. But then I told the truth in all my letters to you." It is evident to the Court that Farr misled Dr. Mhatre as to the extent of his

> intoxication the night of the murder. There is no evidence in the record to indicate that Farr ingested any controlled substances on the night in question. At resentencing the Defendant confirmed a history of alcohol abuse, but denied extensive abuse of illegal drugs and testified that he fully recalled all of the events of the December 11, 1990, contrary to what he had told Dr. Mhatre earlier.

(SR 420-421) Although Farr claimed he was not drinking as much as Mhatre's report reflected, the fact remains Farr suffered from a chronic alcohol abuse problem which the trial court was not free to reject as having no mitigating weight. See, Ross v. State, 474 So.2d 1170 (Fla. 1985). Earlier in the sentencing order, the court acknowledged and found that Farr had a blood alcohol content of .20 percent. (SR 416) Farr was intoxicated at the time of the offense. This mitigating factor exists and should have been considered and weighed in the sentencing decision.

Even without the formal presentation of mitigation, substantial mitigating facts were present in the record. The trial court erred in rejecting them primarily on the basis of Farr's testimony which was not reliable given his motive to obtain a death sentence and the real possibility that he may not have realized the impact some of his past experiences had on him. Contrary to Farr's testimony at the resentencing, he had earlier, on more than one occasion, reported suicidal thoughts and tendencies. 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 should have been considered and weighed in mitigation. The court was not justified in rejecting 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.

The trial court here did not protect society's interests in proper sentencing by carefully examining the mitigating facts which were present in the record. Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988) Victor Farr's death sentence has been imposed in an unreliable and unconstitutional manner. 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); 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). This Court must reverse the death sentence.

B. This Court Should Recede From Hamblen

Although this Court chose not to recede from Hamblen v. State, 527 So.2d. 800 (Fla. 1988) in the first appeal of this case, Farr, 621 So.2d at 1369, the argument is again presented here for the Court's reconsideration.

This Court has addressed issues surrounding a situation where a capital defendant desires that nothing be presented to mitigate his sentence and 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. In Hamblen, 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.

In Pettit v. State, 591 So.2d 618 (Fla. 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, at 620.

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, 589 So.2d 219 (Fla. 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." 589 So.2d at 220. 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.

589 So.2d at 221-222. 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, 591 So.2d 160 (Fla. 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 to insure the constitutional application of the capital sentencing. Amends. V, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

C. The Court Improperly Found Aggravating Circumstances

Compounding the court's failures in not properly considering mitigation which was present 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. (SR 415) Second, the court improperly found that the homicide was especially heinous atrocious or cruel. (SR 416) This Court

rejected this argument in the first appeal. Farr v. State, 621 So.2d at 1370. Nevertheless, the argument is again presented for this Court's review and consideration.

Initially, the court relied on Farr's statements to provide the evidence used to find both of these circumstances. (SR 415-416) Because Farr was actively seeking a death sentence, his statements were not against his penal interest and, therefore, they were not reliable. 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. The same is true for the disruption of governmental function or hindrance of enforcement of laws factor. (SR 416) Only Farr's alleged statement that "Dead people don't talk" provide the court's basis for finding this circumstance. (SR 415)

Finding the homicide was committed to eliminate a witness was the reason the court found the disruption of governmental function factor. (SR 415) 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.

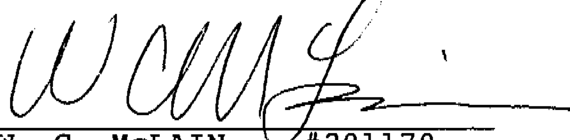
State, 366 So.2d 19 (Fla. 1978); Scull v. State, 533 So.2d 1137 (Fla. 1988). This was not the case here. The homicide was the product of the crazed reaction of an emotionally disturbed, intoxicated man. A senseless homicide, but not one committed solely or predominately to eliminate a witness. Farr said 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) The killing was not predominately to eliminate a witness.

CONCLUSION

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

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Appellant, Victor Marcus Farr, #541170, Union Correctional Inst., Post Office Box 221, Raiford, Florida, 32091, on this 18 day of April, 1994.

W. C. McLAIN