

IN THE SUPREME COURT OF FLORIDA

NO. 81986

FILED

SID J. WHITE

JUN ²⁵ 1993

MICHAEL DUROCHER,

Petitioner,

CLERK, SUPREME COURT

By JC
Chief Deputy Clerk

v.

HARRY K. SINGLETARY,
Secretary, Florida Department of Corrections, and
STATE OF FLORIDA,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF AND FOR A
WRIT OF HABEAS CORPUS, MOTION FOR A STAY OF
EXECUTION, PETITION FOR A WRIT OF MANDAMUS,
AND REQUEST FOR EXTENSION OF RULE 3.581 TIME LIMIT

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COUNSEL FOR PETITIONER

INTRODUCTION

Under Florida law, undersigned counsel "shall represent . . . any person convicted and sentenced to death in this state who is without counsel . . . for the purpose of instituting collateral actions challenging the legality of the judgment." Section 27.702 Fla. Stat. 1991. On May 26, 1993, the Governor signed a warrant setting Michael Durocher's execution. Pursuant to counsel's statutory obligation, counsel has sought to investigate Mr. Durocher's case, advise Mr. Durocher of available claims, and institute collateral actions. However, counsel has been thwarted in carrying out his statutory obligations.

Even in the limited investigation that counsel has been able to start, he has learned that Mr. Durocher has a long history of mental difficulties. Mr. Durocher has attempted suicide in excess of five occasions. Several mental health reports indicate that Mr. Durocher had a brain lesion which accounted for serious mental difficulties. Mr. Durocher was also diagnosed as suffering a borderline personality disorder. Throughout his legal proceedings, Mr. Durocher exhibited erratic behavior. He alternatively cooperated, and refused to cooperate, with his attorneys and the mental health experts. During one psychological examination, he was unable to speak and had to write out all of his responses. During the trial proceedings, he wrote a letter to the prosecutor claiming that he killed J.R., J.F.K., Jimmy Hoffa and Laura Palmer. He admitted homicides only later to deny them. On occasion, he had laughing episodes.

Experts stated that he was incapable of appreciating his own death. They described him as self-aggrandizing and perversely masochistic which may account for his recent bizarre behavior in sending a thank you note to the Governor for expediting a death warrant. These red flags of severe mental illness and mental deficits warrant further investigation. They raise questions about competency, sanity, mental health mitigation, and knowing voluntary waivers.

Unfortunately, counsel has been denied the necessary access to materials needed to allow a full investigation into viable issues and defenses. The Public Defender's Office of the Fourth Judicial Circuit has refused to provide Mr. Durocher's case file. This includes the trial and clemency files. The Duval County Clerk's Office has refused to provide court files. The Duval County State Attorney's Office has refused to respond let alone comply with counsel's Chapter 119 request for access to all available files. The Governor's Office and the Parole Commission have refused to provide any clemency files including the results of a mental health evaluation which according to Mr. Durocher, himself, indicated he was insane at the time of the offense.¹ The record on appeal which has been obtained is so confused, including omission of large sections of testing, that it is completely unreliable.

¹Mr. Durocher made these statements to Judith Dougherty, Assistant CCR, whom he saw on the condition that she not act as his counsel.

In addition, Mr. Durocher has refused to speak to undersigned counsel, although he previously spoke to Judith Dougherty, Assistant CCR, only on the condition that she would not act as his counsel. In his conversation with Ms. Dougherty, Mr. Durocher exhibited bizarre thought processes, claiming that he had been told by clemency counsel that Ms. Dougherty was evil (clemency counsel adamantly denies such a ludicrous charge). He indicated that if he had a viable defense he would have been interested in pursuing it, but has refused to assist counsel in investigating or allowing counsel to advise him of any viable options. Mr. Durocher seems most afraid of mental health testing, apparently out of fear of what it will show. He does not want a mental health expert getting inside his head. In light of his long mental health history, he has developed a fear of mental health experts.

This Court has indicated "that court of this state can[not] administer the death penalty by default." Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988). Accordingly, there is an obligation upon Florida courts to consider mitigation "even if the defendant asks the court not to consider mitigating evidence." Farr v. State, ___ So. 2d ___, slip op 77,925 at 4 (Fla. June 24, 1993). Similarly, Florida law imposes an obligation upon undersigned counsel to investigate legal issues undermining the propriety of a judgment and sentence, advise a client of viable claims, and institute collateral actions challenging the legality of the judgment and sentence. Cf. Klokoc v. State, 589 So. 2d 219 (Fla.

1991) (appellate counsel required to act as advocate seeking to overturn judgment and sentence, even though client wished to waive appeal). Accordingly, counsel files this action seeking access to files and records necessary for counsel to carry out its obligation. Counsel also seeks an appropriate amount of time thereafter to institute additional "collateral actions challenging the legality of the judgment."

I. PROCEDURAL HISTORY

Michael Durocher was convicted of three counts of first-degree murder in the circuit court of the Fourth Judicial Circuit, in and for Clay County, Florida.² Trial began on March 4, but on the following day, Mr. Durocher pled guilty. At the penalty phase, defense counsel presented no evidence in mitigation. The jury, a co-sentencer, was not advised of mitigation of record, and thereupon recommended a death sentence be imposed. Subsequently, the judge did consider mitigation of record, but after giving great weight to the jury's

²In this petition, the record from Mr. Durocher's direct appeal of the Clay County case will be designated as "Clay R. _____," with the appropriate page number.

Mr. Durocher was also charged and convicted of capital murder in a separate proceeding in Duval County. The Duval County death sentence was also affirmed by this Court on direct appeal. Durocher v. State, 596 So. 2d 997 (Fla. 1992). However, the Governor did not sign a warrant in that case. The record for that direct appeal will be designated as "Duval R. _____," with the appropriate page number.

Yet another homicide conviction was also handed down in Duval County. Undersigned counsel has also unsuccessfully sought files and records from that case since it was used in aggravation and because it precipitated Mr. Durocher's efforts to confess his way into the electric chair.

recommendation, he imposed a death sentence. On appeal, this Court affirmed. Durocher v. State, 604 So. 2d 810 (Fla. 1992).

As part of clemency proceedings before The Honorable Lawton Chiles, Governor of Florida, clemency counsel was appointed. This was the Duval County public defender. A mental health evaluation was prepared by Dr. Jethro Toomer. Reportedly, Dr. Toomer found significant mental health problems; however, his report has not been released to undersigned counsel. Further, clemency counsel sought to withdraw citing a conflict. A motion was filed in circuit court and a hearing was held. However, the request was denied.

Clemency was denied when Florida's Governor issued a death warrant on May 26, 1993. Mr. Durocher's execution is now scheduled for 7:00 a.m., August 25, 1993.

II. JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern undersigned counsel's ability to carry out his statutory obligation and litigate the legality of the judgment and sentence.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy

errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Durocher's sentence of death, and of this Court's appellate review. Mr. Durocher's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief is more than proper. This Court therefore has jurisdiction to entertain this petition and to grant habeas corpus relief.

III. STANDING

In 1985, the legislature established the Office of the Capital Collateral Representative (CCR) as an arm of the judicial branch of the State of Florida, Fla. Stat. s. 27.701, and imposed upon the office the following duties:

The capital collateral representative shall represent, without further compensation, any person who is without counsel and who is unable to secure counsel due to his indigency or determined by a court of competent jurisdiction to be indigent for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, the

federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

Fla. Stat. s. 27.702. Emphasis supplied.

The legislature also specified when CCR would become counsel for an indigent capital defendant.

Representation by the capital collateral representative shall commence upon termination of the direct appellate proceedings in state or federal courts, notice of which shall be effected as provided by s. 27.51.

Id.

Accordingly, Fla. Stat. s. 27.51, provides:

When the direct appellate proceeding prosecuted by a public defender on behalf of an accused and challenging a judgment of conviction and sentence of death terminate in an affirmance of such conviction and sentence, . . . the public defender shall notify the accused of his rights pursuant to Rule 3.850, Florida Rules of Criminal Procedure, . . . and shall advise such person that representation in any collateral proceeding is the responsibility of the capital collateral representative. The public defender shall then forward all original files on the matter to the capital collateral representative, retaining such copies for his files as may be desired.

Fla. Stat. s. 27.51. Emphasis supplied.

Through these mandatory provisions CCR thus becomes counsel for all indigent, unrepresented capital defendants upon termination of direct proceedings.

Petitioner Michael Alan Durocher was determined indigent by the Circuit Court in and for Clay County, Florida. The Public Defender for the Second Judicial District represented Mr. Durocher on direct appeal. This Court affirmed his convictions and sentence of death on July 23, 1993. The United States Supreme Court denied certiorari on March 29, 1993. On date same,

the Office of the Capital Collateral Representative became counsel for Mr. Durocher by operation of law.³

The duties assumed by CCR in this case are multitudinous. As with every capital defendant, Michael Durocher is entitled to due process of law throughout his state post conviction proceedings. Holland v. State, 503 So. 2d 1250 (Fla. 1987), and to the effective assistance of counsel, Spalding v. Dugger, supra, 526 So. 2d 71, 73 (1988). In addition to the myriad of claims traditionally presented to the Florida courts through post-conviction proceedings,⁴ Mr. Durocher's case imposes on CCR the additional burden of determining and, if appropriate, challenging whether Mr. Durocher is competent to participate in these proceedings, whether he is competent to waive post-conviction counsel (whether he can even legally waive post-conviction counsel), whether he was competent at the time he entered his guilty plea, and even whether he is competent to be executed. As this Court has explained:

[i]n order for 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

³Under Rule 3.850, counsel had until March 29, 1995, to prepare a motion to vacate on behalf of Mr. Durocher. In light of CCR's caseload and the amount of time available, CCR did not assume active representation until the warrant was signed on May 26, 1993.

⁴These include claims which, as discussed infra, Petitioner is unable to pursue because of the failure, and often outright refusal, of various state agencies to turn over public records pursuant to Chapter 119 of the Florida Statutes.

adversarial manner, providing diligent advocacy of appellant's interests.

Klokoc v. State, 589 So.2d 219, 221-222 (Fla. 1991). Undersigned counsel must investigate all claims which may be meritorious, advise Mr. Durocher about viable issues, and institute collateral proceedings. These obligations cannot be satisfied until counsel receives access to materials which to date have been withheld.

Without a full and adequate investigation of potential issues in Mr. Durocher's case, an investigation made impossible by the interference of the State of Florida, CCR cannot do its job and advise Mr. Durocher of viable issues and initiate appropriate collateral proceedings.

IV. MR. DUROCHER'S HISTORY

Even the scant documentation that undersigned counsel has been able to procure regarding Michael Alan Durocher's life history reveals a plethora of mental illness indicia. Mr. Durocher has a long psychiatric history beginning in childhood that includes numerous suicide attempts. These and other factors clearly pointing to the probability of organic brain damage and serious mental disturbances constitute a wealth of significant evidence that must be fully examined and investigated in order to determine what viable issues exist on which Mr. Durocher should be advised and on which undersigned counsel can initiate collateral proceedings. Yet none of this evidence was presented to the jury, the co-sentencer who recommended the death sentence. It is unclear whether the mental health experts were provided this information at the time of their evaluations.

Michael Durocher experienced a chaotic childhood which was punctuated by an alcoholic father and a mentally unstable mother. Michael's father, Harold Durocher, Sr., was a career Navy man who was regularly at sea on active duty. These tours at sea would often last six months or more. Michael's mother, Ada Pearl Durocher, was left to raise four difficult children by herself. Michael was the second born in his family. His older sibling, Harold Jr., was born mentally retarded and required special care and attention. Because her husband amassed huge gambling debts, Ada was often forced to hold up to three jobs at a time while still trying to be both a mother and father to her children.

Michael's mother was herself the tragic victim of an abusive childhood. Her mother filed charges against her father for the sexual and physical abuse of their children and he was imprisoned. At age 12 Ada Durocher became responsible for her nine brothers and sisters while her mother worked to support them. As is so tragically common, the cycle of abuse continued through to the next generation.

Even when he was not out at sea, Michael's father rarely spent time at home with his family - preferring instead to go out drinking and socializing with his Navy friends. When he did come home, he would whip the children with a belt and fight bitterly with Michael's mother. These sometimes violent brawls terrified all of the young children but particularly Michael who was especially sensitive.

In the first grade, Michael's teacher recommended that he be referred to speech therapy because of a speech problem. At this same time Michael's mother began taking classes at a local college at night after working throughout the day. Not until two years later did anyone intervene on Michael's behalf. His third grade teacher finally had him enrolled in an exceptional education program for children who needed special assistance with speech problems.

As the Durochers' marriage deteriorated, Michael's problems escalated. By the fifth grade he was complaining of persistent headaches to his teacher. That summer, Michael's mother sent him away to live with her sister in Missouri but it did not work out. Because of her marriage problems, Michael's mother started seeing a psychiatrist and was prescribed Mellaril. Soon after Michael's father was discovered being sexually intimate with Michael's teenage cousin, Michael's parents separated and then divorced in 1973 when Michael was in the seventh grade.

Because of the father's gambling debts and failure to pay child support to Michael's mother, the family became impoverished. The public humiliation was particularly painful for Michael. When the family's furniture was repossessed and the fence around their yard was ripped up for failure to keep up with the payments, young Michael became hysterical. Soon thereafter, Michael's mother had to move out of the family home and into a public housing project with her children.

Michael was devastated at the loss of his father and the dramatic change in the family's life. His mother remarried soon after her divorce to a much younger man but that union only lasted six months. During this time Michael's stuttering problem worsened until he was seriously debilitated and he began to withdraw from the world. Even with his family, sometimes he would have to communicate in writing. He blamed himself for the loss of his father and became so depressed that he made his first attempt at suicide by trying to cut his wrists at age fourteen (14). Although Michael's mother took him to see a psychiatrist after he tried to kill himself, she could not afford to keep him in therapy.

By the age of thirteen or fourteen, Michael was introduced to drugs and alcohol by the other young residents of his housing project. He began experimenting often with marijuana, THC, quaaludes, PCP and liquor. This was facilitated by the frequent absence of his mother, who was struggling to support her children by working both day and night. In fact, throughout most of their childhood, Michael and his siblings rarely had a parent present at home. Michael's drug use gradually escalated throughout his teen years and soon he was regularly using even harder drugs such as acid, PCP, cocaine and crack cocaine. When he was about fourteen or fifteen years old he tried to kill himself again by injecting himself with an overdose of PCP.

Drug addiction was an obvious, easy and frequently utilized method of escape from the degradation and despair experienced by

the young teenage children of the impoverished families living in this housing project. Surviving this environment was difficult even for those children fortunate enough to have a loving and stable home environment. For a young boy like Michael, with the additional handicaps of a serious speech impediment, loss of his father, and near-constant absence of his mother, descent into the life of serious drug addiction that constantly beckoned every resident of this area was inevitable.

The young Michael Durocher's decline was evident in his academic performance. Coinciding with his father's abandonment of the family and their resulting poverty, Michael's academic performance plummeted dramatically in the ninth grade. Because he failed so many classes, he was required to repeat the ninth grade. His second attempt at ninth grade yielded similar results and he left school halfway through the school year.

Although Michael attempted to find employment after dropping out of high school, his continuing frustration with his severe stuttering handicap made him terrified of working in any job that required him to speak. He did landscaping work and some day labor, but Michael was often unemployed as a teenager. His growing dependence on alcohol and drugs led to his first arrest for shoplifting apple wine in May of 1976. The court ordered a mental health evaluation and Michael was found to be severely depressed and suicidal.

Michael's mother remarried in June of 1976. His new stepfather moved the family away from the housing project, but

Michael continued to self-medicate with illegal drugs and alcohol. He often clashed with his step-father. His mother, who was regularly taking anti-depressants, would sometimes give Michael some of her prescription medication. Because she feared that he might attempt suicide again, she would give Michael pills when she thought he felt too much pressure or was acting upset.

In the fall of 1976, Michael enrolled in Florida Community College in an attempt to get his high school diploma. But by November, Michael had again tried to kill himself by purposely crashing his mother's car. He was taken to the medical center of the Navy base where his mother worked and the neurologist noted that Michael is suffering from aphasia, which was progressively worsening. At this time, the diagnosis of a brain lesion was made in order to explain Michael's symptoms.

In January of 1977, Michael was hospitalized for surgery to relieve an ongoing problem with chronic ear infections. These resulted in many bouts with high fevers throughout his teenage years. Michael had fevers sometimes as high as 105 degrees for up to four days at a time, which can result in brain damage. A few weeks after leaving the hospital, he took the family car without permission and drove to Mobile, Alabama because, as one psychiatrist noted, Michael felt that "the pressure was too much."

Michael's mother's third husband divorced her in November of 1977 because he could not cope with the children. After his eighteenth birthday in January of 1978, Michael joined the Navy.

However, due to his severe speech impediment and mental impairments, Michael was discharged from the service.

Over the next few years, Michael's substance abuse problems continued and his need to financially support his habits resulted in a 1979 grand theft charge. The day before his sentencing hearing, Michael attempted suicide by overdosing on Tofranil, a tricyclic anti-depressant. He was hospitalized for two days. A year later he stole a gun so he could shoot himself because his girlfriend left him which resulted in charges of armed burglary and violation of probation on the grand theft conviction. Because of his long history of serious suicide attempts and his continuing struggle with stammering and stuttering, the judge recommended that Michael be placed at the Indian River Correctional Institute so that he could receive speech therapy and psychological counseling.

While incarcerated in 1980 and 1981, Michael earned his G.E.D. and learned the skill of cabinet-making. Although his speech problems continued they also improved somewhat. He adjusted well to the institutional setting at Indian River and received no disciplinary reports. His counselor noted that Michael felt deep guilt and bitterness about his father's abandonment of the family. A psychological report conducted at that time shows that Michael's lack of self-esteem, depression, lack of ambition, disinterest in school, and multiple suicide attempts were linked to his drug addiction and depression. In March of 1981, Michael was approved for community release and he

was transferred to the Jacksonville Community Correctional Center. He left there without permission in May of 1981 and returned three days later. He was charged with escape and transferred to DeSoto Correctional Institute.

While at DeSoto, a white inmate was tortured and raped and possibly killed during a prison riot. It is unclear whether Michael only witnessed this event or whether he too was victimized. This incident so terrified Michael that he requested placement in protective custody and refused to return to open population. A psychologist at DeSoto tested Michael and reported evidence of organic brain damage, reactive depression, hysterical tendencies, impulsivity and suicidal ideations. In December of 1981, Michael received a disciplinary report at DeSoto for hiding a sharpened piece of metal in the air duct in his cell in case of a riot.

Although Michael tried to rebuild his life after his release from prison, he soon fell back into the trap of alcohol and drug abuse. When his girlfriend broke up with him in September of 1984, he barricaded himself in her apartment with a shotgun and a bag of pills and threatened to kill himself if she didn't come back to him. After a five hour standoff with police, he was taken to University Hospital in Jacksonville for psychiatric intervention. A month later, Michael laid in a bathtub filled with water and sliced his arms. This suicide attempt was so serious that he was hospitalized in Humana Hospital for several

days until they released him to the care of his mother with a prescription for Mellaril.

Throughout his legal proceedings, Mr. Durocher exhibited erratic behavior. He alternately cooperated, and refused to cooperate, with his attorneys and the mental health experts. During one psychological evaluation, he was unable to speak at all and had to write all of his responses. He wrote a letter to the prosecutor claiming that he had killed "J.R. and Laura Palmer".⁵ During his statements to the police he would admit, then deny killing the victims, he played silly games and had laughing episodes. He said he wanted control, that he intended to control the press and become famous. The experts described him as a combination of an eight year old child and a kamikaze pilot who was incapable of appreciating his own death. He was diagnosed as psychotic, depressed and suicidal. He was described as self-aggrandizing and perversely masochistic.

Michael Alan Durocher has a long history of failed suicide attempts, abnormal behavior, and mental illness. No legal determination of competency to proceed can be made without a detailed examination of Mr. Durocher's medical, psychological and psychiatric history and present condition. It is indicative of the failure of due process that none of this evidence was presented to the jury which recommended a death sentence.

⁵The prosecutor appeared at the jail prepared to take a statement apparently unaware that these were fictitious television personalities.

Florida law recognizes that persons who constitute a danger to themselves or others should be evaluated and provided with appropriate treatment:

394.467 Involuntary placement.--

(1) CRITERIA.--A person may be involuntarily placed for treatment upon a finding of the court by clear and convincing evidence that:

(a) He is mentally ill and because of his mental illness:

1.a. He has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment; or

b. He is unable to determine for himself whether his placement is necessary; and

2.a. He is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, he is likely to suffer from neglect or refuse to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being; or

b. There is substantial likelihood that in the near future he will inflict serious bodily harm on himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and

Mr. Durocher's lengthy history of suicide attempts, beginning at age fourteen (14) and extending to the present time, and his unwillingness to submit to a complete mental health evaluation or to accept treatment constitute a sufficient showing that there is a substantial likelihood that Mr. Durocher is refusing to care for himself and/or is a danger to himself. The State of Florida does not endorse permitting the suicide of its nonincarcerated

citizens. There is no policy reason why a different standard should be applied to citizens who are incarcerated.

V. DENIAL OF ACCESS

A. Public Record Act

Undersigned counsel has been unable to carry out his statutory obligation because he has been denied access to records from the following public entities involved in this case:

a. The Clerk of the Circuit Court, Jacksonville, Florida:

On or about May 26, 1993, CCR submitted a public records request to the Office of the Clerk of the Circuit Court, Criminal Division for copies of the circuit court's files in Mr. Durocher's cases. The Clerk of Circuit Court has refused to provide access and failed to state a reason why. On June 10, 1993, undersigned counsel was contacted by Darryl Hanzelon, Supervisor, Felony Clerk's Office. Mr. Hanzelon wanted to know why undersigned counsel had requested copies of the court files regarding Mr. Durocher's case. Undersigned counsel explained that under Florida law he was required to investigate the case and determine what issues were to be presented and institute collateral proceedings on or before June 25, 1993. Mr. Hanzelon expressed great reluctance to provide undersigned counsel the requested files. Undersigned counsel explained that under law he believed that he was entitled to such files, but if the Clerk's Office disagreed, a letter refusing and explaining why was requested so that appropriate legal action could be taken. To

date, Mr. Hanzelon has failed to provide either the case files or a letter refusing to provide the files.

b. The District Court of Appeals, Tallahassee, Florida:

On or about May 25, 1993, CCR submitted a public records request to the District Court of Appeals in Tallahassee, Florida. On May 31, 1993, some records were obtained. This record did not include the trial transcript. Copies of the trial transcript in Duval County Circuit Court case number 88-10474 CF have not been provided by either the District Court of Appeals or the Duval County Clerk's Office.⁶

c. The Jacksonville Sheriff's Department/Records and Identification Division: On or about May 26, 1993, CCR submitted a public records request to the Captain of Records and Identification for the Jacksonville Sheriff's Department. On June 9, 1993, CCR was informed by the Sheriff's Department that Mr. Durocher's records were damaged by a water leak in their archive's storage area and compliance with our request would be delayed. As of June 24, 1993, the Jacksonville Sheriff's Department has failed to provide CCR access to any records whatsoever.

d. The Jacksonville Sheriff's Department/Human Resources: On or about May 26, 1993, CCR submitted a public records request to the Human Resources Division of the Jacksonville Sheriff's Office. These documents have been withheld from counsel pending

⁶This case resulted in a life sentence for Mr. Durocher and was presented as aggravation at the penalty phase proceedings which led to the death sentence at issue.

prepayment for reproduction costs. The Jacksonville Sheriff's Office has been informed that CCR is a state agency which is prohibited by statute from paying for any services until they are rendered. As of June 24, 1993, the Sheriff's Office has refused to make any records available to CCR without prepayment.

e. **The Clay County Sheriff's Department:** On or about May 27, 1993, CCR submitted a public records request to the Clay County Sheriff's Department. At 11:15 a.m. on June 25, 1993, the Clay County Sheriff's Department notified CCR that records were available for pick up. Presumably these records will be obtained on June 28, 1993.

f. **The Orange Park Police Department:** On or about May 26, 1993, CCR submitted a public records request to the Orange Park Police Department. As of June 24, 1993, the Orange Park Police Department has failed to provide CCR access to any records whatsoever.

g. **The Office of the State Attorney, Jacksonville, Florida:** On or about May 26, 1993, CCR submitted a public records request to the Office of the State Attorney. As of June 24, 1993, the Office of the State Attorney in Jacksonville has failed to provide CCR access to any records whatsoever.

h. **The Office of the State Attorney, Green Cove Springs, Florida:** On or about May 26, 1993, CCR submitted a public records request to the Office of the State Attorney in Green Cove Springs. As of June 24, 1993, the Office of the State Attorney

in Green Cove Springs has failed to provide CCR access to any records whatsoever.

i. **The Duval County Jail, Jacksonville, Florida:** On or about May 26, 1993, CCR submitted a public records request to the Duval County Jail. As June 24, 1993, the Duval County Jail has failed to provide CCR access to any records whatsoever.

j. **The Clemency Department of the Florida Parole Commission, Tallahassee, Florida:** On or about May 26, 1993, CCR submitted a public records request to the Clemency Department of the Florida Parole Commission. As of June 24, 1993, the Florida Parole Commission has failed to provide CCR access to any records whatsoever.

k. **The Florida Department of Law Enforcement's Regional Crime Lab, Jacksonville, Florida:** On or about May 26, 1993, CCR submitted a public records request to the Florida Department of Law Enforcement's (FDLE) Regional Crime Lab in Jacksonville, Florida. As of June 24, 1993, the FDLE in Jacksonville has failed to provide CCR access to any records whatsoever.

l. **The Florida Department of Law Enforcement, Tallahassee, Florida:** On or about May 26, 1993, CCR submitted a public records request to the Florida Department of Law Enforcement (FDLE) in Tallahassee, Florida. As of June 24, 1993, the FDLE in Tallahassee has failed to provide CCR access to any records whatsoever.

m. **Department of Corrections, Jacksonville, Florida:** On or about May 26, 1993, CCR submitted a public records request to

the Department of Corrections. On June 23, 1993, CCR received some documents from the Department of Corrections that may have been in response to this request. However, the records are not certified and no documentation was provided regarding whether the records sent to CCR are true, correct and/or complete.

n. **Office of the Medical Examiner, Jacksonville, Florida:** On or about May 26, 1993, CCR submitted a public records request to the Office of the Medical Examiner in Jacksonville, Florida. Although, CCR has received some records requested from the Office of the Medical Examiner, they are not certified and no documentation was provided regarding whether the records forwarded are true, correct and complete. Additionally, the Jacksonville Medical Examiner's Office indicated that some requested records have not been disclosed, but refused to cite any asserted exemption to Chapter 119 of the Florida Statutes in writing, as requested.

o. **The Governor's Office of Executive Clemency, Tallahassee, Florida:** On or about June 4, 1993, CCR submitted a public records request to the Governor's Office of Executive Clemency. Although some records have been received, they are not certified and no documentation was provided to CCR regarding whether the records sent to CCR are true, correct and/or complete nor have they cited any legal authority for non-disclosure of any documents.

B. Attorney and Mental Health Files

Files and records from other agencies have also not been provided. Once additional records are received, follow up investigation will be required in terms of other necessary records requests and interviews. These other records CCR seeks includes:

a. **Alan Chipperfield, Jacksonville, Florida:** On or about June 2, 1993, CCR requested records from the Mr. Durocher's former defense attorney, Alan Chipperfield. Mr. Chipperfield has refused to provide any records in his possession regarding Michael Alan Durocher to CCR.

b. **Office of the Public Defender, Jacksonville, Florida:** On or about May 26, 1993, CCR requested any and all records from the Office of the Public Defender in Jacksonville, Florida on Michael Alan Durocher. This request was refused by Mr. Durocher's former defense attorney, William P. White.

c. **Orange Park Medical Center, Jacksonville, Florida:** On or about June 3, 1993, CCR requested any and all medical records regarding Michael Alan Durocher from the Orange Park Medical Center (formerly known as Humana Hospital). This request was refused because these records were deemed to be of a "particularly sensitive nature," since they involved suicide attempts. CCR was told it would be required to present a court order to receive any records of any kind on Michael A. Durocher.

d. **Harry Krop, Ph.D., Gainesville, Florida:** On or about May 27, 1993, CCR requested any and all psychological records

regarding Michael Alan Durocher from Dr. Harry Krop. Dr. Krop had evaluated Mr. Durocher during the criminal proceedings. In a letter dated June 15, 1993, Dr. Krop refused to release his records on Michael A. Durocher to CCR.

e. **Jethro Toomer, Ph.D., Miami, Florida:** On or about May 27, 1993, CCR sent a letter to Dr. Jethro Toomer, who evaluated Mr. Durocher during the clemency process. CCR requested any and all psychological records on Michael A. Durocher. In a letter dated June 7, 1993, Dr. Toomer has refused to release his records on Michael A. Durocher to CCR.

f. **Ernest C. Miller, M.D., Jacksonville, Florida:** On or about May 27, 1993, CCR requested any and all medical and psychological records regarding Michael A. Durocher from Dr. Miller. Dr. Miller had evaluated Mr. Durocher during the criminal proceedings. Although some documents were forwarded, Dr. Miller has refused to release his complete file on Michael A. Durocher to CCR.

g. **University Medical Clinic, Jacksonville, Florida:** On or about June 4, 1993, CCR requested from the University Medical Clinic any and all medical, psychiatric or psychological records from the files Ernest C. Miller, M.D., Louis S. Russo, Jr., M.D., Hyman Solomon Sternthal, Ph.D., Judith Hunt, M.A. and Connie Evans, M.S.W. regarding Michael A. Durocher. As of June 24, 1993, the University Medical Clinic has been unable to locate these records.

h. **Hyman S. Sternthal, Ph.D., Jacksonville, Florida:** On or about June 7, 1993, CCR requested from Dr. Hyman Sternthal any and all psychological and medical records on Michael A. Durocher. As of June 24, 1993, Dr. Sternthal has not located these records.

i. **Jacksonville Neurological Clinic, P.A., Jacksonville, Florida:** On or about June 8, 1993, CCR requested from the Jacksonville Neurological Clinic all psychological records, from the files of Dr. Louis Russo, on Michael Alan Durocher. As of June 24, 1993, the Jacksonville Neurological Clinic has not located these records.

It is counterproductive to proceed with the investigation when it would have to be redone after reviewing the files. CCR cannot afford the luxury of duplicative effort, particularly in light of the present budget and personnel limitations. Unless and until counsel have had a full opportunity to review all of the records and fully develop all of his claims, undersigned counsel cannot carry out his statutory obligations.

This Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. Walton v. Dugger, ____ So.2d. ____ (Fla. May 27, 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). See also Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). This Court has extended the time period for filing Rule 3.850 motions where public records have not been properly disclosed. Hoffman v. State, 17 Fla. L. Weekly 741 (Fla. Dec. 10, 1992); Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle

v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano. In these cases, sixty (60) days were afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials. Mr. Durocher should likewise be given an extension of time in which to file a motion to vacate once the requested records have been disclosed.

Further Section 27.51 Fla. Stat. provides that the public defender "shall then forward all original files on the matter to the capital collateral representative." However, this provision has not been followed. Undersigned counsel has been left without the trial attorneys' case files, the confidential mental health experts reports and/or files, and the court appointed mental health experts' files and reports. Clearly, this is in violation of the spirit and meaning of Section 27.702 Fla. Stat.

The beginning point for any meaningful appellate review process is absolute confidence in the completeness and reliability of the record. The appeal of any criminal case assumes that an accurate transcript and record will be provided counsel, appellant and the appellate court. Mayer v. Chicago, 404 U.S. 189, 1195 (1971) ("State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with the resources to pay his own way"); Entsminger v. Iowa, 386 U.S. 748, 752 (1967) ("Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction by the operation of the clerk's

transcript procedure"). Eighth amendment considerations demand even greater precautions in a capital case. See Penry v. Lynaugh, 488 U.S. 74 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

Full appellate review of proceedings resulting in a sentence of death is required in order to assure that the punishment accorded to the capital defendant comports with the eighth amendment. See Proffitt v. Florida; Johnson v. State, 442 So. 2d 193 (Fla. 1983) (Shaw, J. dissenting); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Swann v. State, 322 So. 2d 485 (1975); Art. V, 3(b)(1) Fla. Const.; 921.141(4) Fla. Stat. (1985). Indeed, Florida law insists upon review by the Supreme Court "of the entire record." Fla. Stat. 921.141(4) (1985) (emphasis added). In Florida capital cases, the chief circuit judge is required "to monitor the preparation of the complete record for timely filing in the Supreme Court." Fla. R. App. P. 9.140(b)(4) (emphasis added). (In fact, then Chief Justice Parker Lee McDonald so directed the chief circuit judge of the Seventeenth Judicial Circuit by letter dated 1 October 1986 -- a letter that was among the documents missing from the record on appeal!)

Critical motions, orders, exhibits, depositions, trial transcripts, and pages from the record on appeal were omitted

from Mr. Durocher's record.⁷ Several of these documents are material to Mr. Durocher's claims. These include but are not limited to: 1) depositions of A.W. Hickson and J.M. McKim (listed at Clay R. 179); 2) Mr. Durocher's unedited statement taken on January 23, 1989 (an edited version begins at Clay R. 214); 3) the deposition of J.A. Bradley (listed at Clay R. 243); 4) the deposition of R.H. Dexter (listed at Clay R. 265 and Clay R. 266); 5) the deposition of S.E. Foster (listed at R. 266); 6) the full and complete deposition of M.D. Davis (listed at R. 266); 7) R. 305; 8) Duval County Jail medical records; 9) the full and complete trial transcript for May 31, 1989; 10) the depositions of Archie Padgett, Joel C. Hodges, Roger Gainey, Edward R. Knight, Robert F. Hancock, Robert D. Alred, and James D. Wilson (listed in an invoice at R. 438); 11) the deposition of Helen Sara Gregory (listed in an invoice at R. 444); 12) the deposition of Charles Victor Gratzle (listed in an invoice at R. 532); 13) the statements of Bill Pine (listed as a material witness at R. 538); 14) the statements of Phillip E. Resta, William David Lee, Angel Isaacs, C.J. Jett, Lt. Boivin, Col. Clinton L. Pagano, D.L. Burger, and D.M. Snyder (listed in the state's first supplemental response to demand for discovery at R. 650); 15) the depositions of Michael M. Douglas, Joseph R. Woodcock, Charles M. Tompkins, David S. Goldner, Wanda E. Johns, James Messer, Richard F. Smith,

⁷The record on appeal provided to undersigned counsel indicates that is the record from case No. 77,745. However, review of it seems to indicate it was somehow combined with 74,442, and other cases. However, the combined record is woefully incomplete.

Sr., Lane B. Stuckey, Michael G. Christensen, and Johnny M. Smith (listed in an invoice at R. 735); 16) the deposition of Lewis Charles LaRue (listed at R. 780); 17) R. 1166 - 1221; 18) R. 1366 & 1367; 18) motion to suppress (listed at R. 1389); 19) letter written by defendant and rights advisement form (listed at R. 1391); 20) the deposition of Detective J. Redmond (listed at R. 1642). Finally, the record is missing about eighty pages.

Appellate counsel could not be effective without a complete record. Moreover the Florida Supreme Court's review could not be constitutionally complete. See Parker v. Dugger, 111 S. Ct. 731 (1991).

The trial judge was required to certify the record on appeal in capital cases. 921.141(4) Fla. Stat. (1985). This was not done.

When errors or omissions appear, as here, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). In addition, Mr. Durocher's former counsel rendered ineffective assistance in failing to assure that a proper record was provided to the court.

VII. POTENTIAL CLAIMS

From the information and materials, undersigned counsel currently has it clear that a number of potential guilt and penalty phase claims exist which warrant further investigation. These include:

a. Brady violations.

At this point, undersigned counsel has not been provided with the necessary materials to determine whether a Brady violation occurred. Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So. 2d 428 (Fla. 1993).

b. Ineffective assistance of counsel.

At this point, without defense counsel files, without the mental health experts' files, without the State Attorney's files, and without a complete record on appeal, undersigned counsel has not been provided with the necessary materials to determine whether a viable claim of ineffective assistance of counsel is present. Provenzano v. State, 616 So. 2d 428 (Fla. 1993).

c. Ineffective assistance of appellate counsel.

In light of the current shape of the record on appeal, it is clear that additional investigation is necessary to determine whether the failure to obtain a full and complete record was ineffective assistance.

d. Competency.

There is a wealth of material establishing indicia of mental illness. Again, counsel cannot ascertain with the limited materials he possesses whether all of the indicia of mental illness was made known to the mental health examiners and considered by them. State v. Sirici, 502 So. 2d 1221 (Fla. 1987).

e. Adequacy of mental evaluations.

In light of the failure to provide undersigned counsel with necessary materials, counsel cannot determine whether the mental evaluations were adequate. Mason v. State, 489 So. 2d 734 (Fla. 1986).

f. Insanity defense.

At this point, undersigned counsel has not been provided with the necessary materials to determine whether a viable insanity defense existed which was not presented because of a Brady violation, ineffective assistance, or inadequate mental health evaluations.

g. Johnson v. Mississippi.

At this point, undersigned counsel has not been provided with the necessary materials to determine whether the prior offenses introduced as aggravation are constitutionally valid. Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992).

h. Espinosa v. Florida.

The jury instruction regarding "cold, calculated and premeditated" did not comply with Espinosa v. Florida, in that it did not inform the co-sentencer that heightened premeditation was necessary.

i. Hitchcock v. Dugger.

The jury, a co-sentencer, was not advised of this and thus could not consider the mitigation of record which Florida sentencers are required to consider and weigh in deciding what

sentence to recommend. Farr v. State, ___ So. 2d ___ (Fla. June 24, 1993).

VIII. REQUEST FOR STAY OF EXECUTION

This petition includes a request that the Court stay Mr. Durocher's execution (presently scheduled for August 25, 1993). As has been shown, the issues presented are substantial and warrant a stay of execution. This Court has not hesitated in the past to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. This Court has stayed executions in the past when CCR has been unable to fulfill its statutory responsibility during a pending death warrant. Freeman v. Singletary, No. 79,651 (Fla. Apr. 10, 1992); Mendyk v. Dugger, No. 76,906 (Fla. Nov. 26, 1990); Rivera v. State, No. 76,694 (Fla. Oct. 24, 1990); Walton v. State, No. 76,695 (Fla. Oct. 24, 1990); Chandler v. Dugger, No. 76,039 (Fla. June 8, 1990); Lopez v. Dugger, No. 75,847 (Fla. Apr. 26, 1990); Jackson v. Dugger, No. 75,846 (Fla. Apr. 26, 1990).

This is the first and only petition for a writ of habeas corpus filed upon Mr. Durocher's behalf. The claims presented are no less substantial than those involved in the cases in which a stay has been granted. Undersigned counsel therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

WHEREFORE, Petitioner respectfully requests that the Court enter orders:

- 1) staying his scheduled execution;
- 2) extending the time limitations of Fla. R. Crim. P. 3.851;
- 3) directing the State agencies listed herein to comply with Chapter 119, Fla. Stat.;
- 4) directing the Public Defenders listed herein to comply with Fla. Stat. sec. 27.51; and
- 5) granting any further relief which the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United State Mail, first class, postage prepaid, to all counsel of record on this 25th day of June, 1993.

LARRY HELM SPALDING
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Florida Bar No. 0125540

MARTIN J. MCCLAIN
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